EMPLOYMENT TRIBUNALS

Claimant: **Mr R Wright**

Respondent: **Grove WP Ltd**

Heard at: Reading **On:** 5 April 2024

Before: Employment Judge Shastri-Hurst

Representation
Claimant: in person
Respondent: Mr J Hillerby (solicitor)

RESERVED JUDGMENT

1. The claim of direct race discrimination is struck out as having no reasonable prospect of success.

REASONS

Introduction

1. The claimant was employed as a Wellness Manager by the respondent, which forms part of the Arora Group. The Arora Group runs hotels. The claimant worked at Fairmont Windsor Park Hotel from 6 April 2021 until his dismissal without notice on 14 February 2023. The respondent alleges that the claimant was dismissed for gross misconduct (negligence and dishonesty).

2. The ACAS Early Conciliation process started on 5 May 2023 and ended on 15 June 2023. The claim form was presented on 14 July 2023, and brought a claim of race discrimination relating to the decision to dismiss the claimant.

3. The case was listed for a preliminary hearing on 17 January 2024; the hearing was attended by the claimant representing himself and Mr Hillerby for the respondent. That hearing was dealt with by Employment Judge

Hutchings who, on the respondent's application, listed this hearing in order to deal with two matters:

3.1. Should the complaint of direct race discrimination be struck out because it has no reasonable prospect of success? Or, in the alternative;

3.2. Does the claim or any part of it have little reasonable prospect of success? If so, should the claimant be ordered to pay a deposit of between £1 and £1000 as a condition of continuing with it.

4. In order to assist me in determining these applications, a bundle of 231 pages was produced: reference to page X in that bundle is referenced below as [X]. I also had the benefit of Outline Submissions from Mr Hillerby as well as a statement from the claimant. I read both documents and heard oral remarks from both sides. The claimant also gave some limited oral evidence relating to his finances, for the purposes of the deposit order application.

The claimant's claim

5. The claim was clarified at a preliminary hearing on 17 January 2024 – [58-61]. There were however a few amendments that needed to be made to that list in order to accurately reflect the legal claims:

5.1. There is no claim for unfair dismissal, and so issues relating to an unfair dismissal claim and associated remedy (Issues 1 and 2) were removed;

5.2. In the direct race discrimination claim, at Issue 3.5, the list included reference to a justification defence. Such a defence is not available for direct race discrimination, and so this issue has also been removed.

6. The claim is therefore one of direct race discrimination only. I set out the list of issues relating to liability ("liability" meaning "whether the claim should succeed or not") here for clarity:

3.1 The claimant's race is Black British of Afro-Caribbean descent, and he compares himself with a hypothetical comparator of someone of a different race in the same or similar role of Wellness Manager and with the following actual comparators:

3.1.1 Kanniga Na Chiangmai, Finance Assistant;
3.1.2 Joey Cererio, the Department Manager; and,
3.1.3 Ryan Nicholls, the General Manager at the time.

3.2 Did the respondent (acting through its manager Pepe Merdzan) terminate the claimant's employment?

3.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, or the Tribunal determines there was a material difference between the named comparators and the claimant, the Tribunal will decide whether he was treated worse than someone else in the same or similar role would have been treated.

3.4 If so, was it because of race?

Background facts

7. The claimant commenced employment with the respondent on 6 April 2021 as Wellness Manager.

8. Part of the Wellness Manager's responsibility is to oversee his team in ensuring that the correct daily checks of the gym and its equipment are undertaken. There is a computer system known as "Knowcross" that produces a checklist relating to the status of the gym equipment and areas daily: for example, "check Aerial yoga brackets are secure" and "check for any dust/dirt in the gym".

9. An example Knowcross checklist is at [112-114]: this checklist shows that, between the dates of 21 December 2022 and 9 February 2023, the Knowcross checks were recorded as completed in the Knowcross checklist four times in fifty days. It is common ground that the claimant was ultimately responsible for his team, and therefore for ensuring that these checks were completed and recorded.

10. On 15 December 2022, the claimant was sent an email from Ewelina Dobrogowska (Health and Safety Manager), asking the claimant whether he had completed his risk assessments yet – [92]. The claimant was on annual leave at the time this email was sent and replied on 10 January 2023 to arrange a time/date to discuss the risk assessments – [93].

11. On 2 January 2023, a guest reported that a piece of equipment, the "speed ball", was damaged – [122].

12. On 18 January 2023, Nick Bull (Health & Safety and Security Manager) informed the claimant that there was damage to the gym's outdoor equipment – [104].

