EMPLOYMENT TRIBUNALS

Claimant: Mr E Bell

Respondents: 1. Cordant People Limited (formerly Prime Time Recruitment Limited)
2. Cordant Dynamic People Limited
3. Cordant Group PLC

HELD AT: Manchester **ON:** 5-9 June 2017
12 and 30 June 2017
(in Chambers)

BEFORE: Employment Judge Slater
Mr J Ostrowski
Ms E Cadbury

REPRESENTATION:

Claimant: In person
Respondent: Ms T Vittorio, Group Employee Relations Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claim of unfair dismissal because of making protected disclosures is well founded as against the first respondent.

2. The tribunal does not have jurisdiction to consider the complaints of detriment contrary to section 47B Employment Rights Act 1996 in relation to Mr Barnes expressing his anger to the claimant when he made the disclosure and Mr Barnes taking steps to remove the claimant from the business, which would otherwise have been well founded, due to the complaints being presented out of time.

3. The other complaints of detriment contrary to section 47B Employment Rights Act 1996 are not well founded.

4. The complaints of harassment related to race are well founded as against the first respondent and it is just and equitable to consider them out of time.

5. The complaints of direct discrimination and victimisation under the Equality Act 2010 are not well founded.

6. The claims against the second and third respondents are dismissed.

REASONS

Claims and Issues

1. The claimant claimed detriment on the grounds of making protected disclosures under section 47B Employment Rights Act 1996, automatic unfair dismissal under section 103A Employment Rights Act 1996, direct race discrimination under section 13 of the Equality Act 2010, harassment under section 26 of the Equality Act 2010 and victimisation under section 27 of the Equality Act 2010.

2. The issues were agreed to be as set out in the notes of a preliminary hearing on 3 February 2017, save that, during the course of the hearing, the respondents conceded that the claimant had been employed at the relevant time by the first respondent and the claimant was allowed to add a further occasion of making a protected disclosure, being a disclosure made at a meeting on 30 July 2015 with Sid Barnes. The issues which remained to be determined by the Tribunal were therefore as follows:

Protected disclosures

2.1. Whether the claimant made one or more qualifying disclosures within the meaning of section 43B Employment Rights Act 1996.

2.2. Whether any of the qualifying disclosures were protected disclosures within the meaning of section 43A Employment Rights Act 1996.

2.3. The claimant asserts that –

2.3.1. He made a series of protected disclosures within the meaning of section 43A Employment Rights Act 1996 when he disclosed information to his line manager, Sid Barnes, informing him that Staffgroup, a company purchased by the Cordant Group, had falsified invoices thereby declaring a falsely elevated profit, meaning that Cordant had purchased Staffgroup at an overinflated price.

2.3.2. He made these disclosures –

(i) In July 2015 by a telephone call to Sid Barnes;

(ii) 30 July 2015 at a meeting with Sid Barnes;

(iii) In late August/early September 2015 by a telephone call to Sid Barnes;

(iv) At a meeting on 2 September 2015 when the claimant provided Sid Barnes with documentary evidence of the falsified invoices;

(v) In his written grievance sent to the respondent by email on 24 December 2015.

2.3.3. The disclosed information tended to show either that a criminal offence had been committed and/or that the respondent had failed, was failing or was likely to fail to comply with its legal obligations.

2.3.4. The disclosure was made in the public interest because Cordant is a large company employing 48,000 people and was directly involved in the purchase of a company for the sum of £21million based on fraudulent accounts.

2.3.5. At the time the respondents accepted that he had made the disclosures in good faith.

2.3.6. The respondent denies that any disclosure of information was in the public interest, asserting that:

2.3.6.1. The respondent companies are private companies and do not deal with public finds;

2.3.6.2. Due diligence was exercised in the purchase of Staffgroup.

Detriment

2.4. Whether the claimant was subjected to a detriment on the grounds that he had made a protected disclosure within the meaning of section 47B Employment Rights Act 1996, in particular:

2.4.1. Did Sid Barnes express his anger to the claimant when he made the disclosure?

2.4.2. Did Sid Barnes take steps to remove the claimant from the business?

2.4.3. Did the claimant receive abuse and was he subjected to a vitriolic attack from Sid Barnes, Paul Flynn and Mark Znowski (acting under the instruction and/or with the approval and support of Mr Barnes) at the meeting on 2 September 2015 and at the dinner afterwards?

2.4.4. Did Mark Znowski send a letter of apology for his behaviour to all attendees at the dinner on 2 September 2015 other than the claimant?

2.4.5. Did Sid Barnes in late September 2015 raise “dubious” issues seeking to falsely criticise the claimant about the performance of his business unit, including losses and rent expenses?

2.4.6. Did the respondent make a "trumped up" allegation of misconduct against the claimant and in December 2015 call him to a disciplinary hearing for no good reason?

2.4.7. Did the claimant agree to follow a modified grievance procedure?

2.4.8. Did the respondent fail to follow its own grievance procedure, fail to carry out a reasonable investigation of the claimant's complaints, fail to interview the claimant to allow him the chance to put his side of the story to provide further information in relation to his grievance and the response from those interviewed?

Automatically unfair dismissal – section 103A Employment Rights Act 1996

2.5. Whether the claimant was unfairly dismissed within the meaning of section 103A Employment Rights Act 1996. The claimant asserts that –

2.5.1. He was an excellent performer and until he made the protected disclosures (as set out above) no criticism was made of his performance.

2.5.2. In June 2015 due to his exceptional performance he was notified of an increase in salary from £70,000 per annum to £90,000, his car allowance was increased from £5,000 to £8,500 and he was placed on more senior terms and conditions of employment.

2.5.3. After making the protected disclosures Sid Barnes took steps to force the claimant out of the business by ensuring the appointment of a friend of his, Peter Ban-Murray, at an overinflated salary for the advertised position, thereby adversely affecting the business' profit and loss figures, its staff costs and providing a replacement for the claimant.

2.5.4. Mr Barnes made false allegations of poor performance by the claimant.

2.5.5. The claimant was one of the better performing Managing Directors of the Incubator Businesses.

2.5.6. He was not sacked for poor performance.

2.5.7. After his dismissal Mr Barnes provided an "off the record" reference for the claimant confirming that the claimant was an excellent manager.

Direct discrimination – section 13 Equality Act 2010

2.6. In the alternative the claimant asserts that the respondent directly discriminated against him within the meaning of section 13 Equality Act 2010 because of his race. The claimant describes himself as being Irish and from a traveller background. The question is whether the respondent treated the claimant less favourably than it treated or would have treated the comparators. The claimant asserts that:

2.6.1. He was the only MD of an incubator company who is Irish and from a traveller background.

2.6.2. Other incubator companies were making losses.

2.6.3. He was the only MD who was dismissed

2.6.4. He was performing well in his job.

2.6.5. Steps were taken to remove him from office: false allegations of poor performance were made against him and he was dismissed.

2.7. The question is, therefore, whether any Managing Director of another incubator company within the Group is an actual comparator or whether the circumstances of the claimant and the other Managing Directors were materially different. Was the claimant treated less favourably than an actual comparator? If there is no actual comparator then the question is whether a hypothetical comparator, an MD of an incubator company with the same level of performance as the claimant, would have been treated in the same way and dismissed.

2.8. If so, the next question is whether the claimant has proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic. The claimant asserts that the verbal abuse and harassment he received from Mr Sid Barnes was indicative of Mr Barnes' dismissive attitude to people from the Republic of Ireland and/or from a traveller background and are facts from which the Tribunal could draw the appropriate adverse inference that the reason for the less favourable treatment was the claimant's race.

2.9. If so, the next question is whether the respondent has proved a non discriminatory reason for any proven less favourable treatment.

<u>Harassment – section 26 Equality Act 2010</u>

2.10. Whether the claimant was harassed within the meaning of section 26 Equality Act 2010 and in particular:

2.10.1. Did the respondent engage in unwanted conduct as follows:

2.10.2. Did Mr Barnes make comments about the claimant's "strong and thick accent"?

2.10.3. Did Mr Barnes say that the claimant dressed like a gypsy or a "gypo"?

2.10.4. Did Mr Barnes at the meeting on 2 September 2015 say that the claimant looked like a tinker and ask him "where did you leave your horse and cart?".

2.10.5. Did Mr Barnes call the claimant "pikey" and/or "paddy"?

2.10.6. Did Mr Barnes at dinner on 2 September 2015 continue making similar offensive comments relating to the claimant's race?

2.10.7. Was the conduct related to the claimant's protected characteristic, namely race i.e. Irish and/or from a traveller background?

2.10.8. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.10.9. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

2.10.10. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

2.11. The claimant asserts that this harassment started from his first meeting with Mr Barnes and continued throughout his employment, particularly when they attended business meetings around the country and the attendees met in the bar for a drink after the meeting. The claimant refers, in addition to the above mentioned comments, to the following incidents when he alleges that further harassment took place:

2.11.1. In January 2015 when the claimant first met Sid Barnes in a coffee shop at Euston station.

2.11.2. At a meeting in Reading when the claimant first met the Managing Directors of Staffgroup Ltd, Mark Znowski and Paul Flynn.

2.11.3. At a kick off meeting in Stratford-upon-Avon on 1-2 July 2015 when Mr Barnes was offensive to the claimant in the presence of Joanne Till, Simon Bell, Sean Simmons, Mark Znowski and Paul Flynn.

2.11.4. At a meeting near Woburn Abbey when Sid Barnes was offensive to the claimant in the presence of Joanne Till, Simon Bell and Sean Simmons.

Time Point

2.12. The respondent denies the allegations of harassment and asserts in the alternative that there was no continuing act and the claim was presented out of time.

Victimisation – section 27 Equality Act 2010

2.13. The claimant asserts in the alternative to the claim of detrimental treatment under section 47B Employment Rights Act 1996 that –

2.13.1. He carried out a protected act when he made a complaint of discrimination by his written grievance which he sent to the respondent by email dated 24 December 2015.

2.13.2. The respondent subjected the claimant to the following detriment:

2.13.3. Failed to follow its own grievance procedure.

2.13.4. Failed to carry out a reasonable investigation of the claimant's complaints.

2.13.5. Failed to interview the claimant to allow him the chance to put his side of the story to provide further information in relation to his grievance and the response from those interviewed.

2.13.6. As a result failed to overturn the decision of Sid Barnes to dismiss and failed to reinstate the claimant.

3. No time limit issue was identified at the preliminary hearing other than in relation to the complaints of harassment. However, in making our decision, we concluded that the issue of time limits was relevant also to the complaints of detriment on the grounds of making protected disclosures. This is a matter of jurisdiction and must be considered by the tribunal, whether or not raised by either party. The issue in relation to the complaints of detriment on the ground of making protected disclosures is whether, if the complaint was not presented in time, it was reasonably practicable to present it in time and, if not, whether it was presented within a reasonable time thereafter. Since it did not become apparent to the tribunal that this issue was relevant until the stage of deliberations, the parties were not asked to comment on this issue. If either party considers that they would have made representations that may have made a difference to the tribunal's decision on this point, had they been invited to do so, and it would, therefore, be in the interests of justice for the tribunal to reconsider its decision on the time limit issue relating to the detriment claim, they may apply for a reconsideration of the tribunal's decision on the issue.

