EMPLOYMENT TRIBUNALS

Claimants: Mr Michal Wapinski

Respondent: DHL Services Limited

HEARD AT: Bury St Edmunds on 18, 19 and 20 June 2018

BEFORE: Employment Judge Michell
Mrs Smith
Mr Williams

REPRESENTATION: For the Claimants: Ms Pawlik (lay representative)
For the Respondent: Ms Omeri (Counsel)

RESERVED JUDGMENT

1. The Claimant's unfair dismissal claim is dismissed.
2. The Claimant's race discrimination claim is dismissed.
3. The Claimant's breach of contract claim is dismissed on withdrawal.

REASONS

BACKGROUND

1. The Claimant commenced employment at the Respondent on 14 September 2009. He was dismissed on 23 May 2017 ("**EDT**") for alleged misconduct. Following compliance with the Early Conciliation ("**EC**") procedure, on 13 August 2017 he presented claims alleging unfair dismissal, direct race discrimination contrary to s13 of the Equality Act 2010 ("EqA"), and breach of contract.

EVIDENCE

2. We heard oral evidence from the Claimant (who had some assistance from an interpreter). On behalf of the Respondent, we heard from Mr Jarvis Anderson, who took the decision to dismiss the Claimant, and Mr Daral Lowson, who heard the appeal against dismissal. We were referred to a 280-odd page bundle of documents, to which various pages were added during the course of the hearing. We also received written submissions from both representatives, to which they spoke, and which were helpful.

ISSUES

3. The issues had already been to some extent clarified and reduced following the preliminary hearing ("PH") on 4 December 2017. The issues still for us to determine were agreed as follows:

Direct race discrimination (s.13 EQA)

4. Was the dismissal of the Claimant an act of direct race discrimination? As to this:
    a. The Claimant asserts that his Polish nationality meant he was dismissed in circumstances where a UK national -or in fact, as he alleged in his evidence, a non-Polish worker- would not have been dismissed.
    b. He relies on 6 UK nationals -referred to as A, C, D, E, F and G in the witness statements, which abbreviations we adopt in this judgment- as 'actual' comparators. (He no longer relies on Comparator B.)

Unfair dismissal

5. What was the reason for the Claimant's dismissal? As to this:
    a. The Claimant accepts that misconduct was the principal reason for the dismissal, that the Respondent believed him to be guilty of misconduct, and that he had in fact (to use EJ King's words from the PH order) "committed the misconduct alleged".
    b. Was the dismissal fair? As to this:
        i. Did the decision to dismiss the Claimant fall within the band of reasonable responses open to the Respondent for the purposes of s.98(4) of ERA?

ii. Was the dismissal of the Claimant consistent with the treatment meted out to other employees in allegedly comparable situations to the Claimant? The Claimant relies on the six comparators set out above.

iii. Importantly, the Claimant accepted in questioning by the tribunal that, but for alleged inconsistency with treatment of his 'comparators', he *could have justifiably been dismissed* for having committed the act of misconduct on 14 February 2017 (as described by him) whilst on a 'live' final written warning. Hence his case is very much dependant on the success of his "inconsistency" argument.

iv. The Claimant also asserts that the Internal Safety Alert ("the Alert") referred to below demonstrates that the matter was prejudged against him. (This matter is not relied upon as a freestanding act of discrimination, as Ms Pawlik confirmed at the start of the hearing and as can be seen from the List of Issues articulated at the Preliminary Hearing.)

v. (The Claimant had suggested at the PH that the procedure adopted by the Respondent was unfair, in that that he was initially not given "the correct paperwork" prior to the 10 May 2017 disciplinary hearing, and that the manager hearing the matter was changed without prior notice. However, the Claimant accepted in evidence that such matters were in fact remedied before his disciplinary hearing on 15 May 2017.)

c. If the dismissal was unfair, should any award be reduced (and if so, by how much) having regard to s.122(2) and s.123(1) ERA (contributory fault etc) and/or the principles set out in **Polkey v. AE Dayton Services Ltd**?

FACTUAL FINDINGS

6. The Respondent is a distribution business. From 14 September 2009, the Claimant worked for the Respondent as a warehouse operative at its 800,000 square foot site in Thrapston. The site is used solely in connection with stock distribution for one of the Respondent's major clients, Primark.