13. On 3 February 2023, the claimant requested that Kanniga Na Chiangmai (Finance Assistant) create a postal order ("PO") for a replacement speed ball. The claimant did not send that PO to the supplier. The claimant's account is that he left the PO with Ms Na Chiangmai as she had told him to do.

14. On 8 February 2023, the claimant told Sanjay Arora (Chief Operating Officer) that a replacement speed ball had been ordered. This is despite the fact that the PO had not been sent to the supplier.

15. On 9 February 2023, Mr Arora raised a new PO that was sent immediately to the supplier. A replacement ball was duly supplied. The original PO requested by the claimant was destroyed in order to ensure that there was not a double order.

16. On 10 February 2023, the respondent held an investigation meeting with the claimant pursuant to its disciplinary policy, in order to discuss two matters – [122]:

    16.1. Damage to gym equipment; and,
    16.2. The replacement of a speed ball.

17. Following the investigation meeting, the claimant was invited to a disciplinary hearing in order to consider three allegations – [124]:

    17.1. Failure to complete daily/weekly checks of your areas and gym equipment as per the Knowcross checklist resulting in serious damage of the outdoor gym equipment and the delay of replacing indoor damaged equipment ("Allegation 1");

    17.2. Failure to conduct and complete risk assessments for the gym to the required standards as instructed by the Group Health and Safety Manager ("Allegation 2"); and,

    17.3. Dishonesty pertaining to the ordering of replacement equipment ("Allegation 3").

18. The dishonesty element of Allegation 3 relates to the fact that the claimant was said to have told Mr Arora that he (the claimant) had ordered the replacement speed ball, when in fact the PO had not been sent to the supplier (meaning that the ordering process was incomplete). This was later accepted by the claimant in the disciplinary meeting – [134].

19. The disciplinary hearing took place on 13 February 2023, and was chaired by Mr Merdzan. The amended notes of this hearing, to reflect amendments by the claimant, are at [153]. The claimant read out a prepared statement which appears at [127-132]. In that statement he made various criticisms of the disciplinary procedure as he had experienced it so far.

20. The claimant refuted the three allegations. On occasion he accepted certain facts, such as telling Mr Arora that the order for the replacement speed ball had been placed. However, he provided mitigation for his actions during the disciplinary process.

21. Mr Merdzan determined that the claimant was guilty of Allegations 1 and 3 but did not uphold Allegation 2. The claimant's version of events regarding Allegation 2 was accepted; namely that he had only been informed of the incomplete status of his risk assessments whilst he was on holiday.

22. The decision letter is at [141]. Mr Merdzan's decision was that summary dismissal was the appropriate sanction in all the circumstances. His reasons, in brief, were that Allegations 1 and 3 were allegations of

negligence and dishonesty which, in his view, amounted to gross misconduct.

23. The claimant appealed the decision to summarily dismiss him by letter of 17 February 2023 - [143]. The appeal hearing took place on 28 February 2023 and was chaired by Ryan Nicholls. The amended notes of that hearing, to reflect the claimant's amendments, are at [175]. There is no mention in those notes of the claimant alleging that his dismissal was discriminatory; there is no mention of the claimant's race at all.

24. Mr Nicholls made the decision to uphold the dismissal. He confirmed this in writing to the claimant by letter of 6 March 2023 - [169].

25. The tribunal notes that, throughout the disciplinary process, in his communications with Human Resources, or anyone else, the claimant did not mention that he thought race was a factor in his dismissal.

Application to amend

26. It was clarified both at the hearing before me, and the hearing before Employment Judge Hutchings, that the claim related solely to the decision to dismiss taken by Pepe Merdzan. The claimant accepted before me that the respondent acted appropriately in subjecting him to the disciplinary process.

27. However, when we were mid-way through the hearing, the claimant mentioned that he considered that the appeal process was also part of the dismissal, and had understood that the tribunal would also consider whether the appeal was discriminatory.

28. I explained to the claimant that, as his claim is one of discrimination, it is necessary to identify each act or decision that is said to have been discriminatory. At this stage, and having gone through the preliminary hearing with Employment Judge Hutchings, I explained that the claimant's claim was limited to Mr Merdzan's decision to dismiss him. If the claimant wanted to make a specific allegation that Mr Nicholls' decision at the appeal stage was also because of the claimant's race, that would require the claimant to make an application to amend his claim.