The amendment to the claim

4. The claimant had identified the protected disclosures on which he relied at a preliminary hearing. These did not include disclosures at a meeting with Sid Barnes on 30 July 2015. However, Mr Barnes, in his witness statement recalled meeting with the claimant on 30 July 2015 and the claimant speaking to him that day about some potential billing irregularities within Staff Group Ltd. This prompted the claimant's recollection of that meeting and he applied, while he was giving evidence, for disclosures made at that meeting to be added to the list of protected disclosures. The respondent opposed the application. The tribunal allowed the amendment. In paragraph 25 of the claimant's Amended Particulars of Claim, he referred to a discussion with Mr Barnes at the end of July. Mr Barnes had dealt with the meeting in his witness statement. The respondent's representative told the tribunal that it would not have made any difference to the respondent's preparation for the hearing had this alleged disclosure been included in the list of protected disclosures. The tribunal did not consider there was any prejudice to the respondent in allowing the

amendment but possible prejudice to the claimant if it was not allowed. The tribunal considered it in the interests of justice to allow the amendment.

The Facts

5. The claimant is Irish and of a traveller background.

6. The first and second respondents act as recruitment businesses supplying work seekers to clients for temporary and permanent assignments. They are subsidiaries of the third respondent, Cordant Group PLC. Steven Kirkpatrick was Chief Executive Officer ("CEO") of Cordant Group. Mr Fitzpatrick headhunted the claimant to build a new niche technology recruitment division. This was to be one of a number of "incubator" businesses to be invested in by Cordant Group.

7. The claimant began employment with the first respondent on 2 June 2014. He was Managing Director of the new niche brand called Cordant Dynamic People Recruitment. This was a trading division of the first respondent. The claimant was recruited to start the business. The niche market which the claimant and Mr Kirkpatrick agreed that new business should particularly address was the supply of people working with the Microsoft suite of software called Dynamics. However, the business also did general IT recruitment.

8. Throughout the claimant's time with the Cordant Group, the Cordant Dynamic brand traded as a division of the first respondent. It appears that the intention had been that, ultimately, the second respondent would take over the business. In furtherance of this aim, company number 02223177 changed its name to Cordant Dynamic People Limited in July 2014. The claimant also signed an employee shareholder agreement with the second respondent and received a letter dated 8 September 2014 saying that his employer was Cordant Dynamic People Limited with effect from that date. However, the claimant's wages continued to be paid by the first respondent. HMRC understood the claimant to be an employee of the first respondent throughout his employment. A further contract for the claimant was issued to the claimant in June 2015 with a statement of employment particulars identifying the claimant's employer as a trading division of the first respondent. The respondent had initially argued that the second respondent was the claimant's employer at relevant times, but, during the course of the hearing, the respondents conceded that the first respondent was the claimant's employer at relevant times.

9. The claimant initially reported directly to the CEO, Steven Kirkpatrick. However, in January 2015 Sid Barnes was appointed as Managing Director of the Professional Staffing Brands and the claimant thereafter began to report to him. The claimant's first meeting with Sid Barnes was at a coffee shop in Euston station.

10. The claimant alleges that Mr Barnes said during the course of the conversation, "you have a pretty thick Irish accent don't you". Mr Barnes denies that he made any such comment. We prefer the evidence of the claimant and find that such a comment was made. We make this finding on the balance of probabilities, in the light of our findings on other allegations where Mr Barnes is alleged to have made disparaging comments relating to the claimant's Irish origin and/or traveller background. We give our reasons in due course for making these other findings.

Having made these findings, we consider this alleged conduct to be consistent with the other findings we have made.

11. For reasons we give at relevant points, we have preferred the evidence of the claimant to that of Mr Barnes in relation to a number of disputes about the facts. In general, we found the claimant to be a credible witness. His evidence was not shaken by cross examination and he acknowledged appropriately where he could not recall something specifically due to the passage of time. On the other hand, the evidence of Mr Barnes did not appear to us to be credible in some respects for reasons we set out later.

12. Mr Barnes gave evidence that he started raising performance concerns with the claimant from January 2015. We reject his evidence that he raised concerns about Mr Bell's performance from such an early date. There was nothing other than the normal regular meetings to discuss the progress of a start up business that would be expected. There is a dearth of documentary evidence to support Mr Barnes' witness evidence in this respect, as in some other respects. If performance concerns were being addressed with Mr Bell from such an early stage, we would expect to see this reflected in some way in contemporaneous documents. There is nothing to that effect prior to an email of 13 March 2015. There is on that date an email chain about reducing estimates with Mr Barnes commenting that these are "100% must hit numbers". Mr Barnes comments that, with the size of the claimant's team, the numbers are really low and he could expect a difficult conversation with Mr Kirkpatrick and that he had too many people not contributing. A further email trail on 23 April 2015 deals with dropping forecast numbers. These emails are not sufficient to persuade us that Mr Barnes had any real concerns about the claimant's performance at this stage.

13. Mr Barnes gave evidence that he was also concerned about the claimant's performance as a leader because of feedback he received from a senior management coaching training programme that the claimant and others attended on 28 and 29 April 2015. Mr Barnes asserts that he was told in a phone call from Teresa Cann of the Cordant Learning and Development Team that the claimant was struggling with the concept of coaching and was unable to understand it, and that he received a call from Joanne Till, the MD of one of the other incubator businesses, who said that the claimant was struggling to understand the concept of coaching and that she became very frustrated with him. We do not consider that the documentation produced supports the extent of concern which Mr Barnes now says there was about the claimant's leadership ability. The note of the conversation with Ms Cann indicates only that there was a conversation about who did well on the course and who needed further support and development. The delegate feedback form for Mr Bell does not suggest any serious concerns, and certainly not that he did not understand the concept of coaching. There was mention of Joanne Till finding frustrating a coaching session where she was the coach and the claimant was the coachee, and there is reference to encouragement for the claimant to consider some different approaches. However, the notes record that, when the claimant acted as coach in a coaching session, he got positive feedback.

14. In June 2015, the claimant was told that his salary was being increased from £70,000 to £90,000 per annum and his car allowance was increased to £8,500 per annum. He was also moved onto a more senior level contract of employment which

included an entitlement to six months' notice compared to one month during the six month probationary period, increasing to three months thereafter. The claimant says his increase followed a positive performance review with Mr Barnes. Mr Barnes says that it was because he was trying to reduce differences in pay between the Managing Directors of the various incubator businesses. Mr Barnes gave evidence, incorrectly stating that the claimant had been on £60,000 when he had been on £70,000 per annum. The highest paid Managing Director of an incubator business was Simon Bell on £150,000 per annum. Mr Barnes said in his witness statement that the claimant had mentioned the disparities in pay to him shortly after he started to report to him, and Mr Barnes had told him that he would not do anything straightaway but would consider increasing his pay in July as the new financial year so that this cost could be factored into the new financial year budget. In oral evidence, Mr Barnes said that he had said in March that he would change the salary in July rather than, as he said in his witness statement, that he would consider increasing it. There is no documentation of any performance review. We find, on the balance of probabilities, that Mr Barnes did not have any serious concerns about the claimant's performance by the time he authorised the pay increase for the claimant in June 2015 and the move to more favourable contractual terms. We do not consider it credible that such a substantial increase in pay and in the notice period would have been given had Mr Barnes had serious concerns about the claimant's performance at this time.

15. At a meeting at Woburn Abbey around April 2015 for the Directors of Professional Staffing, the claimant alleges that Mr Barnes made a comment, in relation to the new company car policy, that the claimant would be able to upgrade to a new horse and cart. Mr Barnes denies making such a comment. Following this meeting on 27 April 2015, the claimant sent an email to people who had been present at the time, attaching a picture of someone driving a horse and cart and writing, "Sid and Steven have put me on the new Irish only top end company transport scheme, or at least that's what Sid said it was". Mr Barnes has asserted that the email came out of the blue with the claimant making fun of himself. We reject Mr Barnes' evidence. Mr Barnes' evidence does not fit with the comment, "at least that's what Sid said it was" in the claimant's email. Also, in the later investigation of the claimant's grievance, Jo Till, when asked if she had ever witnessed any derogatory or racist remarks towards the claimant or had made any herself replied, "She said she had absolutely never made any herself. However in the realms of banter there were comments made about Eddie looking scruffy and Shid [sic] would say that Eddie had turned up to meetings on his 'horse and cart'. At the time he joked along with it and it was all in jest, or at least that's how it seemed". We find that it is more likely than not that Jo Till was reporting accurately on her recollection of matters when questioned for the internal investigation. Mr Barnes speculated that she had "an axe to grind" but could give no reason as to why this should have been the case at the time of the investigation meeting, which was in the week commencing 4 April 2016. Ms Till volunteered that a comment was made by Mr Barnes about the claimant turning up to meetings on his "horse and cart". She had not been asked specifically whether a comment about a horse and cart had been made. It appears to us more likely than not that Ms Till was, therefore, recollecting accurately a comment which had been made by Mr Barnes. We also take into account that Ms Till was very balanced in the evidence she gave about this and other matters to the internal investigation. If she had made this up to get Mr Barnes in trouble for some unexplained reason, we do not consider she would have

put this as she did, suggesting that it was “all in jest” or that “at least that was how it seemed at the time”. Ms Till produced a witness statement for these proceedings but did not attend the hearing. We were told she was on holiday. The witness statement confirms what she said in the internal investigation in relation to the alleged “horse and cart” comment. Whilst we must exercise caution in accepting evidence given in a witness statement which has not been tested by cross examination, we have no reason to reject the part of Ms Till’s evidence dealing with the alleged “horse and cart” remark, given that this is consistent with the evidence she gave to the internal investigation.

16. The claimant thanked the respondent for reminding him about the email when they included it in the bundle. We accept the claimant's evidence about his reasons for sending the email i.e. that Mr Barnes had engaged up to this stage in a pattern of racism against him and the claimant sent the email to put this into the open. He felt that it was time to challenge Mr Barnes. He expected Mr Barnes to take the hint and stop his offensive behaviour. We accept that the claimant was offended by the comment made by Mr Barnes, although it appears from the evidence of Ms Till to the internal investigation that the claimant did not make his offence apparent to others at the time. We consider it entirely consistent with the way the claimant appeared during the course of these Tribunal proceedings that he would not have made his upset evident at the time. The claimant was unfailingly polite, courteous and measured in his conduct in these Tribunal proceedings, even in the face of cross examination which verged towards the aggressive at times, with Ms Vittorio sometimes raising her voice and interrupting the claimant when he was trying to answer her questions. The claimant also gave way gracefully in withdrawing objections to the respondent putting in supplementary witness statements.

17. When it was put to the claimant that the best way to have challenged alleged behaviour by Mr Barnes would have to been to say that he was offended and to ask Mr Barnes to stop, the claimant replied “and I’d have lost my job because that’s the real world”.