7. Some 220 full time employees worked at the site, together with about 190 agency workers and 25-30 managers. Of those 220 employees, only about 30% are UK nationals. Though there are several Polish workers, they are not in the majority among the 70% of non-UK nationals. The overall workforce has quite a low turnover- about one leaver and one joiner per month.

8. The Respondent has a disciplinary process, which provides for the usual 'stepped' warnings, with the option (at Clause 5.6 of the procedure) for the Respondent to escalate matters in appropriate cases. The definition of 'gross misconduct' at Clause 5.3 includes "*serious breaches of…rules*", as well as "*gross negligence which causes, or has the potential to cause, unacceptable loss, damage or injury*".

9. Clause 5.6.2 provides a 'shelf life' of 12 months for final written warnings.

10. We were told and we accept that of the 220-odd on-site workforce, only about 10 will have some sort of warning in place against them at any time.

11. (We were not given any statistics which show the nationalities and comparative numbers of those workers receiving oral/written warnings, or being dismissed, or successfully appealing their dismissals. Such statistics may have been helpful, and the Respondent might be wise to consider compiling them, if it does not already now do so.)

12. Staff such as the Claimant are given H&S training, as well as training on manual handling operations. The training assisted the Claimant in carrying out one of his duties –i.e. the "replenishment" or retrieval of empty pallets by hand or fork lift truck, which were to be placed in a designated "picking" area.

13. During his employment, the Claimant received 4 disciplinary warnings. In July 2010, he was verbally warned about his conduct, when he breached H&S rules. In January 2011, he received a stage 2 written warning for other conduct matters.

14. Both those warnings were long 'spent' by the time of the events with which we are primarily concerned. In June 2016, however, he was given a final written warning for breaching the Respondent's site search policy (i.e. failure to hit the search button) on 18 May 2016. The Claimant did not appeal that warning, which was set out in a letter dated 14 June 2016. The letter spells out that if the Claimant committed further misconduct offences in the 12 months following 14 June 2016 (i.e. before 13 June 2017), the warning "*may be taken into account when determining the level of disciplinary action in accordance with the disciplinary policy*". The Claimant did not seek to argue before us that the June 2016 warning was unwarranted or excessive.

15. (The 14 June 2016 letter makes quite clear that the 'live' period to which the letter refers lasted until 13 June 2017, and that the key reference point was date of *commission* of any further offence during the live period, rather than the date on which he might be further disciplined. That makes sense to us.)

16. On 14 February 2017, the Claimant hit and activated a fire sprinkler head whilst moving an empty pallet.

17. There was some debate before us as to whether or not the Claimant accepted that he "threw", as opposed to "moved" or "pushed", the pallet into the sprinkler. Certainly, in questioning from the tribunal and from Ms Omeri, he appeared initially to accept that he "threw" the pallet. Moreover, comments made during the disciplinary and appeal process- as set out below- as well perhaps as the fact of the damage caused to the sprinkler- also suggest the Claimant manoeuvred the pallet with some force. However, we saw that debate to be of limited relevance, in the light of the concession recorded at para 5(b)(iii) above.

18. Specifically, the Claimant picked up the pallet and manoeuvred it at an angle through a narrow gap in some racking in an attempt to get it over to the other side of the aisle. His actions were -as he knew at the time- in clear breach of the training and instruction he had been given.

19. As the Claimant himself accurately described it, the results of his actions were "*very spectacular*". The entire building had to be evacuated of all staff for over an hour, the damaged sprinkler ran for about 40 minutes flooding 6 (very sizeable) aisles, and a 9 hour clean-up operation was required. Outsourced equipment had to be brought on site for that task. Several pallets of stock had to be sent off for repackaging/checking. Though we do not know what, if any, stock was damaged, it is obvious that –at the very least- many working hours were wasted as a result.

20. Shortly thereafter, the Respondent put up the Alert on the staff notice board, in which staff were warned to "*follow their training and safe systems of work at all times*". The Alert named "Michal" as the person responsible for the incident.

