EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE FRANCES SPENCER**

MEMBERS **MS M FOSTER NORMAN**
MS A SADLER

BETWEEN: **MR U KAMARA** **CLAIMANT**

AND

BUPA CARE HOMES (AKW) LIMITED **RESPONDENT**

ON: **7- 9th March and (in chambers) 3rd April 2017**

Appearances

For the Claimant: In person

For the Respondent: Mr Turner, solicitor

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that

(i) The Claimant was not suspended or dismissed for making a protected interest disclosure and his claims under section 103A and 47B of the Employment Rights Act 1996 are dismissed.

(ii) The Claimant was not unfairly dismissed;

(iii) The Claimant's claims of race discrimination are not well founded and are dismissed.

REASONS

Background and Issues

1. In this case the Claimant claims "ordinary" unfair dismissal, "automatic" unfair dismissal and detriment for making a protected interest disclosure and direct race discrimination. The issues were clarified and set out in a case management order made by Regional Employment Judge Hildebrand on 9th August 2016.

2. The Claimant worked for some 16 years as the Financial Administrator of Heathland Court Care Centre, one of the Respondent's care homes (the Home). He was dismissed by letter dated 29th January 2016 (and his effective date of termination was 1st February 2016). The Claimant claims that the principal reason for his dismissal was that he made a protected interest disclosure namely (i) an email sent to the Respondent's confidential whistleblowing service on 18th September 2015 and (ii) his hand written notes setting out details of taxi journeys which he considered had been fraudulently charged to the Respondent by a colleague. The Claimant also claims that his suspension on 18th September 2015 (some 5 hours after his first disclosure) was a whistleblowing detriment. He also claims ordinary unfair dismissal.

3. Insofar as the claim for race discrimination is concerned it is the Claimant's case that he was less favourably treated because of his race (black African) when he was dismissed. It is recorded in the case management order that the Claimant relied on actual comparators at other homes namely Chris at Fieldway and Monique at Linton Hall. We take it as read that he also relies on a hypothetical comparator.

4. In his witness statement the Claimant referred to a number of matters that he now relies on as background evidence to support his complaint that his dismissal was an act of direct race discrimination. Those complaints related to events in 2014 and were that (i) he was not given an appropriate place to work or workstation during a refurbishment of the home, (ii) that he was required to work in reception during the refurbishment process where it was dirty and dusty, (iii) that he was not given access to a printer dedicated for his sole use (iv) that he was required to work in an office with new data and telephone equipment that made a continuous noise causing him headaches and ringing in his ears (iv) that the Respondent unfairly took him to a disciplinary for refusing to move out of his office during the refurbishment when there was no other available place to work (v) that the Respondent disciplined him after he was sick due to the Respondent's failure to take his health and safety seriously (vi) that the Respondent did not deal with his complaints.

5. It had not previously been clear, either from the pleadings or the case management order, that these matters were relied on to support a race discrimination complaint and consequently the Respondent's witness statements do not set out their response to these matters. Even in his own witness statement the Claimant details the events that he complains about without suggesting any link to his race. The Claimant gave no evidence about Chris at Fieldway or Monique at Linton Hall. Neither is referred to at all in the Claimant's witness statement.

Evidence

6. The Tribunal had a bundle of documents running to some 300 pages. We heard evidence from the Claimant and, on behalf of the Respondent, from Ms Williams who took the decision to dismiss and Ms Andrew who heard the Claimant's appeal.

Findings of relevant fact

7. The Claimant worked at the Home as a Financial Administrator. In that capacity, he was head of the finance department of the Home. He was accountable to the Home Manager for the residents' administration systems and all aspects of financial administration such as recording and processing of income and expenditure, banking and allocation of receipts and processing petty cash.

8. Not infrequently staff at the Home needed to book taxis to accompany residents to hospital or GP appointments and for other business relating to the Home. At the Home, the process for booking taxis was that the member of staff would telephone the taxi company with which the Home had an account and quote a code unique to the Home. He or she would then give the journey details and the time of the pickup. Although members of staff should have obtained verbal permission from the Home Manager for such journeys, there was no formal process in place for this. No cash was involved as the journeys would be on account and charged to the Respondent. At the end of each month the taxi company would send the invoice to Leeds. Leeds would then send the invoice electronically to each individual home. It was the Claimant's responsibility, as Financial Administrator, to check the invoices for anything unusual and flag it to the Home Manager. If no concerns were flagged the Manager would approve the invoice for payment. The Claimant said in cross examination that while it was his responsibility to check that the amounts tallied it was not for him to check who travelled where, as that was for the Manager. However we do not accept that and find that that the Claimant was required to scrutinise the taxi invoices carefully for anomalies of whatever nature.