18. For these reasons, we prefer the evidence of the claimant, supported by the evidence of Ms Till in the internal investigation document and her witness statement, to that of Mr Barnes in finding that Mr Barnes did make a comment in front of other Managing Directors and the claimant about the claimant using a horse and cart.

19. The claimant also alleges that, at various times, Mr Barnes referred to him as a “pikey” or a “paddy”. We prefer the evidence of the claimant to that of Mr Barnes in finding that such comments were made. We also prefer the claimant's evidence in finding that Mr Barnes said at various times that the claimant was “scruffy”, “dressed like a gypsy” or a “gypo” or looked like a tinker. Ms Till’s evidence to the internal investigation was that Mr Barnes commented on the claimant looking scruffy.

20. In June 2015, Cordant Group acquired Staffgroup Limited, an established successful recruitment company. Staffgroup provides recruitment solutions to the IT, Finance and Energy sectors. We were told that it had only 8% of its trade in the UK, the remainder being global. However, within the UK, there was clearly an overlap between the target markets of the established Staffgroup and the incubator business, Cordant Dynamics. The existence of competing businesses within the Cordant Group led to various difficulties to which we will return.

21. On 7 July 2015, Mr Barnes sent an email to Managing Directors of the incubator businesses, copied to Paul Flynn and Mark Znowski of Staffgroup. Mr Barnes knew Mr Flynn and Mr Znowski before the purchase of Staffgroup. He knew Mr Flynn particularly well as he had worked on the same team as Mr Flynn in the past, attended Mr Flynn's wedding and had a night out together when they were both on holiday in Ibiza. Paul Flynn and Mark Znowski were the founders of Staffgroup Limited.

22. In the email of 7 July 2015 Mr Barnes wrote about the GP targets per FTE. In relation to the claimant he wrote:

> "Eddie, you are pretty much at budget headcount and your combined GP targets are well in excess of your budget so you are in a very good position."

Mr Barnes gave evidence that this statement did not mean that the claimant was performing well, but it meant that the business was in a good position to start building and improving as was forecasted for the financial year 2015/2016. We reject Mr Barnes' evidence that this email is consistent with him having any substantial concerns about the claimant's performance at this time. On the face of the email, it appears that Mr Barnes thought the claimant was doing well, indeed better than some other Managing Directors at that time.

23. Staffgroup Limited used a database for recruiters called Bullhorn. A database is an important and useful tool for those in the recruitment business. Cordant Dynamic had not, prior to the acquisition of Staffgroup, been provided with a database but, instead, worked from spreadsheets. The acquisition of Staffgroup gave Cordant Dynamic the opportunity to use the Bullhorn database which was welcomed by the claimant and others in that business. The original intention was that all Staffgroup Limited and Cordant Dynamic data would be put on the system and available to both businesses.

24. The database became available to Cordant Dynamic some time in July, and Cordant Dynamic's staff loaded on their data. We accept the evidence of Chris Merchant, supported by contemporaneous documents, that employees of Staffgroup then began to contact Cordant Dynamic's candidates for placement. We accept the evidence of Mr Merchant that Staffgroup were mailshotting Cordant Dynamics' candidates as soon as they were on the system. On 21 July 2015, Mr Merchant sent the claimant an email, forwarding an approach by a member of Staffgroup to one of their candidates. Mr Merchant had received a call from a candidate who was upset that he had been mailshotted by Staffgroup on the basis of information Cordant Dynamic had loaded onto Bullhorn.

25. Cordant Dynamic had an agreement with LexisNexis for supply of candidates, which included the provision that they would not seek to poach LexisNexis staff. Staffgroup tried to headhunt a person at LexisNexis in breach of Cordant Dynamic's agreement.

26. There was also a problem with an employee of the Cordant Dynamic division, Billy, contacting a Staffline client, contrary to the agreement that Staffgroup and Cordant Dynamic should not contact each other's clients.

27. On 23 July 2015, Mr Barnes sent an email to all those at Cordant Dynamic, copied to those at Staffgroup, saying that no-one from any Cordant business was to call any manager that had been added onto Bullhorn by anyone from Staffgroup without express permission from the team leader, at least, at Staffgroup. He wrote:

> "There will be no ambulance chasing and no calling managers added to the system by other businesses."

Mr Barnes wrote:

> "Staffgroup are a multi-disciplined business that covers all areas of IT (including Dynamics), engineering and some finance. Staffgroup and Dynamics may well both be historically in touch with the same managers in certain instances. If this can be proven, then we need to agree a way where all parties proceed, without selling against each other or jeopardising the other's relationship."

28. In July or August, the Contracts Manager, Dan Haydon, left the business. He resigned after the claimant and Mr Morrison found that Mr Haydon was invoicing for contractors in advance at the start of the month, assuming that they would work for the whole month, contrary to correct practice where the invoices should have been for work done. This resulted in incorrect invoicing and having to re-credit back to Cordant the amounts overpaid.

29. Restrictions were put in place after a period of a few weeks so that each professional staffing brand could only see their own data on Bullhorn.

30. During the time the claimant had access to Staffgroup's data on Bullhorn about candidates recorded to have been placed by Staffgroup, or in respect of whom offers were made, the claimant, from his own knowledge of some candidates in the field, doubted the accuracy of some of the Staffgroup data. He consulted other members of his team, including Mr Merchant and Mr Morrison, who confirmed his concerns.

31. We accept the claimant's evidence that he contacted Mr Barnes by telephone in late July about these concerns. We accept his evidence that he mentioned a few examples and they agreed to discuss this further at a meeting which was already planned for Mr Barnes to come to the Manchester office on 30 July. We accept that the claimant was concerned that some of the placements shown in the Staffgroup data had not, in fact, been made by Staffgroup and this could have led to false invoicing.

32. Mr Barnes came to the Manchester office on 30 July 2015 and the claimant raised his concerns with Mr Barnes. Mr Barnes, in his witness statement, wrote that the claimant spoke to him that day about some potential billing irregularities within Staffgroup Limited, and that the claimant informed him that he believed this to be the case as he had been looking at the Staffgroup data on the newly introduced Bullhorn IT system. However, Mr Barnes asserted that the claimant provided no specific information or evidence to support his concern. Mr Barnes said this was the only time that the claimant raised this issue with him.

33. We accept the claimant's evidence that he had generated the printouts which appeared at pages 225-233 of the tribunal bundle in preparation for the meeting and his markings indicated areas of potential concern. The claimant could not recall whether he gave Mr Barnes a copy of this printout at the meeting, although he gave evidence that he gave Mr Barnes a copy or a further copy of the document at a later meeting on 2 September. Given the passage of time, Mr Bell could not recall the details of all the matters he raised with Mr Barnes. However, we accept his evidence that the markings indicated those candidates about whom he had concerns. A particular example that he recalled was in relation to Birgir Gunnlaugsson. We find that, whether or not the claimant handed the document over on 30 July, he went through it with Mr Barnes and raised issues. Given the detail with which Mr Bell addresses matters in correspondence, in evidence and with his accounting degree background, we consider it highly unlikely that the claimant did not provide Mr Barnes with sufficient detail for Mr Barnes to make further enquiries. We find, on a balance of probabilities, that the claimant did provide Mr Barnes with specific information to support his concerns that placements were incorrectly recorded, which may have led to false invoicing.

34. We find that Mr Barnes did not react angrily at this meeting but quietly noted the claimant's concerns and said he would look into it.

35. Mr Barnes gave evidence that, regardless of the lack of information he says was provided by the claimant, he did approach Stephen Herniman, Finance Director for Staffgroup Limited, and asked Mr Herniman to check the system to see if there had been a higher than normal level of credits or uncollected invoices, that Mr Herniman did this and confirmed to Mr Barnes that he was unable to find any concerning data.

36. In the internal investigation into the claimant's grievance, Mr Herniman said that he could not recall ever investigating concerns about irregularity of candidate records and payments, or anyone ever raising to him any concerns or suggestions of untoward activity. We find, on a balance of probabilities, that, if Mr Barnes had raised with Mr Herniman the concerns raised with him by the claimant, then this would have been something which was more likely than not to have been remembered by Mr Herniman and led to investigations which Mr Herniman would have recalled. We find, on a balance of probabilities, therefore, that Mr Barnes did not raise with Mr Herniman the specific concerns raised by the claimant.

37. Following the departure of Mr Haydon, the claimant and Mr Morrison interviewed Peter Ban-Murray for the role of Contracts Manager. The claimant says this was at the instigation of Mr Barnes who knew Mr Ban-Murray. Mr Barnes says this was the idea of the claimant, who had found Mr Ban-Murray’s details on Linked In. Dan Haydon had been on a £50,000 basic salary. Mr Ban-Murray had worked for “Nigel Franks”, a leading recruiter in the field. Mr Barnes had worked with Mr Ban-Murray in the past. The claimant gave evidence, which was not challenged, that he and Mr Morrison also interviewed Jason King, who had also worked for Nigel Franks and had been Mr Ban-Murray’s boss. Mr King had been out of the Nigel Franks business for sufficient time that restrictive covenants no longer applied to him. Mr Ban-Murray was seeking a salary of around £80,000 and was bound by restrictive covenants which would prevent him talking to any clients or candidates until January

2016. We accept the evidence of the claimant that Jason King would have joined the respondent for a lower salary than Peter Ban-Murray was seeking.

38. It is common ground that the Cordant Dynamics business had a high staff turnover but a strategy was put in place to address this with the assistance of Katie from HR in Staffgroup. The new strategy included psychometric testing all candidates and taking up references. It is common ground that no psychometric tests were done on Peter Ban-Murray and no references were taken up before he was appointed. The reason no psychometric tests were done or references taken up was because Mr Barnes knew Mr Ban-Murray and he did not think these were necessary for people that he knew. Mr Barnes also agrees that it was he who suggested the salary to be offered to Mr Ban-Murray, which was a basic salary of £78,000 and a car allowance of £7,000. Mr Barnes gave evidence that the salary offered was in line with the market rate for a Contracts Director of between £70,000 and £100,000. However, we have no evidence other than Mr Barnes' assertion that this was the case at the relevant time.

39. We note that in an email on 23 September 2015 from Mr Bell to Mr Barnes about various matters to do with budget he wrote that:

> "Without Peter we would be under budget. Issue moving forward is carrying a large salary for Peter."

This suggests to us that the claimant was not happy about Mr Ban-Murray being appointed on such a salary.

40. The claimant and Mr Morrison conducted the first interview with Mr Ban-Murray. Mr Barnes then took Mr Ban-Murray out for lunch before the position was offered to Mr Ban-Murray. We prefer the evidence of the claimant and Mr Morrison that the job was offered to Mr Ban-Murray at the insistence of Mr Barnes rather than being the choice of the claimant. This appears to us to be more consistent with the facts which are agreed or unchallenged than Mr Barnes' account of events. It would seem a completely bizarre decision for the claimant to appoint Mr Ban-Murray rather than Mr King and to appoint someone on such a high salary, increasing the costs to the business, particularly when that person was under restrictive covenants which would severely hamper his activities in the business for some months.