21. Alerts of some description are put up about every month. They do not usually name the individual/s concerned. The Claimant sought to argue before us that the Alert showed a pre-determined mind-set on the part of the Respondent (not least, because it named "Michal"). However, as we see it, the Alert in fact set out the details of the incident in fairly uncontentious terms. The Claimant later accepted that he "*tried to place an empty pallet in an opposite location through a gap in the racking causing the pallet to hit the sprinkler*". That is what is said in the Alert. Mr Lowson also confirmed that it would in any event have been common knowledge to those on shift that the Claimant was the individual responsible for the "spectacular" mass evacuation.

22. Hence even if (as Ms Pawlik asserted) naming the Claimant in the Alert was somehow a "*breach of confidentiality*", we do not think it assists his claim. Moreover, we in any event accept the evidence of Mr Anderson and Mr Lowson that the content of the Alert played no part in their decision-making process.

23. The Claimant made a written statement later on 14 February 2017. In it, he admitted responsibility. (He did not express regret or apologise to Mr

Anderson or Mr Lowson during his meetings with them, but he did say "sorry" in that statement.)

24. The Claimant was signed off sick with "depression" from 23 February until 23 March 2017.

25. At his investigatory meeting on 19 April 2017, the Claimant accepted that he had been trying to manipulate the pallet in a way which he knew was non-compliant with the manual handling and Safe Systems of Work training and instructions that had been given to all staff by the Respondent, which he said he had done in order to "*speed the process up*".

26. He claimed that (unnamed) other drivers also manhandled pallets in an unauthorised way. He asserted "*I haven't been a witness for any [others] that have broken the rules… I know that if I see anyone break the rules I must report it*". He did not suggest that anyone else had caused a mass evacuation by breaking a sprinkler as he had done.

27. The disciplinary hearing was originally set for 10 May 2017, and diarised to be heard by Mr Andy McKinley. That meeting was rescheduled in order to ensure the Claimant had copies of relevant documents, and Mr Anderson was tasked with dealing with the matter instead of Mr McKinley.

28. At the disciplinary hearing on 15 May 2017, the Claimant admitted he had failed to follow the correct process. He said this was because he was concerned about his targets- albeit Mr Anderson considered there was no particular reason why he needed to be concerned, because the Claimant's target rate "was fine", and because the Claimant had already qualified for his monthly bonus –which was given to those who, like the Claimant, had performed some driving duties in the month- at the date in question.

29. The Claimant asserted that Mr McKinley had told him on the afternoon of 14 February "*I would only receive the premium if I hit the rate*". (That assertion was not consistent with his evidence given to the tribunal, or at other stages

of the disciplinary process. It also conflicts with Mr Andersons' evidence as regards the workings of the bonus system, which we accept.)

30. The Claimant did not dispute:
    a. that he had not assessed the environment as he ought to have done,
    b. that his actions were unsafe, and that he knew "*property could be damaged*" as a result; and
    c. that "*a picker on the other side of [the] racking could have been put at risk*" by his manipulation of the pallet.

31. He also said (at least at one point) that he had seen the sprinkler, but "*didn't expect it to be activated*".

32. On several occasions Mr Anderson put to the Claimant that he had "thrown" the pallet through the gap in the racking. Though the Claimant did not himself use the word "throw", he did not assert at the time that it was the wrong word to use, and (having had the benefit of an interpreter) he signed the disciplinary notes which record the use of that word.

33. The Claimant at one stage became agitated, and told Mr Anderson that his questioning was "stupid". He soon apologised, after a short adjournment. He claimed that giving his name on the Alert and using "*picture of my incident*" in the Alert was "*victimisation if not discrimination".* We understand why Mr Anderson considered such comments to be somewhat over-defensive. Mr Anderson was also unimpressed by the absence of any expression or remorse. Half way through the meeting, Mr Anderson arranged for an interpreter to assist the Claimant, to ensure he understood the questions put to him (albeit Mr Anderson felt the Claimant already understood him well enough).

34. Mr Anderson decided that the Claimant's conduct constituted gross misconduct. Nevertheless, he concluded that a final written warning was the appropriate sanction for the offence if viewed in isolation. However, because the Claimant had a 'live' final written warning on his record, Mr Anderson decided that the Claimant ought to be dismissed -albeit he

dismissed him on notice "out of kindness" rather than summarily. That decision was confirmed in Mr Anderson's letter dated 23 May 2017.