29. Given the late stage of the hearing at which this issue arose, I suggested to the parties that the most efficient way to proceed would be for me to decide the strike out/deposit order applications as the claim stands. If I decided to strike out the claim, I would make it clear that the claim remains live solely for the purpose of allowing an amendment application to be made. The claimant therefore did not have to decide today whether he wished to pursue an application to amend, and we did not need not postpone the entire hearing today, having gotten most of the way through the parties submissions when this issue arose.

30. I explained to the claimant that this approach meant that he reserved the right to apply to amend his claim to add a claim of direct race discrimination regarding the appeal decision by Mr Nicholls, regardless of the outcome of

the applications today. It may well be that this decision gives him pause for thought as to whether to apply to amend.

Law – strike out

31. The power to strike out a claim (or part of a claim) is found within r37(1) of Sch 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** (“the Rules”). The relevant ground for strike out in this case is r37(1)(a), which provides as follows:

> 37(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim on any of the following grounds –
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success;...

32. For discrimination claims, the starting point regarding case-law is Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

33. Further caution has been advised in Bahad v HSBC Bank plc [2022] EAT 83, at paragraph 25:

> “The approach that should be adopted to applications to strike out is of extremely long standing. From the House of Lords to the EAT, the appellate courts have for many years urged caution in striking out discrimination and public interest disclosure claims. Yet, on occasions employment tribunals having directed themselves that it is an extraordinary thing to do, strike out claims that are far from unusual. Experienced employment judges may sometimes feel that it is pretty clear that a claim will not succeed at trial and wish to save the expense and, possibly, the distress to the claimant of a failed claim. But that is what deposit orders were designed for. To strike out a claim the employment judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospects of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence. When discrimination claims succeed it is often because of material that came out in disclosure and because witnesses prove unable to explain their actions convincingly when giving evidence.”

34. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, the Court of Appeal held that, as a general point of principle, cases should not be struck out when there is a dispute over the key facts. The reference to key facts also encompasses the reasons for a respondent’s conduct, where those reasons are relevant to the applicable legal test – Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755.

35. I am also assisted by the case of Balls v Downham Market High School and College [2011] IRLR 217, in which Lady Smith held:

> “When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word “no” because it shows

that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

36. Mitting J in Mecharov v Citibank NA [2016] ICR 1121 EAT provided the following guidance at paragraph 14:

> "…the approach that should be taken in a strike out application in a discrimination case is as follows:
>
> (1) Only in the clearest case should a discrimination claim be struck out;
> (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) The claimant's case must ordinarily be taken at its highest;
> (4) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
> (5) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

37. However, there are some caveats to the general approach of caution towards strike out applications. In Ahir v British Airways plc [2017] EWCA Civ 1392 CA, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

38. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that:

> "the time and resources of the employment tribunals ought not be taken up by having to hear evidence in cases that are bound to fail."

39. In Methuen, the Employment Appeal Tribunal ("EAT") were considering a case of alleged discriminatory dismissal in relation on the grounds of age, race and sex. The claimant relied upon the actual comparator of his replacement, who was younger, a different race, and a different sex. The claimant made specific reference to this replacement's 3 years' post-qualification experience: in other words, he was replaced by someone much less experienced than him, which was relevant to the age discrimination allegation. However, in relation to race and sex, the claimant simply relied upon the bare fact of the difference in race and sex between him and his chosen comparator. The EAT held that the bare assertion by a claimant that the dismissal was because of race and sex could not give rise to a *prima facie* (on the face of it) case of discrimination sufficient to shift the burden of proof to the respondent (see "Burden of Proof" below). Therefore the EAT held that the race and sex claims should have been struck out by the first instance tribunal. The claimant's case relating to age could just be said to have little (as opposed to no) reasonable prospects, meaning that the first instance tribunal had not made an error by not striking it out; the age claim was made subject to a deposit order.

40. In Cox v Adecco & Others [2021] ICR 1307, HHJ Taylor gave the following summary of general propositions gleaned from the relevant case-law (paragraph 28):

> "(1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

41. HHJ Taylor went on to hold that the tribunal must attempt to get to grips with the claimant's claims, and take reasonable steps to understand the complaints that the claimant is bringing, before considering strike out. However, he also made it clear that the tribunal can only be expected to take reasonable steps when attempting to identify the claims (paragraph 32).

Law – deposit order

42. The tribunal has the power to make deposit orders against any specific allegations or arguments that it considers have little reasonable prospect of success under r39 of the Rules:

> "39(1) Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim…has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.
>
> 39(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

43. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for making a deposit order.

44. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – Hemdan v Ishmail and anor [2017] IRLR 228.

45. In terms of the test of "little reasonable prospect of success", the tribunal is permitted to consider the likelihood of the claimant being able to establish the essential facts of his or her case. In undertaking this exercise, it is entitled to reach a preliminary view on the credibility of the allegations and assertions that the claimant is making in his/her claim – Van Rensburg v Royal Borough of Kingston-upon-Thames [2007] All ER (D) 187 (Nov). The tribunal must have a proper basis for considering it unlikely that a claimant will be able to establish the necessary facts to prove his/her claim.

46. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – Adams v Kingdon Services Group Ltd EAT/0235/18.

Law – direct sex discrimination

47. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

48. Direct discrimination is set out in s13 EqA:

> "(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

49. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes, however, it is difficult to separate these two issues so neatly. The tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

50. In terms of the required link between the claimant's race and the less favourable treatment he alleges, the two must be "inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

51. The test is not the "but for" test; in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

52. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a question of fact for the tribunal to determine and is a different question to the question of motivation, which is irrelevant. The tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

53. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

54. The burden of proof for discrimination claims is set out in s136 EqA:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision".

55. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

> "the onus lies on the employee to show potentially less favourably treatment from which an inference of discrimination could properly be drawn".

56. This requires the tribunal to consider all the material facts without considering the respondent's explanation at this stage. However, this does not mean that evidence from the respondent undermining the claimant's case can be ignored at stage one – Efobi v Royal Mail Group Ltd 2021 ICR 1263.

57. It is only if the initial burden of proof is reached that the burden shifts to the respondent to prove to the tribunal that the conduct in question was in no

sense whatsoever based on the protected characteristic – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

58. In terms of comparators, the definition is at s23 EqA:

> "(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".

59. It is not enough for the claimant to show that there has been a difference in treatment between him and a comparator, there must be "something more". In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

60. In Virgin Active Ltd v Hughes 2023 EAT 130, it was highlighted by the EAT that the consideration of whether there are material differences in the circumstances of an actual comparator compared to those of the claimant needs to take place before applying the shift in the burden of proof. Regarding a hypothetical comparator, the claimant must show that the comparator would have been treated more favourably. This requires the tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.

61. Unreasonable treatment of the claimant is not sufficient to show that he has suffered less favourable treatment. In Essex County Council v Jarrett EAT 0045/15, the EAT held that a claimant must present evidence to the tribunal to support the argument that he was treated less favourably compared to those who do not share his protected characteristic.

62. Unreasonable treatment is also not enough to permit the tribunal to draw an inference of discrimination that would cause the burden of proof to shift – Glasgow City Council v Zafar 1998 ICR 120. In that case, the House of Lords (as it then was) held that the tribunal was wrong to draw an inference of discrimination purely on the basis that the employer had acted unreasonably in dismissing the claimant.

63. Although Lord Justice Peter Gibson accepted in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong 2005 ICR 931 that it was open to a tribunal to draw an inference of discrimination from unexplained unreasonable conduct, he warned tribunals

> "against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such grounds."

Conclusions

64. The key issue that the respondent relies upon here to show that the claimant has no reasonable prospect of success is its assertion that the claimant

cannot satisfy the initial burden of proof under s136 EqA.

65. The first point to consider is whether the claimant's three named actual comparators are appropriate comparators under s23 EqA. I conclude that they are not. First, none of the three are (or were at the material time) Wellness Managers. Second, all three were in positions more senior to the claimant. As such, there are material differences between the claimant and his alleged actual comparators.

66. The second point then is to contemplate the identity of a hypothetical comparator. This would be someone of a different race to the claimant, but in all other areas the same, including;

    66.1. A wellness Manager;
    66.2. With the same training as the claimant;
    66.3. Having overseen a team who produced the same Knowcross checks as set out at [112-114];
    66.4. Having dealt with the replacement of the speedball in the same way as the claimant;
    66.5. Having given the same answers in the investigation meeting;
    66.6. Having given the same answers and the same statement in the disciplinary meeting.

67. What the claimant then must prove is that, had this hypothetical comparator gone through the same disciplinary process, he would not have been dismissed.

68. Even if the claimant can prove that there would (hypothetically) be a difference in treatment, there has to be something more than just a difference in race – see <u>Madarassy</u> above. I therefore turn to consider the points from which the Claimant says that the tribunal would be able to draw an inference of discrimination.