41. In oral evidence, Mr Barnes talked about a new strategy of Mr Ban-Murray training up "rookies" which would mean that it did not matter that he was not able himself to contact candidates or clients until the end of his restrictive covenants. However, there is no documentary evidence to support such a new strategy, unlike the slides of a CEO presentation in July 2015, and we heard evidence that no such rookies were ever recruited by Mr Ban-Murray. We reject Mr Barnes' evidence that the recruitment of Mr Ban-Murray was part of such a revised strategy.

42. We find, on a balance of probabilities, that the appointment of Mr Ban-Murray was made because this was the choice of Mr Barnes, rather than this being something desired by the claimant.

43. We accept the evidence of the claimant that he made a telephone call to Mr Barnes in late August or early September asking what was happening in relation to

the matter which he had raised about what he suspected were incorrectly recorded placements by Staffgroup. The claimant did not give Mr Barnes any more information in this telephone call but asked what was happening and was told that Mr Barnes was looking into this.

44. There was a directors' meeting in London on 2 September 2015. We prefer the evidence of the claimant to that of Mr Barnes in finding that, prior to the directors' meeting, the claimant had a meeting with Mr Barnes where he again raised his concerns about the placements on the Bullhorn list. We find that the claimant gave Mr Barnes a copy of the printout and tried to have a conversation with him about the specifics. We accept the claimant's evidence that Mr Barnes got angry and irate and told the claimant that he had investigated the matter and the claimant should not tell him how to do his job and all was well. He told the claimant that the claimant should pay more attention to his own figures and business.

45. The directors' meeting was attended by Mr Barnes, his PA, Helen Mayhew, and all the Managing Directors of the professional staffing business units. Each Managing Director gave a presentation about their business unit's performance and then the others had an opportunity to question them. The claimant alleges that, when it came to his turn, Mark Znowski and Paul Flynn from Staffgroup tried to tear him apart. In particular, Mark Znowski stated, incorrectly, that there was no market for contractors in Dynamics. The claimant says that Mr Barnes did not intervene and allowed the attack to happen. Mr Barnes says that all the directors were questioned and suggests that the claimant was subjected to close questioning by Mr Znowski in particular because Mr Znowski knew more about the claimant's area of business than about the other businesses.

46. During the investigation into the claimant's later grievance, Joanne Till said that the claimant took the brunt of heavy questioning, but said that they were all asked difficult questions. She said:

> "Sid didn't really get involved at all. He did not support them but he also didn't really diffuse the situation. Was it bullying (Mark and Paul)? No, but it probably was a step over the line."

47. Sean Simmons said that the claimant was challenged heavily by Mark Znowski about contract business as Mark Znowski felt there was not a market in contracts. He said that Mark Znowski was a very forceful individual who communicated his case and the claimant was thrown off track and could not answer Mark Znowski's points or back up with facts.

48. Helen Mayhew wrote that the meeting was a difficult meeting. It was the first time they had all got together since they had acquired Staffgroup and "there were some strong personalities in the room". She wrote that she remembered thinking that Mark Znowski grilled the claimant pretty hard on his business, although she wrote that she thought he did that because the claimant did not answer his questions very well and he felt he was not getting answers and perhaps got a bit impatient.

49. Another Managing Director, Simon Bell, said there was nothing unusual about the meeting and that he did not witness any bullying.

50. We find, on a balance of probabilities, that the claimant was subjected to more aggressive questioning by Mr Flynn and Mr Znowski than others were subjected to at the meeting. Mr Barnes did nothing to intervene and control the manner of questioning.

51. The claimant when asked why he thought Mr Flynn and Mr Znowski had gone for him replied that: "Staffgroup wanted a piece of the pie. If they closed down Cordant, Staffgroup would be the natural place to put the business". He thought they had an underlying commercial interest.

52. We prefer the evidence of the claimant to that of Mr Barnes in finding that, at the start of the meeting, Mr Barnes made a comment about being glad to see that the claimant had made it there on his horse and cart. We also prefer the claimant's evidence in finding that, during drinks after the meeting, Mr Barnes said, in front of others, that the claimant was the only person who could wear good clothes and still look like a gypsy. Helen Mayhew told the investigator that there were comments sometimes made about "Eddie looking scruffy" although she said there were "silly comments made about everyone, for example someone never wearing a tie".

53. On the evening of 2 September, all those who had attended the meeting went out to dinner. We accept the claimant's evidence that Mark Znowski made comments that none of the Managing Directors had a future with the company and they were "all shit". Joanne Till told the investigator of the claimant's grievance that she had left during the dinner because she did not agree with some of the comments being made and that Mark Znowski was being aggressive towards the claimant and others as well, and that Helen Mayhew was reduced to tears.

54. Mr Barnes gave evidence that he had not heard what Mark Znowski was saying at the dinner. However, Helen Mayhew had informed him that Mr Znowski was being bullish and rude. Joanne Till told the investigators that she had spoken to Mr Barnes and Mark Znowski about Mr Znowski's conduct later. Mr Barnes gave evidence that he had called Mr Znowski, asked him what he had said and told him that it was not the way to behave, and told him to contact each Managing Director to apologise. Mr Barnes said he did not know whether Mr Bell had taken the brunt of the comments because he did not hear it. Ms Till told the investigators that, after speaking to Mr Znowski it was resolved. We have evidence in the bundle of Mr Znowski emailing an apology to Sean Simmons, writing that he would have called in person if he had had Mr Simmons' number. We accept the claimant's evidence that Mark Znowski did not apologise to him. On a balance of probabilities, we find that Mark Znowski was likely to have complied, in large part, with Mr Barnes' instructions and apologised to most, if not all, of the Managing Directors but did not apologise to the claimant.

55. On 8 September 2015, Mr Bell sent an email to all users at Cordant Dynamic to inform them that Staffgroup and Cordant Dynamic would act as completely independent businesses going forward. Cordant Dynamic would be on a separate version of Bullhorn so both businesses would be completely independent. He wrote:

> "This means that Staffgroup can work on Dynamic roles wherever they choose, and Cordant Dynamic can do the same. There will be very little, if any, collaboration between these two businesses. Neither company will ever

> disclose to candidates or clients that we are part of the same group etc. We proceed as we did before the acquisition."

56. We find that the claimant wrote as he did on the authority of Mr Barnes, who was the line manager of the claimant, Mr Flynn and Mr Znowski.

57. On 7 August 2015, Mr Barnes wrote to all the Managing Directors regarding the August budget. He noted that the majority of businesses were reporting achieving budget GP. Grays were forecasting being £30,000 down on budget. Dynamics were forecasting being £30,000 above GP budget for August. On the basis of forecast budgets at that time, therefore, Cordant Dynamics were expecting to be doing well compared to the other businesses. July profit and loss was due the following week.

58. Mr Barnes gave evidence that he decided to dismiss the claimant in the week leading up to 28 September when he informed the claimant of his decision. His evidence is that he phoned Mr Steers, Head of HR for the Cordant Group, on 21 September and informed him that he was going to be terminating the claimant's employment. Mr Barnes' evidence as to the trigger for his decision at that time was trading performance; staff attrition; forecasts being missed and being wrong; feedback from Mr Morrison and Helen Mayhew that the claimant had "lost" the team; and feedback from the Head of Training and Jo Till about the claimant's performance on the coaching course.

59. At the time he took the decision to dismiss the claimant, Mr Barnes had the figures for July, provisional, but not final, figures for August and a "flash view" for the forecast for September.

60. We heard evidence from the claimant and Mr Morrison as to problems with the accuracy of the accounts. After taking instructions, Ms Vittorio made a concession on behalf of the respondents that there was an error in the accounts as shown to the Tribunal in that the Cordant Dynamic business had not been credited with around £92,000 worth of internal sales. Cordant Dynamic's business should have been credited with margin generated on these sales for July and August. Mr Morrison agreed that this was around £30,000 split between the two months.

61. The claimant had raised queries on the figures in the accounts for July and August which had not yet been resolved. When this was put to Mr Barnes in evidence, he said that it was the Managing Director's role to resolve issues with finance before the profit and loss came out and he could tell from the forecast and flash view that it was trending the wrong way. It does not appear to us that the respondents' figures support Mr Barnes' assertion that the figures were trending the wrong way. In the trading summary on page 186, whilst the business is not achieving budget in July, August and September 2015, both the actual loss and the variance from the budget is reducing in each month. The trend, therefore, appears to be of improvement rather than getting worse. The figure for October 2015 (after the claimant had been dismissed), if it can be relied on, shows a much greater actual loss and variance from budget, but, even if this poor performance could be attributed to the claimant, this was not information which was before Mr Barnes at the time he took the decision to dismiss the claimant. There was no data provided to us on the basis of which we could see whether Cordant Dynamic's business was doing better

or worse than other incubator businesses at the time Mr Barnes took the decision to dismiss the claimant.

62. Mr Morrison disputed that he had raised concerns about the claimant with Mr Barnes. However, he told us that he may, at times, have made some negative comments to Helen Mayhew who sat near him in the office. Ms Mayhew was Mr Barnes' personal assistant, whom he described as "his eyes and ears". Mr Morrison described this as just occasions where he would "vent" and that it was just two work colleagues chatting. He said he would never have run down the claimant, who was a friend and a colleague, but, if exasperated, he might have made some negative comments. Mr Morrison said the claimant was not perfect but he had confidence in the claimant's leadership and they worked well together as a team.

63. We prefer Mr Morrison's evidence that he did not make negative comments about the claimant directly to Mr Barnes, and find that his comments to Ms Mayhew were of the nature he described and not intended as a serious criticism of the claimant. Ms Mayhew may have passed on such comments as were made to Mr Barnes, but these were not of such a nature as to lead Mr Barnes to conclude, on reasonable grounds, that the claimant had "lost the team". We consider that, if Mr Morrison had held a seriously poor opinion of the claimant, he would not have come forward voluntarily to give evidence for the claimant in these proceedings. Mr Morrison left the respondent's employment voluntarily and had no obvious reason to make up evidence to the detriment of the respondents. The number of supportive statements about the claimant provided in these proceedings by former members of the claimant's team at Cordant Dynamics suggests to us that it is unlikely that Mr Morrison would have made criticisms from which Mr Barnes could have concluded that the claimant had "lost the team".

64. Mr Morrison did not satisfy us on a balance of probabilities that Mr Barnes had called him prior to 28 September to inform him that he was letting the claimant go. This evidence was not contained in Mr Morrison's witness statement and Mr Barnes denied it. We find that there was a conversation in which Mr Barnes told Mr Morrison that Mr Morrison and Mr Ban-Murray were to run the business, but we are not satisfied that the conversation took place prior to 28 September.

65. Mr Ban-Murray took up his new position on 27 September 2015. One day later, at a meeting in Northampton on 28 September, Mr Barnes gave the claimant notice of termination and put him on garden leave. The claimant alleged that Mr Barnes made a comment about him being dressed "ok for once", but it is not necessary for us to make a finding as to whether that was said. There is a divergence of evidence as to how long the meeting was, varying between seven and 20 minutes. On any account, it was a short meeting.