35. Mr Anderson told us (and we accept) that he had never himself extended an already existing final written warning. He also had nothing to do with the disciplining any of the comparators relied upon by the Claimant in his claim. Moreover, the Claimant did not mention any of those comparators when being dealt with by Mr Anderson.

36. The Claimant appealed his dismissal by way of a letter dated 30 May 2017. In his letter, the Claimant accepted he broke H&S rules "*due to pressure of work*". He claimed (we think, not entirely fairly) that he was being "*punished for admitting the truth*". He asserted (inconsistently-see above) that he "*didn't see the sprinkler in place*" until after he hit it; that some other employees' warnings were treated as though they ran "*from decision to decision*", and (again, we think, unjustly) that it was "*a total lack of goodwill to dismiss someone who is as honest as me*". He did not at that stage assert his dismissal was racially motivated.

37. Mr Lowson dealt with the appeal. He had presided over disciplinary hearings before, and had dismissed several British workers in the past (amongst other things, because they had committed a disciplinary offence during the currency of a live final written warning). He had never himself extended a final written warning, and he thought it rare that such an extension would be appropriate.

38. Mr Lawson had also allowed appeals by non-British workers such as Mr "RB", whose sanction he had reduced from dismissal to a warning.

39. Mr Lowson thought Mr Anderson had been lenient to the Claimant, because (as he saw it) the Claimant's 14 February 2017 actions of themselves should have resulted in his summary dismissal, even ignoring the fact that he had a final written warning, which still had over 3 months' currency as at that date.

40. At the appeal hearing, Mr Lowson put to the Clamant that (as he understood it) he had "thrown" the pallet. The Claimant did not dissent.

41. The Claimant alleged that Comparators A, C and F and G had been treated in an inconsistent and more favourable way, e.g. by being allowed a 'second chance' –in some instances, on appeal following dismissal- and an extension of a previous 'live' final written warning rather than dismissal by 'totting up'.

42. Mr Lowson had not personally dealt with any of those comparators. So, he adjourned the hearing to 4 July 2017 to give him time to consider those comparators. He determined as follows:

    a. **Comparator A** already had a final written warning (for breach of procedure) dating from December 2012 at the time of his second offence in March 2013. However, that second offence was of a very different nature to that of the Claimant. Specifically, Mr Davies was acting up as manager, and in that position had overstepped the mark with 'banter' involving another (female) member of staff, who had complained. Mr Davies had had a friendly relationship with the complainant. He (like other staff) had not had any diversity and bullying training[1]; had not realised he had caused offence, was (unlike the Claimant) very apologetic at the disciplinary meeting, and volunteered himself to be 'demoted' (which he duly was). Mr Lowson therefore thought this was relatively more of a 'grey area' case. Not least because of the "spectacular" consequences of the Claimant's actions on 14 February 2017, and the fact that the Claimant fully knew what he was doing was in breach of procedure at the time, Mr Lowson considered the Claimant's offence to be more serious.

    (From the paperwork we have seen, it also appears that the disciplining officer in March 2013 *may* not have been aware that Comparator A already had a final written warning on file, because there was no explicit extension of the final written warning. If this is correct, it might be explained by the fact that the Respondent only

[1] This is an omission which the Respondent ought to remedy with its staff, if it has not already done so.

properly rationalised its HR filing system in 2014. However, this was not a matter which Mr Davies took into account at the time.)

b. **Comparator C** received a further warning, rather than being dismissed, during the currency of a final written warning. But (as the paperwork in the bundle to which we were taken clearly demonstrates) the second such warning was given by a manager was unaware that Mr Buzzard had already received a final written warning. This error explained his apparent generosity and the absence of consideration of 'totting up' in Comparator C's case.

c. **Comparator F** had his 'totting up' dismissal reduced on appeal to an extended final written warning, but in plainly distinguishable circumstances. In particular, his most recent offence (a driving offence) was accepted as being the result of a lack of experience- he had only received the relevant training some 3-5 weeks earlier (and others had been in a similar position before, where their inexperience with driving had led to mistakes and they were therefore not dismissed). In contrast, the Claimant had at no point asserted that his misconduct was the result of a lack of training.

d. **Comparator G** committed his first disciplinary offence (failure to hit the search button) on 11 April 2014, and his second (failure to sign out in the fire register) on 22 April 2014. By the time of his second offence, he had not yet received a sanction for the first one- he was given a final written warning for the first offence on 8 May 2014. Hence –in contrast to the Claimant- he did not 'breach' the terms of any final written warning when he committed his second offence.