9. In 2014 the Home was refurbished. The Claimant was required to work in an office behind reception. He had to share a printer. At times it was dusty. In September 2014 the Claimant was told that he had to attend a disciplinary investigation meeting with Rachel (the manager of another Home) for refusing

to move out of his office and abandonment of duties, but this was not progressed (the Claimant saying this was because there was no merit in it and the Respondent saying because Rachel left their employment).

10. On 18th May 2015, following a disciplinary hearing before Ms Milevska (Home Manager of another Home) the Claimant was given a written warning to remain on his file for 6 months for being absent from work without authorisation from 2nd to 13th February 2015, failure to follow the correct absence reporting procedure and failure to update his current address. (99). He appealed the warning although (following a couple of postponements) the appeal had not taken place when he was subsequently suspended for unrelated matters.

11. In July 2015 the Claimant was given a "letter of concern" by Ms Carter the Home Manager for failure to comply with a management instruction concerning the way in which agency hours were reported. (119)

12. Employees of the Respondent are encouraged to report any concerns though a process known as "Speak up". This can either be done anonymously via telephone, by email or by correspondence. On 24th August Patrick Mouelle, Lifestyle and Wellbeing Co-ordinator for the Home, called the Speak up telephone line to complain that he was being bullied by the Claimant. The following day, 25th August, Dammi Archbold, Hotel Service manager, also called the Speak up line to complain about the Claimant's behaviour.

13. The calls made to Speak up by Mr Mouelle and Ms Archbold were referred to Mr Bennett to investigate. (Mr Bennett is engaged by Bupa as an investigator). He sought to establish if those employees would agree to complete written statements. Once they had agreed to do so, (as emails provided by the Respondent establish) Mr Bennet recommended on 15th September that the Claimant be suspended. We accept the Respondent's evidence that the decision to suspend the Claimant was taken on 16th or 17th September although the Claimant had not in fact been suspended until the 18th.

14. On 18th September 2015 at 10.21 a.m. the Claimant sent an email to a Mr David Hynam (145) via the Respondent's Speak up procedure. In his email headed "alleged fraud" the Claimant reported that:

    a. An unnamed member of staff was claiming time on his timesheet when he was not at work. He alleged collusion between that member of staff, the previous home manager, Ms Carter and her deputy as they had agreed his hours.

    b. The same unnamed individual was using taxis from his home to work and for social events. He reported that taxis had been used in that way about 45 times.

    The Claimant said he could not raise this with the acting home manager (formerly the deputy) and did not feel supported by the regional manager

hence raising via speak up. His email was acknowledged promptly and Mr Hynam said he would arrange for the Head of People Services to investigate.

15. At 15.15 that afternoon the Claimant was given a letter of suspension (143). In the letter the Claimant is informed that he is being suspended "whilst the following allegations of bullying and harassment are investigated". The "following allegations" were not identified. (The Respondent had lazily sent out an unfinished pro forma standard letter without setting out the specific allegations.)

16. On 21st September 2015 the Claimant emailed Mr Hynam telling him that he had been suspended shortly after his whistleblowing email. The same day Mr Bennett emailed the Claimant to say he had been appointed to investigate his whistleblowing concerns. The following day (22nd September) he emailed again saying that the Claimant's suspension was unrelated to the whistleblowing email he had sent Mr Hynam (148A).

17. Mr Bennett met the Claimant on 29th September to obtain further details about the alleged fraud reported by the Claimant in his email of 18th September. (149). In that meeting the Claimant also spoke about the various issues he had had over the recent refurbishment and about what he perceived to be unfair disciplinary procedures against him in 2014 and 2015.