66. It is common ground that the claimant was told he was being dismissed for reasons later recorded by Mr Steers. The claimant asked to discuss the reasons and was not allowed to do so. Mr Barnes reminded the claimant of the restrictive covenants. The claimant agrees that he thanked them for giving him the opportunity. The respondents suggest that the claimant would not have done this if he had not agreed that there was justification for his dismissal. However, we do not consider that any such inference can be drawn from the claimant's conduct. The way the claimant conducted himself at the end of that meeting was consistent with the way

the claimant conducted himself during the Tribunal hearing; as previously recorded, he was unfailingly polite during these proceedings, even under trying circumstances.

67. Mr Steers confirmed the termination of the claimant's employment on six months' notice by a letter dated 2 October 2015. This letter did not record the reasons for dismissal. However, in an email dated 1 April 2016 he records the reasons given as being that the business for which the claimant was responsible was underperforming; that the business was continually failing to deliver against the forecasts the claimant was giving; and that staff attrition was extremely high.

68. On 30 September 2015, with the agreement of Mr Barnes and Mr Steers, the claimant attended a party for one of his staff. We accept the evidence of Mr Merchant and Mr Morrison that, at this party, Helen Mayhew referred to Mr Ban-Murray as her "new MD". We accept the evidence of Mr Merchant that, until his exit interview with Ken Steers in around January 2016, Mr Merchant understood Mr Ban-Murray to be the Managing Director. When Mr Merchant resigned, he had an exit interview with Mr Steers and was informed by Mr Steers that Mr Ban-Murray was never his Managing Director and that he should have been reporting directly to Sid Barnes. He asked Mr Steers, if Mr Ban-Murray was not the actual MD, why he could sack Billy Gavin who reported to Mr Merchant without his knowledge and without any observation of employment law. Mr Merchant received no reply to this question.

69. Although Mr Merchant was challenged on whether Mr Gavin had resigned rather than being dismissed, he was not challenged on having questioned Mr Steers in the exit interview about the statement that Mr Ban-Murray was not the MD. Mr Merchant questioned the authenticity of the resignation letter from Billy Gavin. If the letter is authentic, it would be entirely consistent with Mr Gavin leaving in circumstances where he felt he had no option but to do so. This would be consistent with Mr Merchant's evidence. He understood Mr Gavin to have been dismissed or put in a position where he felt he had to resign. The resignation letter makes it clear that Mr Gavin is leaving without another job to go to and it states:

> "As discussed over the phone, I feel it would be best if I left the company and would like to thank you for your support in the short time we worked together."

70. The email is addressed to Mr Ban-Murray, although apparently copied to Mr Merchant, who denies receiving it. Given the addressee of the letter, it is clear that the conversation preceding Mr Gavin's resignation was with Mr Ban-Murray.

71. The claimant was placed on garden leave during his notice period which he was told would expire on 28 March 2016. The claimant did nothing to challenge his dismissal or raise any issues about anything which had happened during his employment until after the claimant received a letter dated 10 December 2015 inviting him to attend a disciplinary hearing. When questioned about this, the claimant said this was because he had not taken legal advice. He was still shell-shocked and felt there was an underlying threat not to challenge them or he would not get his six months' pay and he had his daughter to think about. We accept the claimant's evidence on this point. We consider it more likely than not that the claimant would have been wary of doing anything which prejudiced the security of receiving his salary during the notice period. It would also be consistent with the claimant's approach during employment to any offensive comments from Mr Barnes

and the way in which the claimant conducted himself during the hearing, if he were to let things go until his reputation was more at risk from disciplinary proceedings. This is consistent with what the claimant wrote in his grievance, which was that, when placed on garden leave, he just wanted to see this out and move onto his next role but, when the disciplinary issue was raised: "with this attack on me which is SB's fabrication I cannot stand by or just roll over. I will fight for my good name and that of Cordant Dynamic…well the good name and reputation it had before SB and PBM started running and ruining it."

72. Mr Steers wrote to the claimant on 10 December, writing that, since the company had given him notice of termination, "serious concerns have been raised regarding certain placements that were billed to customers that should not of [sic] been." Mr Steers then set out three specific allegations, writing that these matters raised "serious concerns as to why you appear to have instructed for these invoices to be raised without justification and outside accepted operational standards and protocol". He invited the claimant to attend a formal disciplinary hearing to be conducted by Sid Barnes on 16 December. He advised the claimant of his right to be accompanied. Mr Steers had not spoken to the claimant about these allegations prior to inviting him to a disciplinary hearing and there had been no investigation meeting with the claimant; no investigation report had been made to HR as required by the respondent's policy before a decision was taken to proceed to a disciplinary hearing; the invitation to the disciplinary hearing did not include a summary report and documents as required by the respondent's policy. Mr Steers said in evidence that, with hindsight, he probably should have invited the claimant to an investigatory interview. When asked if he could give any explanation as to why he did not do this, he said he could not.

73. Mr Steers told us that, in requiring the claimant to attend a disciplinary hearing, he acted on information from Mr Ban-Murray given in a telephone conversation of which Mr Steers took no notes. He told us that what Mr Ban-Murray told him was what he put in the allegations in the letter. Mr Steers had not, at the time of writing the letter or, it appears, at any time thereafter, seen any evidence to support the allegations. Mr Steers said he was told by Mr Ban-Murray that there would be witness statements to support the allegations but these were never produced. The hearing was re-arranged to take place in Manchester on 6 January 2016 but then the disciplinary proceedings were put on hold whilst the claimant's grievance submitted on 24 December 2015 was dealt with. Mr Steers did not produce an outcome to the grievance investigation until after the claimant's employment had terminated so no further action was taken in relation to the disciplinary allegations.

74. In an email dated 22 December, Mr Steers wrote to the claimant that the evidence for the disciplinary allegations would be in the form of witness statements provided by Helen Mayhew and Rosie O'Brien but that, as a result of the festive holidays, they would be unable to obtain signed witness statements until the New Year.

75. On 24 December 2015, the claimant emailed to Mr Steers a six page grievance letter. This included complaints about the disciplinary proceedings. It also included the following in relation to things seen on Staffgroup's bullhorn system:

> "Initially I saw some unusual and possibly questionable invoicing that Staffgroup had done in the 12 month period prior to Cordant purchasing the business for many millions of pounds. With my knowledge of the Dynamic's market and my team's expertise we were concerned that some of these invoices did not correlate with where we knew people had been moved to.
>
> I brought my concerns to SB who told me he would check into this. He informed me that a full due diligence had been done on Euro staff by Cordant and expressed annoyance towards me. He came back to me later and said all was ok and he had personally checked these invoices. I now believe he did not in actuality undertake any checking into the concerns raised. In the aftermath of that conversation my problems increased. I believe that SB saw me as a potential whistle-blower, sought to get me out of Cordant."

76. The claimant also wrote that, when placed on garden leave, he decided not to raise his concerns as he did not think that anything would be done. He wrote:

> "When I was placed on garden leave I wished just to see out my garden leave and move onto my next role and be a good corporate citizen. But with this attack on me which is SB's fabrication I cannot stand by or just roll over. I will fight for my good name and that of Cordant Dynamic…well the good name and reputation it had before SB and PBM started running and ruining it."

77. The letter included the following complaint:

> "Throughout this time but growing more frequently towards the end I was constantly receiving remarks to my face from Sid, very disparaging and racist comments became very much a part of his way of speaking to me. Comments as to my appearance and way of being a 'pikey', 'tinker', 'dressing like a gypo' or 'paddy' became regular, I even made joke about it on my last day when you were there in Northampton."

78. In January 2016, Ken Steers advised the claimant because the matter was so serious he would deal with it himself. It appears that Ken Steers took a decision at that point to suspend the disciplinary hearing pending investigation of the grievance, although he did not inform the claimant at the time that he was doing that.

79. On 10 March 2016, the claimant emailed Mr Steers, writing that he had now not heard from Mr Steers for a number of months and hoped to hear back from him as soon as possible. The claimant included a further letter setting out his complaints. Mr Steers replied on 23 March, apologising for the delay in responding. He referred to having had a number of other urgent matters which had delayed him in dealing with the grievance. He invited the claimant to attend a meeting in London on 29 March 2016. He wrote:

> "Alternatively, given you will cease to be employed by the company as at this date we can agree to deal with your grievance under a modified procedure where we can deal with the matter via correspondence."

80. The claimant replied the same day. His response included the difficulties he would face in attending a meeting in London. He wrote:

> "I have provided you with my witness statement in line with Cordant disciplinary policy. There is no reason for me to attend an interview in relation to my allegations."

He questioned why, if the disciplinary investigation was dropped, he had not been informed. He wrote that, although he was now free to pursue other opportunities, the unfinished investigation and the unresolved allegations against him meant that he had to pursue his case fully. He wrote that he was willing to meet in Manchester or to have a conference call to try to answer any questions that were pertinent to the investigation into his allegations. He wrote:

> "I want to resolve this situation as quickly as possible in order that I can move on with my professional life without any detriment or damage to my character."

81. The claimant's employment came to an end on 28 March 2016, at the end of his notice period.

82. Mr Steers replied to the claimant's email on 1 April 2016. His letter included the statement that:

> "If you can provide more detailed information regarding which placements you allege to have been dubious I will gladly investigate further."

Mr Steers wrote that the disciplinary investigation was postponed in order to investigate his grievances which he accepted had taken much longer than it should have. He wrote that, due to his workload and other priorities, he had regrettably been unable to investigate the matter personally in a timely manner, for which he apologised. He wrote that the company would not, as the claimant had requested, confirm in writing to him that the allegations raised in the disciplinary proceedings were without substance and that the claimant's behaviour was appropriate at all times as the matter under investigation was not concluded. However, he wrote that they would not make any statement to a third party regarding a disciplinary investigation. If they received a request for a reference they would provide only a factual reference in line with company policy.

83. Mr Steers referred to an allegation from the claimant that Mr Barnes' decision to issue him with notice of termination and place him on garden leave was due to him having raised his concerns with Mr Barnes regarding the Staffgroup matter. He wrote:

> "Sid vehemently denies this and confirms his decision to terminate your employment as Managing Director of Cordant Dynamic was solely for the reasons explained to you at our meeting of 28 September 2015, namely that the business for which you were responsible was underperforming, that the business was continually failing to deliver against the forecasts you were giving and that staff attrition was extremely high."

He wrote:

> "My understanding from your letter of 10 March is that your main points of complaint are that as a result of your whistle-blowing in relation to Staffgroup's

> invoicing you were subjected to bullying and harassment by Sid Barnes and others (namely Mark Znowski and Paul Flynn) and that this was the real reason for Sid making a decision to terminate your employment and replace you with Peter Ban-Murray."

Mr Steers wrote that he was committed to concluding his investigation into the claimant's grievances and, as he was to be on annual leave until 12 April, he had instructed Clare Laing, Senior HR Business Partner, to continue the investigation on his behalf with a view to providing him with a full response as soon as possible following is return from leave.