43. The Claimant did not rely on Comparators D and E during the appeal process. However, he did so in his pleaded tribunal case. Mr Lowson's evidence in respect of these two UK national comparators (which we accept) was as follows:

a. **Comparator D** had been charged with a further disciplinary matter during the currency of a final written warning given on 14 March 2016, but that charge had resulted in a finding of 'no case to answer' (i.e. at the disciplinary hearing, he was found to have done nothing wrong). That is why there was no prospect of 'totting up' in his case.

b. **Comparator E's** case was similar to Comparator G's, in that his 21 April 2014 misconduct (non-completion of the fire register) did not take place during the currency of a final written warning -which he only received on 8 May 2014. Hence on appeal against dismissal, it was determined that his second offence ought not to have resulted in a dismissal through 'totting up'.

44. Mr Lowson determined that none of the comparators the Claimant had given (A, C, F and G) were sufficiently close to the facts of his case to assist. He considered (after the event) the same applied to Comparators D and E.

45. At a reconvened appeal hearing on 4 July 2017, Mr Lowson rejected the Claimant's appeal against dismissal. Mr Lowson did, however confirm in his decision letter dated 10 July 2017 that the Claimant would be paid a total of 7 weeks' payment in lieu of notice (rather than just the 4 weeks he had already been paid).

46. Fortunately, the Claimant found alterative work on 25 July 2017, albeit apparently at a salary of £100 pcm (net) less than he had earned at the Respondent.

THE LAW

Direct discrimination

Two stage test

47. Following the guidance given by the EAT in **Barton v. Investec Henderson Crosthwaite Securities Ltd**,[2] as affirmed in **Ayodele v Citylink Ltd**[3], the burden of proof in a discrimination claim falls into two parts.

48. Firstly, it is for the claimant to prove on the balance of probabilities facts from which a reasonable tribunal could properly conclude, on the assumption that there is no adequate explanation, that the respondent's discriminatory treatment of them was *because of* race. They must show that

[2] [2003] IRLR 332.
[3] [2017] EWCA Civ 1913.

to be the answer to 'the reason why' question that arises in such claims. That is 'Stage 1'.

49. If the claimant does not prove such facts, they must fail.

50. Secondly, where the claimant has proved facts from which it could be inferred that the respondent has treated the claimant less favourably on proscribed grounds, then the burden of proof moves to the respondent.

51. It is then for the respondent to pass 'Stage 2' and prove that it did not commit or, as the case may be, is not to be treated as having committed that act.

52. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on proscribed grounds.

53. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the relevant protected characteristic was not any part of the reasons for the treatment in question. If the respondent can do this, the claim fails.

Limits to 2 stage test

54. The '2 stage test' is often useful, but need not be rigidly applied. See **London Borough of Islington v Ladele**[4]. The judgment also sets out a useful summary of other key propositions:
    a. In every case the tribunal has to determine the reason why the claimant was treated as he was- this is "*the crucial question*".
    b. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

[4] [2009] IRLR 154.

c. Direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test, which reflects the requirements of the Burden of Proof Directive 97/80/EEC.

d. The explanation for the less favourable treatment does not have to be reasonable. So, the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one.

e. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of *the* **Igen v. Wong** test.

Comparators

55. Comparators are defined by s.23 of the EqA. On "*a comparison of cases*" for the purpose of s.13 EqA, there must be "*no material differences between the circumstances relating to each case*".

Motive

56. In determining whether there has been direct discrimination, it is necessary in all save the most obvious cases for the ET to determine what was in the mind of the alleged discriminator, making appropriate inferences from the primary facts which it finds. **Bahl v. Law Society**[5] (§ 84).