18. In relation to the specific allegations that he had raised in his email the Claimant referred to 2 employees, Patrick Mouelle and Mr Gutierrez, (a carer at the Home) who he believed had fraudulently claimed money for hours they had not worked and who had misused the Home's taxi account. He gave Mr Bennett a handwritten list of examples going back to February 2015 where he identified that taxis for personal use had been charged to the Home and some occasions where time worked had been claimed when the individual was not at work. (Mr Bennett estimated that the list contained about 50 examples, though on the Tribunal's count there were rather more). The Claimant also alleged that the previous Home Manager (Ms Carter) had manipulated hours by incorrectly allocating hours worked to training, that kitchen staff were claiming for hours not worked, that another employee attended work late and didn't sign in and that various members of staff had been bribed or were given a kickback for ganging up on him and making false allegations.

19. Mr Bennet investigated both the Claimant's allegations and those of Mr Mouelle and Ms Archbold.

20. Mr Bennett wrote to the Claimant on 28th October with the outcome of his investigation into the Claimant's whistleblowing allegations. In relation to the misuse of the taxi account the Claimant was told that Mr Bennett was conducting a separate disciplinary investigation into 2 members of staff regarding fraudulent claims for hours worked and misusing the taxi account. (Mr Mouelle was subsequently dismissed as a result of those allegations.). The letter also deals systematically with the various concerns that the Claimant had raised during his meeting -- including the issues raised about his

office move, the home refurbishment and previous disciplinary actions. Those issues were all dismissed.

21. Mr Bennett also prepared a separate investigation report into the allegations of bullying made by Mr Mouelle and Ms Archbold about the Claimant. As part of that investigation Mr Bennett interviewed the Claimant on 8th October 2015 (177) and the Claimant also provided a written submission (186). Mr Bennett took statements from Mr Mouelle, Ms Archbold, Ms Carter (former Home manager), the receptionist Ms Agouro, Mr Gutierrez, a carer, and 3 others. He spoke with Ms Carter on the telephone on 9th September and met with her on 15th October. Ms Carter did not paint a flattering picture of the Claimant, saying that his attitude to her was "contemptuous and unhelpful" that staff were fearful of him, that some female staff became tearful and upset when approaching him with reasonable requests and that she herself was extremely reluctant to speak to him unless she had someone in the room with her. Mr Bennet also spoke on the telephone to the acting manager Mr Costa, (who had taken over when Ms Carter left) and reviewed some other written material including complaints against the Claimant from the son of a resident and the Home's external podiatrist and some internal notes.

22. This report was finalised on 22nd October 2015 (151) and the outcome was a recommendation that the bullying and harassment allegations against the Claimant should be explored further at a disciplinary hearing.

23. In addition, Mr Bennett's report notes that during the investigation process an additional concern had been identified namely that the Claimant "had been seriously negligent in the performance of his duties by failing to question unusual expenditure by members of staff." Mr Bennett says that, having met with the Claimant to discuss his whistleblowing concerns, the Claimant had said that he had only recently started checking the taxi invoices properly and hadn't previously noted the unusual expenditure. It was Mr Bennett's view that this amounted to serious negligence in the performance of his duties and should be also subject to a disciplinary process. The invoices from the taxi company were attached to the report and showed that Mr Mouelle had been booking and taking taxis to and from his home address, to Bar Italia, the Wolsley and Victoria Coach Station, none of which could possibly have been work related.

24. On 9th November 2015 the Respondent wrote to the Claimant asking him to attend a disciplinary hearing on 19th November to be conducted by Ms Williams, the Home Manager of a different Home. The allegations against the Claimant were that: –

- "between March 2015 and September 2015 you intimidated and bullied Dammi Archbold
- between November 2015 and September 2015 [sic] you failed to treat colleague Patrick Mouelle with respect which has resulted in PM feeling upset and humiliated

- you have regularly failed to treat colleagues and customers with respect and professionalism in accordance with the standards expected in the BUPA code of conduct and failed to display key BUPA values
- between 20th February 2015 and 18th September 2015 you have been seriously negligent in the performance of your duties by failing to question unusual expenditure on taxis by members of staff."

25. While those allegations are vaguely worded the Claimant was sent the investigation report and appendices, including the various statements and notes and the taxi invoices. This set out the relevant detail. The Claimant was informed that the Respondent did not intend to call any witnesses to the hearing and that if the Claimant wished to call witnesses he should let the Respondent have their names no later than 17th November 2015. The Claimant was informed that if the allegations were upheld and were deemed to be gross misconduct he could be dismissed without notice or pay in lieu. (214).