84. Clare Laing then interviewed various people, including Joanne Till and Mr Barnes. She did not, however, seek to interview the claimant. She produced a report of her conversations. Following this, Mr Steers conducted some further investigation by having a conversation with Mr Barnes. Mr Steers tells us he took no notes of this conversation.

85. On 19 April 2017, Mr Steers wrote to the claimant with the outcome of the grievance. Mr Steers did not uphold any of the claimant's grievances. Mr Steers did not provide the claimant with a copy of Ms Laing's investigation notes. The letter gave a misleading account of the evidence in some respects. In particular, the paragraph dealing with Mr Herniman is, at best, ambiguous and gives the impression that Mr Herniman confirmed that there was no problem. Mr Steers did not record that Mr Herniman had not recalled the conversation with Mr Barnes. Mr Steers does not make it clear that his finding is based entirely on what Mr Barnes told him. The part of the letter dealing with the allegations of harassment and bullying fails to inform the claimant of Ms Till's evidence about the horse and cart comment.

86. Mr Steers' evidence to the Tribunal in relation to the recollection of Ms Till and Mr Steers' conclusions changed during the course of questioning. At first Mr Steers was saying that he concluded that there was no harassment or racially motivated comments because Ms Till had said this was all banter, done in jest and the comment did not, therefore, amount to harassment. When asked whether he had concluded that Mr Barnes had made the remark or not, Mr Steers' evidence then changed to say that he had concluded that Mr Barnes had not made the comment, notwithstanding the evidence to the investigation of Ms Till, and he had reached this conclusion because Ms Till was the only person who heard the comment and others did not hear it. He could not provide any explanation for why Ms Till would have said this if she had not heard the comment. Mr Steers' letter also does not address Ms Till's evidence that the claimant got the brunt of the questioning by Mr Flynn and Mr Znowski.

87. Mr Steers accepted in the letter that the claimant's intentions in flagging the issue of irregularities in data on Staffgroup's bullhorn systems were entirely honourable.

88. The respondent in its amended response to the claim wrote, at paragraph 36 of the grounds of resistance that the parties had agreed that the grievance would be dealt with by way of the modified grievance procedure. In his witness statement, Mr Steers said that statement was not correct; there was no express agreement from the claimant to conclude the grievance using a modified procedure. Mr Steers said

that he adopted that process as the claimant was no longer an employee. Mr Steers, in oral evidence, said he had taken the claimant's statement that he had no reason to attend an interview as agreement to carry out the investigation without an interview with the claimant. Mr Steers took the claimant's comments as meaning that the claimant had given him everything he had so he was in a position to conclude dealing with the grievance. Mr Steers was acutely aware of the delays there had already been and having another meeting would have delayed matters further.

89. The respondent's grievance procedure states that, when a grievance is raised in writing, a meeting will be arranged to discuss the employee's concerns, wherever possible within 10 working days of receiving the written complaint. The outcome of the grievance is to be notified in writing to the employee, normally within 10 working days of the meeting. There is a right of appeal against a grievance outcome. The respondent's policy states, under the heading "The Modified Formal Grievance Procedure", that the respondent may be prepared to deal with the complaint without the need for a meeting in circumstances where the employee is unable or unwilling to attend a meeting. In this situation, the respondent may write to the employee, asking them to provide more detail regarding their complaint in order for them to investigate matters.

90. The claimant gave notification to ACAS of a potential claim on 5 May 2016. The respondent refused to engage with ACAS and a certificate was issued on 13 May 2016. The claimant presented his claim to the Tribunal on 20 June 2016.

91. Cordant Dynamic ceased trading in June 2016. The Grosvenor Boston brand closed in June 2015. The Ardent Fort brand was closed in March 2016. The Savant Recruitment brand was sold to its Managing Director in March 2016. The Cordant Procurement Brand was sold to a private buyer for a nominal fee in August 2016. The Grays Executive brand was sold to its Managing Director in February 2017.

92. Mr Barnes' evidence, which was unchallenged on this point, was that he had dismissed other managing directors of "incubator" companies; he had dismissed Jason McCready in March 2015 and then David Barone, who replaced Jason McCready, in June 2015. He dismissed Alex Sutherland in March 2016. Other MDs left the group when Cordant decided not to continue investing in their incubator brands.

93. By the time of this hearing, Staffgroup Limited and Cordant Technical and Engineering were the only professional staffing brands remaining within the Cordant Group. We were told that both of these were trading profitably.

94. At the time of the Tribunal hearing, Mr Barnes was on garden leave, having resigned from the Cordant Group. He told us that he had headed up a bid for a management buyout of Staffgroup. He would have been Chief Executive Officer of Staffgroup had the MBO gone ahead. When Cordant decided to keep the business, Mr Barnes decided he wanted to move on.

95. We accept the claimant's evidence as to why he did not submit his complaints of race discrimination and harassment until 20 June 2016. The claimant was still employed by the respondent. He eventually raised this with Mr Steers on 24 December. At the end of the respondent's internal process, when this had come to

nothing, the claimant felt that he had no choice but to bring his claim. He said the delay was because the respondent had buried it.

96. In January 2015, Mr Barnes gave the claimant an oral reference to a potential employer. The claimant asserts that this was an excellent reference. Mr Barnes denies it was an excellent reference, but on his own account, it was a positive reference. Mr Barnes understood that the job was a management role with direct responsibility for one or two people. Mr Barnes said he told the enquirer that the claimant could manage a small team in a billing capacity and was very knowledgeable in the field of Microsoft dynamics.

Submissions

97. Ms Vittorio, for the respondent, spoke to written submissions. The respondent submitted that the claimant did not make protected disclosures in that he did not provide Mr Barnes with information, he could not have had a reasonable belief that the criminal offence of fraud had been committed and the concerns raised by him were not in the public interest. The respondent conceded that the concerns raised by the claimant on 30 July 2015 (the only date on which Mr Barnes accepted any concerns about the Staffgroup Bullhorn data were raised with him) were raised in good faith. The respondent submitted that the claimant did not raise his concerns in good faith in his grievance on 24 December 2015 because this was retaliation to the disciplinary process started by the respondent.

98. The respondent submitted that, on the facts, the claimant was not subjected to detriments as alleged and his dismissal was not because of making protected disclosures.

99. The respondent submitted that the respondent did not treat the claimant less favourably because of his race by dismissing him.

100. The respondent submitted that Mr Barnes did not make the comments alleged to be harassment and argued that the tribunal did not have jurisdiction to consider these complaints.

101. The respondent submitted that the respondent did not victimise the claimant because of raising his grievance, contending that the respondent carried out a reasonable investigation into the claimant's grievance.

102. Ms Vittorio noted that no evidence had been given by the claimant regarding the relevance of the inclusion of the third respondent as a respondent to the proceedings.

103. The claimant made oral submissions. He made submissions in relation to the facts. Points made included that the time line was telling; prior to the disclosures, he had had a large pay rise and was put on a more senior contract, which clearly indicated a level of satisfaction with him. He submitted that no company would extend a notice period by 3 months if they were deeply concerned about performance issues. There was a lack of evidence about performance management. He argued that Mr Barnes arranged to bring in Mr Ban-Murray as part of an overarching plan; Mr Barnes went outside recently established procedures to hire Mr Ban-Murray.

104. The claimant submitted that he had made protected disclosures by disclosing information about Staffgroup to Mr Barnes. He referred to the case of *Chesterton Global Ltd v Nurmohamed* in submitting that his disclosures were in the public interest.

105. In relation to his dismissal, the claimant submitted that there was no evidence that the pay rise was for anything other than performance. Mr Barnes had no evidence to support his alleged change of strategy.

Law

106. Section 103A ERA provides: "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."

107. Where, as here, the claimant has insufficient service to claim "ordinary" unfair dismissal, the burden lies on him to prove that the reason or principal reason for his dismissal was that he made a protected disclosure.

108. Section 47B(1) ERA provides: "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

109. What constitutes a protected disclosure is defined by sections 43A to 43H ERA. Section 43A provides: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

110. The relevant parts of section 43B for this case are as follows:

> "(1) In this Part 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 one or more of the following –
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,"

111. It is agreed in this case that the disclosure was made to the claimant's employer, so section 43C is relevant.

112. In *Babula v Waltham Forest College [2007] ICR 1026,* the Court of Appeal held that an employee who informed the police and other enforcement agencies that he believed that an act of racial hatred had been committed could rely on the protection of the whistleblowing provisions to argue that his dismissal was automatically unfair, even though his belief was mistaken. The Court held that a belief may be reasonably held and yet be wrong.

113. The EAT considered the public interest test in *Chesterton Global Ltd v Nurmohamed [2015] ICR 920.* The EAT held that a disclosure of information affecting the earnings of over 100 senior managers, including the claimant, was made in the public interest; this was a sufficient group of the public for the matter to engage the public interest. The EAT observed that the objective of the 2013 amendment, by which the public interest test was inserted, was to reverse the effect of the EAT's decision in *Parkins v Sodexho Ltd [2002] IRLR 109,* and that the words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his or her own contract of employment where the breach was of a personal nature and there were no wider public interest implications. The EAT in *Chesterton* did not consider its conclusion to be undermined by the fact that the employer was a private rather than a public company.

114. Section 47B ERA 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 person making the protected disclosure: *NHS Manchester v Fecitt [2011] EWCA Civ 1190.*

115. Section 48(2) ERA provides that in relation to a complaint including a complaint that the worker had been subjected to a detriment in contravention of section 47B:

> "On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

116. In *Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14,* the EAT held that a failure by the respondent to show positively why no action had been taken on a grievance did not mean that a section 47B complaint succeeded by default. The EAT did not allow an appeal against a decision of the employment tribunal that a "managerial failure" to deal with a grievance was not on the ground that the claimant had made a protected disclosure, where the tribunal found no evidence of a causal link between the protected disclosure and the failure to deal with the claimant's complaint.

117. A complaint of detriment for making a protected disclosure must be presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months: s.48(3) ERA.

118. Section 13(1) of the Equality Act 2010 (EqA) provides: "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". Section 4 lists protected characteristics which include race.

119. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by dismissing that employee or subjecting them to a detriment. The EHRC Employment Code advises, based on relevant case law, that

"generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

120. Section 212(1) states that "detriment" does not, subject to section 212(5), include conduct which amounts to harassment.

121. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

122. Section 27 defines victimisation as follows:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

123. Section 136 EqA provides:

> "(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."

124. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

Conclusions

The respondents

125. The respondents conceded that the first respondent was the claimant's employer. We consider the respondents to have been correct in making this concession which was in accordance with the evidence. The first respondent was, therefore, the correct respondent to the claims. The claims against the second and third respondents are, therefore, dismissed.

Protected disclosures

126. The claimant relied on four incidents when he said he made protected disclosures. The first four disclosures were all to Mr Barnes. All related to the claimant's concerns arising from viewing the Staffgroup data on the Bullhorn database. The claimant, from his own knowledge and that of other Cordant Dynamics employees, about candidates on the list, believed that some of the data about placements was not correct, with Staffgroup claiming placements which the claimant did not believe had been made. The claimant believed this could have led to incorrect invoicing.