57. The discrimination need not be conscious. Sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware. **Bahl** (§ 82). As regards 'unconscious discrimination':

> "*127. ... it is a significant finding for a tribunal to hold that they can read someone's mind better than the person himself, and they are*

[5] EAT/1057/01

not entitled to reach that conclusion merely by way of a hunch or speculation, but only where there is clear evidence to warrant it".

(1) Unfair dismissal

58. The following principles are material:

a. When considering whether or not a dismissal was fair for s.98(4) ERA purposes, a tribunal must not substitute its own judgment as to what would have been a fair outcome. Rather, it must consider what was within the band of responses reasonably open to the employer. See for example **London Ambulance Service NHS Trust v. Small**[6].

b. Whether a lesser penalty than dismissal might have been considered can be relevant, but only in the limited context of the range of reasonable responses test, i.e. 'whether a lesser sanction would have been one that right thinking employers would have applied to a particular act of misconduct' (not just whether the tribunal would have done so): **Connolly v Western Health and Social Care Trust**[7].

c. An employer will normally be allowed to rely on a previous 'live' warning, without a tribunal going behind it to consider its propriety, unless it is shown that the warning was given for an oblique reason or was 'manifestly inappropriate' (i.e. a deliberately higher test than that for unfairness generally): **Stein v Associated Dairies Ltd**[8].

d. The mere fact that earlier warnings may have been for reasons other than the reason for which the employee was dismissed does not mean that the employer is precluded from taking them into account when deciding whether dismissal is an appropriate sanction. Indeed, it is an error of law for a tribunal to conclude that previous warnings are irrelevant merely because they concern different subject matters, though the significance which can properly be given to them will vary from case to case. **Wincanton Group plc v Stone**[9].

e. It may be reasonable for employers to rely on misconduct that is the subject of an expired warning to justify dismissal if the subsequent

[6] [2009] IRLR 563, CA, §43 *per* Mummery LJ.
[7] [2018] IRLR 239.
[8] [1982] IRLR 447, EAT.
[9] [2013] IRLR 178, EAT.

misconduct, which is the reason (or principal reason) for dismissal itself, justifies dismissal but not to tip the balance if the subsequent misconduct does not itself justify dismissal. This is particularly so if the employer is considering not just the particular lapsed warning of itself, but as part of the employee's overall disciplinary record over time. See **Diosynth Ltd v Thomson**[10] and **Airbus UK Ltd v Webb**[11].

f. Disparity in treatment can found a claim for unfair dismissal. However, it is uncommon for such a case to be made out. See **Paul v East Surrey District Health Authority**[12], where the Court of Appeal approved the dicta of Waterhouse J in **Hadjioannou v. Coral Casinos Ltd**[13]:

> "… *evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate …. [Nevertheless] … Tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a Tribunal may be led away from a proper consideration of the issues raised by [s. 98(4) of ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case… It is of the highest importance that flexibility should be retained*…" (underlining

[10] [2006] IRLR 284.
[11] [2008] ECWA Civ 49, [2008] IRLR 309.
[12] [1995] IRLR 305.
[13] [1981] IRLR 352.

added).

g. **MBNA v. Jones**[14] also reminds us that "*if it was reasonable for the employer to dismiss the employee whose case the ET is considering, the mere fact that the employer was unduly lenient to another employee is neither here nor there. That is why arguments about disparity must be considered with particular care and why the guidance in **Hadjioannou** is important*". The facts of **MBNA** (two employees fighting) are a useful reminder of what is, and what is not, "truly parallel".

h. In a case based on inconsistency of treatment as between employees, **Securicor Ltd v Smith**[15] and more recently **Scottish Prison Service v Laing**[16] each suggest the test is whether the employer's decision to differentiate between them was 'perverse'.

i. If there is inconsistency with a 'truly parallel' case, then it is no answer for s.98 ERA purposes for the employer to say that this was because different managers dealt with the separate incidents. Consistency must be consistency as between all employees of the employer irrespective of the human agencies through which the employer acts. **Cain v Leeds Western Health Authority**[17].