26. The Claimant asked for further documents which were provided to him. On 7th December the Claimant said he wanted to call four members of staff as witnesses (Ruth, Joyce, Leonard, and Adelaide). Ms Williams responded that she would try to get them to attend but that it might be difficult for them all to attend – it would depend on their availability and being on shift on the day in question. The Claimant informed Ms Williams that he would be happy for her to speak with them and to ask them specific questions which he identified in an email of 13th December (216G).

27. The disciplinary hearing eventually took place on 14th December 2015. At the hearing the Claimant denied all allegations of bullying. He said he had not been rude, had not shouted at Ms Archbold, the allegations were all lies and false. The staff had got together against him, orchestrated by the Home Manager.

28. In respect of the allegation that he had been negligent by failing to question unusual expenditure on the taxi account the Claimant accepted that it was his responsibility to check the invoices. He said he had not noticed the high or unusual expenditure on the account because he trusted the staff and it was only when he had seen the most recent invoice that he knew that Patrick had been using the taxi account for his personal use. The notes record that the Claimant own representative said to the Claimant during the course the hearing "you have to accept the fact that you've let yourself down" and the Claimant replies "Yes that's true. I accept the fact that I failed in my duty."

29. Subsequently the Claimant challenged this version of the notes saying that what he had said was "yes that is true. I accept the fact that I let myself down but I was following the instruction given to me by the manager to avoid being accused of anything else." We do not accept this amended version (which was denied by Ms Williams) and in any event the Claimant would have been well aware that an instruction not to check the invoices would have been

unreasonable and impermissible. He also disputed that he said he was not checking the invoices as he trusted the staff. His amended version of the notes suggests that he said "I was not checking as I used to before, I only check for the accuracy of the invoice not who uses it as I was told they are authorising and monitoring the booking of the taxis. I raised my concerns immediately to head office after collecting the supporting evidence." (289*)* Having heard the evidence of Ms Williams and the Claimant we accept the accuracy of the notes provided by the Respondent, and do not accept the Claimant's amended version.

30. Following the disciplinary hearing Ms Williams spoke to 3 of the 4 witnesses nominated by the Claimant. (The 4th refused to get involved.) After those interviews the minutes were sent to the Claimant. Ruth and Leonard both stated that the Claimant had been helpful with their issues and they had not seen him being rude. Adelaide went further. She said this "when Unis was off sick people were going around saying nasty things about him. They said they don't want to see his monkey face around the home so they are going to get rid of him. When Unis returned from sick leave I personally warned him to be careful of these people. Unis always stay calm and quiet but these people have made him a target to get rid of him. I'm a child of God and I stand for the truth. I did hear rumours about Unis to be dismissed, they treated him with dishonour. Example, the management team refused to change his chair." She said he was helpful and friendly in the workplace and was never rude as far as she was aware.

31. In evidence, Ms Williams said that, when pressed, Adelaide was unable to give her the names of those that had said nasty things about him or called him "monkey face". Adelaide told Ms Williams that she didn't hear it herself just the rumours going around.

32. Ms Williams sent the minutes of her interviews with the Claimant's nominated witnesses to him on 26th January. The Claimant requested Ms Williams go back to Ruth to ask about her recollection that Ms Archbold had shouted at him. This was done (though Ruth could not recollect any such incident) and the Claimant informed of her response (235g.) the Claimant did not however get the minutes of his disciplinary hearing till the day before his appeal (265.)

33. The outcome was sent to the Claimant on 29th January (236). Ms Williams found that:

    a. The allegation that the Claimant had failed to treat Mr Mouelle with respect was not upheld.

    b. Ms Archbold's allegations were upheld in part. Ms Williams did not uphold the allegation of bullying relating to a failure to reimburse Ms Archbold for petty cash expenditure and late payment of wages. She did however find that the Claimant had failed to support Ms Archbold in relation to e-purchasing requests and had made her feel belittled and upset by the way he communicated with her.