Points from which to draw an inference

69. The claimant has set out in his statement produced for the hearing today the factors he relies upon as being evidence from which a tribunal could draw the inference that the difference in treatment was because of the claimant's race. The claimant relies on various matters at paragraph 4, however only some of them are directly related to Mr Merdzan. I consider that matters recorded in the claimant's paragraph 4 that relate to other people's actions are not relevant to the actions of Mr Merdzan. The only question for the tribunal in this case will be why Mr Merdzan dismissed the claimant, and was it because of his (the claimant's) race. The actions of other people therefore do not assist the tribunal with these questions. As such, the matters of relevance that the claimant raises in his paragraph 4 are as follows:

    69.1. Mr Merdzan failing to intervene when the General Manager threated to "box [the claimant's] face'';
    69.2. Mr Merdzan subjecting the claimant to micro-aggressions. The claimant uses the example of Mr Merdzan talking "at" him during the disciplinary hearing and giving the claimant "little opportunity to speak so that by the time [he] was asked for a

response [he] was too intimidated to do so in [his] usual way";

69.3. Mr Merdzan (and others) "disregarding the procedural and substantive defects when [the claimant] pointed them out to them".

70. At the hearing, I asked the claimant to explain to me what it was that made him think his dismissal was due to his race. In summary, the points he made were as follows (some of which appear in his paragraph 4):

    70.1. He told me "I wasn't given a chance to raise any racial concerns..." during the disciplinary process including the appeal;
    70.2. The claimant explained that he has experienced racial issues since he was 5 years old, and said (understandably) that it was not something that someone who is not in an ethnic minority can understand;
    70.3. There were no other black managers (i.e. employees at his level) employed by the respondent;
    70.4. The claimant said he was loathe to raise race in the internal disciplinary process, and there were no other black managers for him to talk to. He felt it was a hard subject to discuss;
    70.5. The claimant's mother told me that the first thing the claimant said to her following the disciplinary was "That was so racist", to which his mother asked "why?". The claimant and his mother discussed the disciplinary hearing, and his mother understood that the claimant felt it had been racist, that the notes were inaccurate, that the claimant considered that the decision had already been made, and that the claimant ended up feeling "what's the point?";
    70.6. The claimant and his mother both told me that they thought there were substantive and procedural defects within the process.

71. The claimant concluded by telling me that "all these things led me to think there must be a reason and that reason was race".

72. I note that in the claim form, the claimant sets out the alleged unfairness of his dismissal. In terms of the allegation of race discrimination, it is a bare assertion at paragraph 61 that his dismissal was discriminatory.

73. The claimant's mother told me the claimant "felt penalised because he was a black person, and it didn't matter what he said, he felt that it was race and the decision was pre-determined".

Decision

74. I am satisfied that, taking the claimant's case at its highest as to why he believes his dismissal was discriminatory, there is no reasonable prospect of him passing the initial burden of proof under s136 EqA.

75. I asked for the claimant to tell me why he thought the decision to dismiss him was racist: I have set out all the reasons given by him and his mother above. However, taken together, they amount to the claimant stating that he did not think the process was fair. Then he cast round for a reason why

that may be the case and decided it must be his race.

76. I fully accept that it is rare for claimants to be able to point to some tangible evidence of racism (as is also true of other forms of discrimination). I also accept that someone who has suffered racism is more likely to pick up on any racist undertones compared to someone who has never been a victim of, or been directly affected by, racism.

77. However, the tribunal must operate in facts and evidence. There is no good evidence from which a tribunal could infer that a hypothetical comparator would not be dismissed in the same circumstances. Even if the tribunal were to accept that a white hypothetical comparator would not be dismissed, there is no good evidence of "something more" from which the tribunal could infer discrimination. As in Madarassy, a difference in race, without something more, is not enough.

78. There are no facts or evidence from which a tribunal could safely conclude that the dismissal could have been because of the claimant's race so as to satisfy the initial burden of proof. There is no sufficient basis on which an inference could be founded. Even if there was unfairness about the dismissal process and decision, there is nothing that links that unfairness to the claimant's race.

79. As such, I grant the application to strike out the claimant's claim. As above, the claim will remain live purely for the purposes of any application to amend the claim. I have set out directions a separate Case Management Order that detail next steps in relation to any such application from the claimant.

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Employment Judge Shastri-Hurst

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Date: 2 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
3 May 2024

FOR EMPLOYMENT TRIBUNALS