127. In the telephone call in late July 2015, shortly before the meeting on 30 July, the claimant provided some details about his concerns. The claimant provided more detail in the meeting on 30 July and again at the meeting on 2 September 2015. We conclude that the claimant, on these three occasions, provided information that in the claimant's reasonable belief tended to show that a criminal offence may have been committed i.e. fraud, and that there may have been a breach of a legal obligation, being an employee's duty not make fraudulent records. The respondent accepted in the internal proceedings that the claimant's intentions were honourable in raising these matters with his employer. There is no suggestion that there was any possible personal benefit to the claimant in raising these matters. In accordance with *Chesterton*, where a disclosure relates to even a relatively small group, this may be sufficient to satisfy the public interest test. In this case, we consider that there is clearly a public interest in disclosures relating to potential fraud. It appears to us irrelevant that the first and second respondents are private companies and that the public might not find the matter disclosed of particular interest: just because the public are not interested in a matter does not mean that a disclosure of the information is not in the public interest. The tribunal fails to see the relevance of the due diligence exercise conducted when purchasing Staffgroup to the issue of whether disclosure of information was in the public interest and note that this was not pursued as an argument in the respondent's closing submissions. We conclude that there were protected disclosures in the telephone call in late July and the meetings on 30 July and 2 September 2015.

128. The telephone call in late August/early September, was, on the evidence of the claimant no more than the claimant asking what was happening in relation to the matter which he had raised about what he suspected to be incorrectly recorded placements by Staffgroup. The claimant did not give Mr Barnes any more information in this telephone call but asked what was happening and was told that Mr Barnes

was looking into this. We conclude that there was no disclosure of information on this occasion and this telephone conversation did not constitute a protected disclosure.

129. In the claimant's written grievance to the respondent sent on 24 December 2015, the claimant included information about the same matters to do with the Staffgroup data on Bullhorn that he had raised with Mr Barnes, although without the detail provided to Mr Barnes. We conclude, for the same reasons as in relation to the disclosures made to Mr Barnes, that the claimant made a further protected disclosure in his written grievance.

Detriments on the grounds of making protected disclosures

Did Sid Barnes express his anger to the claimant when he made the disclosure

130. We found as a fact that Mr Barnes expressed anger at the meeting on 2 September 2015 when the claimant made a further protected disclosure. Mr Barnes got angry and irate and told the claimant that he had investigated the matter and the claimant should not tell him how to do his job and all was well. He told the claimant that the claimant should pay more attention to his own figures and business. We conclude that the claimant suffered a detriment on 2 September by reason of Mr Barnes' unpleasant conduct. However, we found that Mr Barnes did not express anger at the meeting in July when, we found, Mr Barnes remained quiet, taking notes. Mr Barnes denied that he expressed anger at the meeting on 2 September (and denied the claimant made a disclosure on that date). The respondent has not shown the reason for Mr Barnes' conduct on 2 September. There was clearly a close connection between the disclosure and the things said by Mr Barnes when expressing his anger. We conclude that, on 2 September 2015, the claimant suffered a detriment on the ground of having made disclosures to Mr Barnes in July 2015 and on 2 September 2015. This complaint is well founded, subject to the issue of time limits.

Did Sid Barnes take steps to remove the claimant from the business

131. We understand, from the claimant's evidence, that this allegation relates to two matters: an allegation that Mr Barnes did not assist the claimant to get internal invoices credited to Cordant Dynamics; and the appointment of Mr Ban-Murray which the claimant says was with the intention of replacing the claimant.

132. In relation to the first matter, the claimant has not satisfied us that he has suffered a detriment by the lack of Mr Barnes' assistance in this matter. The claimant has not satisfied us that he was put at a disadvantage in comparison with managing directors of other incubator businesses. There is no evidence that Mr Barnes provided more assistance to others. There is evidence, however, that Mr Barnes acted in a way helpful to the claimant by reducing targets.

133. In relation to the appointment of Mr Ban-Murray, we found that Mr Barnes was responsible for the decision to appoint Mr Ban-Murray, contrary to the wishes of the claimant. Mr Ban-Murray took up his appointment the day before the claimant was given notice of termination and put on garden leave. We rejected Mr Barnes' evidence as to the triggers for dismissing the claimant on 28 September. Mr Barnes' evidence as to the trigger for his decision at that time was trading performance; staff

attrition; forecasts being missed and being wrong; feedback from Mr Morrison and Helen Mayhew that the claimant had "lost" the team; and feedback from the Head of Training and Jo Till about the claimant's performance on the coaching course. We found that the figures were not, as Mr Barnes asserted, trending the wrong way. Although Cordant Dynamics was not making its targets, the disparity was reducing. Staff attrition had been an issue but was being addressed by an agreed strategy. We preferred Mr Morrison's evidence to that of Mr Barnes in finding that Mr Morrison did not make criticisms from which Mr Barnes could conclude that the claimant had "lost" the team. We did not consider that the evidence showed poor performance by the claimant on the coaching course. We rejected Mr Barnes' evidence as to the new business strategy that he said was to accompany Mr Ban-Murray's appointment, with Mr Ban-Murray training up "rookies", which then did not occur in practice and was not reflected in any contemporaneous documents. These matters lead us to draw inferences that, by appointing Mr Ban-Murray, Mr Barnes was lining him up to be the claimant's successor. We conclude that the appointment of Mr Ban-Murray was a step in the process of removing the claimant from the business.

134. We conclude that the claimant suffered a detriment by reason of Mr Ban-Murray's appointment. Even before Mr Ban-Murray took up his position, his appointment had an adverse impact on the claimant's budgets for the business, greatly increasing costs and making it less likely that the business could achieve budget. In an email on 23 September 2015 from the claimant to Mr Barnes about various matters to do with budget, the claimant wrote that: "Without Peter we would be under budget. Issue moving forward is carrying a large salary for Peter." The appointment of Mr Ban-Murray then allowed Mr Barnes to dismiss the claimant, having a successor in place. We conclude that the appointment of Mr Ban-Murray was a detriment to the claimant.

135. We have rejected Mr Barnes' explanation about the appointment of Mr Ban-Murray, in particular his suggestion that it was the claimant who wanted to appoint Mr Ban-Murray. Although the first contact with Mr Ban-Murray appears to have been shortly before the first of the protected disclosures, Mr Barnes took over the appointment process, after the disclosures, ignoring the agreed process for appointment which should have involved psychometric testing and the taking up of references. Mr Barnes has not shown that the appointment of Mr Ban-Murray was for a reason other than as a step in the process of removing the claimant from the business. We found that Mr Barnes did not have major concerns about the claimant's performance prior to the protected disclosures towards the end of July. In June, Mr Barnes gave the claimant a substantial pay rise and improvement in terms, including a lengthening of the notice period required to be given on termination. An email on 7 July 2015 from Mr Barnes wrote of the claimant being in a "very good position". We conclude that the appointment of Mr Ban-Murray was a step to remove the claimant from the business, was to the claimant's detriment and was on the ground of the claimant having made protected disclosures. The complaint of detriment is well founded in relation to the appointment of Mr Ban-Murray, subject to the time limit issue.

Did the claimant receive abuse and was he subjected to a vitriolic attack from Sid Barnes, Paul Flynn and Mark Znowski (acting under the instruction and/or with the approval and support of Mr Barnes) at the meeting on 2 September 2015 and at the dinner afterwards.

136. We found that the claimant was subjected to more aggressive questioning by Mr Flynn and Mr Znowski than others were subjected to at the meeting on 2 September and that Mr Barnes did nothing to intervene and control the manner of questioning, although Mr Barnes did not join in the attack. We have no evidence which would enable us to find that Mr Barnes instructed Mr Flynn and Mr Znowski to behave as they did. At the dinner, the evidence suggests that Mr Znowski was very unpleasant to all the MDs and did not single the claimant out. We conclude that the claimant suffered a detriment by being subjected to the unpleasant treatment by Mr Flynn and Mr Znowski at the meeting. We did not hear evidence from Mr Flynn and Mr Znowski so heard no evidence from them as to why they behaved as they did. We had speculation from the claimant and Mr Barnes as to their motives. Mr Barnes suggested they subjected the claimant to more intense challenge because they were familiar with the claimant's area of work and did not have the same familiarity with the work of the other incubator businesses. The claimant suggested it was because they were after the business of Cordant Dynamics. In accordance with *Ibekwe,* a claimant does not automatically succeed in a complaint under section 47B ERA just because the respondent fails to provide evidence of a reason for their actions or failure to act other than the making of a protected disclosure. We note that the claimant's own evidence did not make a link between the protected disclosures and the conduct of Mr Flynn and Mr Znowski. We have no evidence that Mr Flynn and Mr Znowski knew about the protected disclosures. There is insufficient evidence from which we could draw inferences that their conduct was on the grounds of the protected disclosures. Staffgroup and Cordant Dynamics were competing businesses and the claimant's suggested motive for the conduct of Mr Flynn and Mr Znowski at the meeting is plausible in the light of the rivalry. The evidence does not suggest to us a causal link between the protected disclosures and the actions of Mr Flynn and Mr Znowski.

137. We found that there was no evidence that Mr Barnes instructed Mr Flynn and Mr Znowski to behave as they did. Although Mr Barnes failed to intervene, the claimant has not satisfied us that his failure was due to approval and support of their conduct.

138. We conclude that this complaint is not well founded.

Did Mark Znowski send a letter of apology for his behaviour to all attendees at the dinner on 2 September 2015 other than the claimant.

139. It appeared from the evidence that the apologies were not all in writing; Mr Znowski wrote to one of the other MDs when he was unable to reach him by telephone and spoke to others. We consider this allegation, therefore, as an allegation that Mr Znowski apologised to all attendees other than the claimant, whether the apology was oral or written. Mr Barnes instructed Mr Znowski to apologise to all the MDs. On a balance of probabilities, we found that Mark Znowski was likely to have complied, in large part, with Mr Barnes' instructions and

apologised to most, if not all, of the Managing Directors but did not apologise to the claimant. The claimant did not give evidence about when he found out that Mr Znowski had apologised to others. We conclude that the claimant has not satisfied us that he suffered a detriment by reason of Mr Znowski apologising to other MDs but not to the claimant. We conclude, for this reason, that the complaint is not well founded. If we had concluded that the claimant had suffered a detriment, we would have concluded, for the same reasons as in relation to the previous complaint about Mr Flynn and Mr Znowski's behaviour, that the complaint was not well founded because the evidence did not suggest a causal connection between the protected disclosures and the failure of Mr Znowski to apologise to the claimant.

Did Sid Barnes in late September 2015 raise "dubious" issues, seeking to falsely criticise the claimant about performance of his business unit including losses and rent expenses.

140. It does not appear to the tribunal that this complaint relates to anything prior to the meeting on 28 September 2015 when Mr Barnes dismissed the claimant. If it was intended to refer to anything earlier than this, we conclude that the claimant has not proved the facts to support the allegation. In relation to matters prior to 28 September 2015, we, therefore, conclude that the complaint is not well founded.