c. The allegation that the Claimant had regularly failed to treat colleagues and customers with respect and professionalism was upheld. Ms Williams found that "looking through the statements and other documents from external people outside of BUPA, family and health professionals, there appears to be a common theme of discontent around how you have communicated with them which has been perceived as being rude and unprofessional in your manner and not customer friendly."

d. The allegation that he had been seriously negligent in the performance of his duties by failing to question unusual expenditure on taxis by members of staff was also upheld.

e. The Claimant's suspension was not related to his "Speak Up". It was a result of concerns which had been raised about his conduct towards his colleagues. On the other had Ms Williams said she was "of the impression" that the Claimant raised his concerns as a direct result of his suspension and not because it was the right thing to do. The taxi fraud was happening at least 8 months prior to his "Speak Up" and possibly even longer."

34. It was Ms Williams's evidence that the 4th allegation was the most serious and it was that in particular that led her to determine that the Claimant should be dismissed.

35. The Claimant appealed (241). The grounds of his appeal were essentially that:

He had been suspended due to blowing the whistle and Ms Williams was not right to say that he had not raised his concerns as a direct result of his suspension.

There was a breach in the disciplinary investigation process.

There were flaws in the disciplinary hearing; and

The decision to dismiss was too harsh.

36. In relation to the taxi fraud issue it was the Claimant's case that from February 2015 he had not scrutinised the taxi invoices. Although he used to do this, he knew that all taxi invoices had been authorised by and were monitored by the home manager and deputy home manager. He therefore trusted that all taxi journeys were for genuine purposes. If he had not blown the whistle on the taxi fraud it would still be happening. As regards process the Claimant said he had been suspended for one thing and dismissed for another. Colleagues who might have supported him were not spoken to during the investigation. The investigation was biased and unfair.

37. The appeal was heard by Ms Andrew, Area Manager, on 11th March 2016. The Claimant said that the allegation that he had not been doing his job was not true. He had raised his concerns about misuse of taxis on 18th September.

He had been suspended and then dismissed for raising concerns. He had originally been suspended because of bullying allegations and it was unfair to add the taxi expenditure allegation to the charges against him following his suspension.

38. In relation to the taxis the Claimant said that taxis he had been told by Ms Carter and David Costa, (the deputy home manager) in February that Patrick would be in charge of booking taxis and that that they would be monitoring and authorising the booking of taxis and that he did not need to. Although he used to check taxi invoices he had been told not to. He only noticed that Patrick Mouelle was claiming for hours not worked when he started monitoring in July, following his return from holiday. He had been punished for speaking up.

39. Following the appeal hearing Ms Andrew spoke to Ms Fozard in HR who told her that complaints about the Claimant had been made by relatives and by other employees before his email of 18th September. She also emailed Mr Bennett about the sequence of events. (268A.) Mr Bennett told her that Mr Mouelle had raised his concerns in a telephone conversation on 24th August and Ms Archbold on 25th August. However they had been unwilling to breach their anonymity and it was only after they had agreed to provide statements that the Respondent felt they could proceed. The decision had been made to suspend the Claimant on the 16th or 17th September. That evidence was accepted by Ms Andrew.

40. Ms Andrew decided to dismiss the appeal and the Claimant was informed by letter dated 3rd May 2016 (269). Ms Andrew found that

    a. He was not suspended for blowing the whistle and the timing was co-incidental;

    b. the investigation was unbiased and it was legitimate to include allegations that came to light during the investigation;

    c. Colleagues whose views the Claimant wished the Respondent to canvass as to his behaviour had been interviewed by Ms Williams.

    d. The decision to dismiss was not too harsh. The Claimant had delayed reporting his concerns for 8 months and that this was unacceptable he had a duty to report financial concerns. She concluded that the Claimant's motive in reporting the fraud was to obtain evidence against people that had raised concerns about him.

Relevant law

41. Public Interest Disclosure

Section 103A of the ERA provides that:-

"An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one, the principal reason) for the

dismissal is that the employee made a protected disclosure".

42. Section 47B(1) gives an employee the right not to be subjected to a detriment on the ground that he has made a protected disclosure. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act or deliberate failure to act was done. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower, whereas section 103A requires the protected disclosure to be "the principal reason" for the dismissal. The former however is not a "but for" test.