j. In the event of a finding of unfair dismissal:

    i. If the tribunal finds that a claimant by his own culpable or blameworthy conduct contributed to his dismissal, compensation may be reduced under s.123(6) of ERA -by as much as 100% in an appropriate case.

    i. Any basic award also falls to be reduced, by up to 100%, under s.122(2) of ERA if it is just and equitable to do so having regard to the conduct of the employee before the dismissal. (The test is different to that set by s.123(6) of ERA, which

[14] EAT/0120/15.
[15] [1989] IRLR 356, CA.
[16] [2013] IRLR 859, EAT.
[17] [1990] IRLR 168.

requires a 'blameworthy' causal link with the dismissal.)

APPLICATION TO THE FACTS

Direct discrimination

59. By way of preliminary observations:

    a. The Claimant adduced no evidence to explain why *Polish* nationality (as opposed to, say, other non-UK EU nationality) would have caused 'decision makers' to discriminate against him. Such evidence would have been helpful, for example in the light of the 'more favourable' treatment which was apparently meted out by the Respondent in disciplinary cases involving "RB" and Comparator B- who respectively, were Latvian and Lithuanian nationals.

    b. As Ms Omeri pointed out in her submissions, at no stage was it put by Ms Pawlik to either Mr Anderson or Mr Lowson in cross examination that they were motivated by race- still less, by the Claimant's particular nationality.

    We respectfully consider Ms Omeri goes too far in submitting the Claimant must (by reason of point (b) above) "*thereby be taken to have abandoned his claim for race discrimination*". But neither matter assists the Claimant.

60. We do not accept that the Claimant's nationality had any material impact on the fact he was dismissed. The 'reason why' he was dismissed, and the 'reason why' his appeal was rejected, was (a) his misconduct on 14 February 2018, and (b) the fact that he had a live final written warning. The 'reason why' was not race-related in any way. Hence even if the Claimant's case can pass 'stage 1', it fails at 'stage 2'. In particular:

    a. We accept the evidence of Mr Anderson and Mr Lowson (the tribunal having asked the question ourselves) that race did not play a part in their conscious thought process.

    b. We do not consider there is evidence before us making it appropriate to infer unconscious bias.

    c. We do not consider that any of the comparators relied upon by the Claimant are apt comparators for s.23 EqA purposes, given their

"material differences" as explained above. (Even if the differences in each case were not "material", we accept that Mr Lowson believed them to be so.)

d. Mr Anderson dismissed the Claimant for an offence which merited dismissal. He had no involvement with any of the comparators (and had never himself extended a final written warning). So, it is not realistic to assert that he himself treated the Claimant less favourably than any of the comparators.

e. Mr Lowson was also not involved in any of the comparator cases. As set out above, he did not think it was usually appropriate to extend a final written warning, and we accepted his (non race-related) reasons for not doing so in the Claimant's case.

Unfair dismissal

61. As noted above, the key issue was alleged inconsistency with the comparators.

62. Given:

a. the Claimant's admitted misconduct;

b. the fact his misconduct fell within the definition of gross misconduct in the Handbook and disciplinary procedure (and, as he accepted, in any event was "dismissible");

c. the distinguishing features of each of the comparators relied upon by the Claimant (as set out above), which meant none of them were "truly parallel";

d. the limited mitigating circumstances; and

e. the need for us not to adopt a "substitution mindset"

we consider the dismissal and rejection of appeal to have been comfortably within the range of reasonable responses open to the Respondent.

63. Even if we had found otherwise, we consider it would have been just and equitable to make a deduction of at least 90% pursuant to both s.123(6) and s.122(2) of ERA. The Claimant was very much to blame for his dismissal. Even on his 'best case', the most he could have hoped for was an extended

final written warning for his conduct. Thus, particularly in the light of the Claimant's new employment, the amount he would potentially have recovered would probably have been very modest in any event.

OTHER MATTERS

64. It follows that our request for the parties to submit dates to avoid for a ½ day remedy hearing need not be actioned. No remedy hearing is required.

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Employment Judge Michell, Bury St Edmunds

JUDGMENT SENT TO THE PARTIES ON

3 July 2018

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FOR THE SECRETARY TO THE TRIBUNALS