43. If, as in this case, the employee has a year's service then in considering the reason for dismissal the following analysis of the burden of proof applies:-

    a. Has the Claimant shown that there is a real issue as to whether the reason put forward by the employer was not the true reason?

    b. If so, has the employer proved his reason for dismissal?

    c. If not has the employer disproved the section103A reason advanced by the Claimant? (Kuzel v Roche Products Limited 2008 IRLR 530.)

44. The term "protected disclosure" is defined in Section 43A of the Act as a "qualifying disclosure" (as defined in Section 43B) which is made in accordance with sections 43C to 43H.

45. A qualifying disclosure means "any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show. "(a) that a criminal offence has been committed , is being committed or is likely to be committed; or (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".(the other subsections do not apply here.)

46. A disclosure must involve the provision of information in the sense of conveying facts. It is not enough simply to make an allegation. *Cavendish Munro Professional Risks Management Ltd* v *Geduld* 2010 IRLR 38.

47. In considering the public interest test, the workers belief that the disclosure was made in the public interest must be objectively reasonable but the disclosure does not need to be in the public interest per se. (Chesterton Global Ltd –v Nurmohammed 2015 IRLR 614). In Underwood – v – Wincanton plc EAT/0163/15 the EAT considered Chesterton and said "it is quite clear that both the Employment Tribunal and the Employment Appeal Tribunal in the Chesterton case were satisfied that the "public", for the present purposes, could be constituted by a subset of the public, even if that subset comprised only persons employed by the same employer on the same terms."

48. Guidance on how to approach the question of whether a protected disclosure has been made was given in Blackbay Ventures Ltd v Gahir 2014 IRLR 416.

Unfair dismissal

49. If the principal reason for an employee's dismissal is that he made a protected disclosure that dismissal will be automatically unfair without more. If however the Respondent can show that the reason for the Claimant's dismissal was misconduct then this is a potentially fair reason for dismissal.

50. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

51. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (*British Home Stores v Burchell* [1980] ICR 303.) The Claimant must also be given a fair hearing.

52. In *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The Tribunal must consider whether the decision to dismiss fell within the band of reasonable responses for an employer to take with regard to the misconduct in question. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances. (See *Post Office v Foley* 2000 IRLR 827). The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23.)

53. The ACAS Code of Practice on disciplinary and grievance procedures provides guidance which tribunals must take into account in deciding whether a dismissal is fair or unfair.

Race discrimination

54. Section 39 of the Equality Act 2010 prohibits an employer discriminating

against its employees by dismissing them or subjecting them to any other detriment. Section 40 prohibits an employer from harassing its employees. Section 13 defines direct discrimination as follows:-

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

Race is a protected characteristic.

55. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why she (or he) has acted in a certain way towards another, in circumstances where she may not even be conscious of the underlying reason and will in any event be determined to explain her motives or reasons for what she has done in a way which does not involve discrimination.

56. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, harassment or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

Submissions and Conclusions

57. Did the Claimant make a protected interest disclosure? The Respondent submits that the email (145) of 18th September and the list given to Mr Bennett on 29th September 2015 (211) fail to meet the requirements set out in section 43B. Mr Turner submits that the email was simply an allegation and not a disclosure of information which met the Cavendish Munro test. He further submits that the disclosure made during the meeting with Mr Bennett is a statement of opinion and not a qualifying disclosure.

58. We do not accept either submission. In Kilraine v London Borough of Wandsworth EAT/0260/15 Langstaff J cautioned some care in the application of the principle arising out of Cavendish Munro. *"The dichotomy between "information" and "allegation" is not one that is made by statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other, when reality and experience suggest that very often information and allegation are intertwined….. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point."*

59. In his email the Claimant discloses the information that an employee was arriving at work later than the time claimed on his timesheets and was therefore claiming pay for time not worked. He also discloses that the same employee was improperly charging taxis fares for his social events to the Respondent's taxi account and had done so, by his count, 45 times. This was the disclosure of specific information and cannot said to be a mere allegation.

60. Equally during the meeting with Mr Bennett the Claimant said in terms that he believed that Patrick Mouelle and another employee were involved in fraudulently claiming payment for hours they had worked and had been misusing the Respondent's taxi account. He handed Mr Bennett a list of over 50 examples setting out the details and dates of taxi journeys said to be unrelated to the Home and of times that Mr Mouelle claimed to be at work but wasn't. That was very clear and specific information which related to a breach of a legal obligation and a criminal offence. The Respondent accepts that the Claimant had a belief that a criminal offence was occurring or was likely to occur.

61. The Respondent also submits that the disclosures were not made in the public interest but were ultimately self-serving and made to deflect from the disciplinary proceedings that were taking place in relation to his conduct.

62. On 18th September when the Claimant sent his email the Claimant was scheduled to attend (on 23rd September) the hearing of his appeal against the warning which he had received regarding his sickness absence. He was also engaged in correspondence demanding the withdrawal of the "letter of concern" that had been sent to him on 21st July. There had been a number of issues of disagreement between the Claimant and Ms Carter.

63. The Claimant may have had mixed motives for raising the Speak Up (though we do not make a finding that he did) but even if he did, we accept that the Claimant reasonably believed the disclosure to be in the public interest. He was reporting a potential crime - and we consider that this must necessarily be in the public interest.

64. We therefore find that the Claimant did make a protected interest disclosure (i) when he sent his email to Mr Hynam on 18th September and (ii) during the subsequent investigation. (276).

<u>Was the Claimant suspended because of the email which he sent to Mr Hynam?</u>

65. Section 48(2) provides that in a case of detriment for making a protected disclosure it is for the employer to show the ground on which any act was done. In this case we are satisfied that the Respondent has shown that the Claimant was suspended because of the earlier Speak Ups. The chronology establishes that both the Speak Up by Mr Mouelle and by Ms Archbold and the Respondent's subsequent decision to suspend the Claimant occurred before the Claimant sent his email to Mr Hynam and related to allegations of bullying made by individuals through the Speak up process. Despite the timing of his suspension, we are satisfied that the Respondent was not influenced by the Claimant's email because he had not sent it when the decision to suspend him was taken.

<u>Was the principal reason for the Claimant's dismissal the fact that he made protected disclosures?</u>

66. We considered whether the Claimant had shown that there is a real issue as to whether the reason put forward by the employer was not the true reason. We have found that he made a disclosure of a very real issue and 5 hours later he was suspended. On balance we accept that this alone provided a prima facie case which shifted the burden to the Respondent to prove the reason for the dismissal was not the disclosure.

67. Having heard all the evidence and the reasons put forward by Ms Williams and Ms Andrew we were satisfied that Respondent has shown the reason for his dismissal was Ms Williams genuine belief that the Claimant had been negligent in the performance of his role in safeguarding the finances of the Home. This is an issue that relates to conduct and is a potentially fair reason for dismissal.

68. The invoices that had been sent to the Claimant for checking identified that on one occasion in February, and more frequently from April onwards, Mr Mouelle had been systematically taking taxis for personal use and charging these to the Home. As Ms Williams explained it would have been obvious from "a cursory review" of these invoices that something was amiss and that the taxi system was being abused. The Claimant had failed to query any of these and had admitted that he had failed in his duty. He should not simply have "trusted the staff". She regarded this as the complete disregard of a fundamental part of his role. It was this allegation in particular that led her to dismiss the Claimant. His failures to treat colleagues and customers with respect was a contributory factor.

69. Although the taxi journeys had come to light via the Claimant's own disclosure the Claimant was not dismissed because he had made the protected disclosure. In disclosing the misconduct of others he had inadvertently also revealed that he had been failing in his own duties and he was dismissed because of that conduct. Had the Claimant reported the alleged fraud in a timely fashion, he would not have been subjected to disciplinary procedures in respect of them.

<u>Race discrimination</u>

70. The Claimant contends that his dismissal was an act of direct race discrimination. His witness statement concentrates on his case that he was suspended and dismissed for blowing the whistle and does not suggest that Ms Williams or Ms Andrew's decisions were was influenced by his race. Nor did he put to Ms Williams or Ms Andrew in evidence that he would have been differently treated had he been white or of a different racial origin.

71. Much of the Claimant's witness statement set out series of complaints he had about the treatment he received from Ms Carter, although he does not suggest or provide evidence that any of this was connected to his race. His treatment by Ms Carter was not the issue before us which was whether Ms Williams, or Ms Andrews at the appeal were, consciously or subconsciously influenced by the Claimant's race when they decided that he should be dismissed and /or his appeal was dismissed.

72. The only evidence which would suggest that any actions taken in relation to the Claimant were related to his race came from an interview with a colleague, Adelaide, referred to above (but not referred to in the Claimant's witness statement). Her shocking and extremely serious allegations were about unnamed "people" in the Home. While we are critical of Ms Williams for not trying significantly harder to get to the bottom of those allegations, we did not consider that this was material from which we could infer that either Ms Williams or Ms Andrews (neither of whom worked in the Home) were motivated by race when making the decisions that they did.

Unfair dismissal

73. Finally we considered whether the Claimant was unfairly dismissed. As we have said we accept that the Respondent had a genuine belief that the Claimant had been negligent in his duties and had not treated colleagues and customers with respect.

74. The Claimant had accepted during the course of the Disciplinary Hearing that he had not checked the taxi invoices. He said it was because he "trusted the staff" but it was his job to check the invoices for oddities whether because of staff malpractice or for any other issues. The Claimant also accepted in the hearing that he had not completed his duties as he should have done.

75. Given this admission and the invoices showing the obvious irregularities we find the Respondent arrived at its belief that the Claimant had been negligent in his duties on reasonable grounds and after reasonable investigation. There was a fair hearing at which the Claimant was accompanied by his trade union representative and he had a chance to say what he wanted to say in his defence or in mitigation. He was sent all the relevant documents so that he was able to respond and Ms Williams interviewed those employees that the Claimant nominated to respond to the bullying allegations.

76. In relation to the allegation that he had failed to treat colleagues and customers with respect the Investigation report contained written evidence from numerous people to the effect that they had considered his behaviour to be rude and unprofessional. The Claimant's defence, that it was all lies, without trying to deal with the specific complaints, was not helpful.

77. As for the sanction, we did have some concerns about Ms Williams' conclusion that the Claimant had raised his allegations about taxi fares as a direct result of his suspension and not because it was the right thing to do. In fact the Claimant had raised his Speak Up before he had been suspended and Ms Williams was unclear in her evidence as to how she had arrived at that conclusion.

78. However, we were satisfied that this was not a material factor operating on the decision to dismiss. Ms Williams' referred to this in the context of rejecting his defence that he had been suspended because he had blown the whistle. Ms Williams was clear that she regarded the failure to report the taxi issue for some eight months amounted to serious negligence and that, whatever his

motives in reporting it, it revealed that he had been seriously negligent in the performance of his duties.

79. In considering the fairness of the dismissal we have to consider the overall process including the appeal. We considered whether the Claimant had a fair appeal. We concluded that he did. The Claimant said he had been suspended for blowing the whistle and Ms Andrew conducted enquiries into the timing of the Claimant's suspension. Ms Andrew also considered the Claimant's case that Ms Williams was wrong to conclude that he had not raised his Speak Up because it was the right thing to do. She concluded however that the Claimant did not have altruistic reasons for reporting the Speak Up. "He himself said he had been monitoring taxi usage since July and he had not reported it to anyone till 18th September. If he had had genuine concerns he would have raised it earlier…he should not have sat on it for 2 months". That was a conclusion that was reasonably open to her on the evidence before her.

80. Ms Andrew also considered the Claimant's case that he had been told that Patrick was in charge of booking taxis and concluded that this was not so. It was clear from the invoices that the taxis were not just booked by one person.

81. Ms Andrew was clear as to the seriousness with which she viewed the Claimant's failure to report the taxi issue and her decision to dismiss the appeal was a reasonable one. We also find that the delay in sending the Claimant the notes of the disciplinary hearing, although regrettable, was not an error which undermined the overall fairness of the process.

82. We concluded that the decision to dismiss was not outside the band of reasonable responses. The Claimant had discovered discrepancies going back 8 months and either he had simply failed to spot quite clear errors or he had spotted them and failed to act. Either way there was a failure to carry out a fundamental aspect of his role. When coupled with findings on reasonable grounds that the Claimant had failed to treat colleagues and customers with respect and professionalism, dismissal was not unreasonable.

Employment Judge F Spencer
6th June ~~2016~~

6th June 2017

[Amended on 16 June 2017 under Rule 69 of the Employment Tribunals Rules of Procedure 2013]