141. In so far as the allegation relates to things raised at the 28 September meeting, we conclude that this relates to the claimant's dismissal so is properly addressed in the context of the section 103A ERA unfair dismissal complaint.

Did the respondent make a "trumped up" allegation of misconduct against the claimant and in December 2015 call him to a disciplinary hearing for no good reason.

142. On the information available to us, we are unable to conclude that the allegation was "trumped up" in the sense of the respondent deliberately making up the allegation in the knowledge that there was no cause for concern at all in relation to the matters raised, although we note that the claimant provided information which would, if accepted, mean that no personal blame lay with him. However, the claimant satisfied the tribunal that the respondent, in the person of Mr Steers, called the claimant to a disciplinary hearing for no good reason. Mr Steers' evidence was that the allegations in the letter requiring the claimant to attend the disciplinary hearing were matters raised by Mr Ban-Murray in a telephone call to Mr Steers, of which Mr Steers took no notes. At its highest, it appears that these were matters which would have been a cause for investigation. However, contrary to the respondent's own disciplinary policy, no investigation report had been made to HR before a decision was taken to proceed to a disciplinary hearing and the invitation to the disciplinary hearing did not include a summary report and documents. The making of disciplinary allegations against the claimant attached stigma to the claimant and potential reputational damage. The claimant's concern about the possible implications of such charges being made against him is demonstrated by the fact that this caused him to start fighting back, whereas he had otherwise been willing to serve out his garden leave and move onto another position without making complaints.

143. Mr Steers did not give us a satisfactory explanation for moving straight to a disciplinary hearing without an investigation. Mr Steers said in evidence that, with hindsight, he probably should have invited the claimant to an investigatory interview.

When asked if he could give any explanation as to why he did not do this, he said he could not. Although we can find no evidence to indicate why Mr Steers decided to call the claimant to a disciplinary hearing for no good reason, in accordance with *Ibekwe,* it does not follow that the claim succeeds by default; we are not bound to find that the reason was the making of protected disclosures. We have no evidence that Mr Steers knew about the protected disclosures made to Mr Barnes before he wrote the letter to the claimant requiring him to attend a disciplinary hearing. The claimant subsequently made a protected disclosure to Mr Steers in his grievance letter but this was after Mr Steers' decision to call him to a disciplinary hearing. In these circumstances, there is no evidence that Mr Steers' actions were because of the claimant making protected disclosures. We conclude that this complaint is not well founded.

Did the claimant agree to follow a modified grievance procedure.

144. Mr Steers accepted in evidence that the claimant had not expressly agreed to follow a modified grievance procedure. However, he understood from comments made by the claimant in correspondence, that the claimant was happy for Mr Steers to proceed without holding a meeting. Mr Steers was also keen not to delay an outcome further by holding a meeting with the claimant.

145. We conclude that the claimant was subjected to a detriment by no meeting being held at which the claimant could have put his case and, in particular, responded to points raised in interviews conducted by Ms Laing, on which the claimant was not invited to comment before Mr Steers reached his conclusions. However, we conclude that the respondent did not unilaterally go ahead with the modified procedure because the claimant had made protected disclosures. Mr Steers has satisfied us that his reasons for not holding a meeting with the claimant were because he understood from the claimant's letters that the claimant was willing for him to proceed without a meeting and Mr Steers did not want the further delay in producing an outcome that a meeting with the claimant would have led to. We conclude that this complaint is not well founded.

Did the respondent fail to follow its own grievance procedure, fail to carry out a reasonable investigation of the claimant's complaints, fail to interview the claimant, to allow him the chance to put his side of the story, to provide further information in relation to his grievance and the response from those interviewed.

146. The claimant was not unable or unwilling to attend a grievance meeting. The respondent's policy, therefore, required that a meeting be held. The respondent was in breach of its own procedure by not doing so. Ms Laing, who Mr Steers asked to conduct an investigation, interviewed others but did not interview the claimant. The claimant was not given an opportunity to see and comment on the information gathered by Ms Laing before Mr Steers reached his decision. We conclude that the claimant suffered a detriment by reason of these matters; he was unable to put his case as well as he would have done had he been interviewed and given an opportunity to comment on information obtained in the investigation. Mr Steers understood from the claimant's letters that the claimant was willing for him to proceed without a meeting and Mr Steers did not want the further delay in producing an outcome that a meeting with the claimant would have led to. We conclude that the

respondent's failures were not due to the claimant making protected disclosures. We conclude that this complaint is not well founded.

Time limits in relation to detriment claims

147. As noted in the section of our reasons dealing with the issues, no time limit issue was identified at the preliminary hearing other than in relation to the complaints of harassment. However, in making our decision, we concluded that the issue of time limits was relevant also to the complaints of detriment on the grounds of making protected disclosures. This is a matter of jurisdiction and must be considered by the tribunal, whether or not raised by either party. The issue in relation to the complaints of detriment on the ground of making protected disclosures is whether, if the complaint was not presented in time, it was reasonably practicable to present it in time and, if not, whether it was presented within a reasonable time thereafter.

148. Although the claimant was not questioned specifically on his reasons for not presenting complaints of s.47B ERA detriment at an earlier stage, we would understand his reasons to be the same as for not presenting complaints of harassment earlier: the claimant was still employed by the respondent. He eventually raised complaints with Mr Steers on 24 December. At the end of the respondent's internal process, when this had come to nothing, the claimant felt that he had no choice but to bring his claim. He said the delay was because the respondent had buried it.

149. The claimant would succeed on the merits on the complaints of detriment in relation to Mr Barnes expressing anger to the claimant when he made the disclosure on 2 September 2015 and Mr Barnes taking steps to remove the claimant from the business by appointing Mr Ban-Murray if the tribunal has jurisdiction to consider these complaints. We did not hear evidence about the exact date Mr Ban-Murray was offered the job. However, Mr Ban-Murray took up his appointment on 27 September 2015 so it cannot have been later than this, and was probably some time earlier. Taking the very latest date of 27 September 2015 to be the last act complained of (although it was probably earlier), time would have expired for presentation of the claim at the latest on 26 December 2015, since the claimant did not notify ACAS within the primary time limit so the period spent in early conciliation does not extend the time limit. The claim was presented on 20 June 2016, around six months out of time. The test is whether it was reasonably practicable for the claimant to present the claim in time. We conclude that it was. Even if the claimant was not aware at the time of the events about the law relating to protected disclosure detriments, he could reasonably have been expected to take advice or research his rights in sufficient time to present a claim in time. The fact that the claimant pursued internal proceedings and the respondent delayed in dealing with these does not make it not reasonably practicable to have presented a claim whilst the internal proceedings were still underway. We, therefore, conclude that the tribunal does not have jurisdiction to consider the complaints of detriment which would otherwise have been well founded.

<u>Automatically unfair dismissal – s.103A ERA 1996</u>

150. The claimant was dismissed. He had less than two years' service, so the burden lies on him to prove that the reason or principal reason for his dismissal was

that he made a protected disclosure. Mr Barnes was the decision maker. We must examine why Mr Barnes decided to dismiss the claimant. Why did Mr Barnes act as he did? What, consciously or unconsciously, was his reason? As with discrimination claims, it will be rare that there is explicit evidence to show that dismissal is for the prohibited reason, in this case because the claimant made protected disclosures. We must consider whether, considering all relevant evidence, there is sufficient material from which we can draw inferences that Mr Barnes' reason or principal reason for the claimant's dismissal was because the claimant had made protected disclosures.

151. The evidence suggests that, prior to the protected disclosures at the end of July 2015, Mr Barnes had no substantial concerns about the claimant's performance. We rejected Mr Barnes' evidence that he had concerns from as early as January 2015. There is a dearth of the type of documentary evidence we would have expected to exist if there had been such concerns. Mr Barnes gave the claimant a very substantial pay rise and improved his terms and conditions, in particular extending the period of notice to which he was entitled, in June 2015. We rejected Mr Barnes' explanation that this was a promised increase in pay, aimed at reducing disparities between MDs and nothing to do with performance. It was not credible that Mr Barnes would have improved the claimant's pay and conditions to such an extent had Mr Barnes had serious concerns about his performance at the time. We found that an email from Mr Barnes to the claimant dated 7 July 2015 indicated that, at that time, Mr Barnes thought the claimant was doing well, indeed better than some other Managing Directors.

152. We concluded, when considering the complaints of detriment, that the appointment of Mr Ban-Murray was a step taken to remove the claimant from the business. Although the first contact with Mr Ban-Murray appears to have been shortly before the first of the protected disclosures, Mr Barnes took over the appointment process after the disclosures, ignoring the agreed process for appointment which should have involved psychometric testing and the taking up of references. We consider it significant that the claimant was dismissed a day after Mr Ban-Murray took up his appointment; we consider this timing unlikely to have been coincidental. This is particularly the case since we have not been satisfied, for reasons given below, that the reasons given by Mr Barnes for dismissing the claimant at the time he did were the real trigger for the claimant's dismissal at that particular time.

153. We accept there were some issues about business performance. The Cordant Dynamics business was not hitting targets. As we have noted, there were problems as to the accuracy of the accounts. Given the concession made by the respondents in relation to one error, it appears that, even by the time of the hearing, the accounts produced by the respondent could not be regarded as wholly reliable. However, even the uncorrected respondent's figures did not support Mr Barnes' assertion that the figures were trending the wrong way. At the time the claimant was dismissed, the trend appeared to be of improvement rather than getting worse. There was no data provided to us on the basis of which we could see whether Cordant Dynamic's business was doing better or worse than other incubator businesses at the time Mr Barnes took the decision to dismiss the claimant. It appears to us that Mr Barnes' concerns were exaggerated.

154. Mr Barnes' evidence as to the trigger for his decision at that time was trading performance; staff attrition; forecasts being missed and being wrong; feedback from Mr Morrison and Helen Mayhew that the claimant had "lost" the team; and feedback from the Head of Training and Jo Till about the claimant's performance on the coaching course. We considered the evidence in relation to these expressed reasons in detail in our findings of fact.

155. Staff attrition had been an issue but a strategy was in place to address this (although parts of this strategy, involving psychometric testing and taking up of references were then ignored by Mr Barnes in relation to the appointment of Mr Ban-Murray). There were issues about forecasts being missed and being wrong, but this was an incubator business still trying to establish itself and, as noted above, even the respondent's figures did not support Mr Barnes' assertion that the figures were trending the wrong way at the time he decided to dismiss the claimant.

156. We preferred Mr Morrison's evidence to that of Mr Barnes in finding that Mr Morrison did not make negative comments about the claimant directly to Mr Barnes, and found that his comments to Ms Mayhew were not intended as serious criticism of the claimant. We found it unlikely that Mr Morrison would have made criticisms from which Mr Barnes could have concluded that the claimant had "lost the team".

157. We did not consider the documentation produced relating to the coaching course supported the extent of concern Mr Barnes now says there was about the claimant's leadership ability. In any event, the training course had been at the end of April 2015. We consider it unlikely that this would have played a material part in triggering the claimant's dismissal at the end of September 2015.

158. We consider Mr Barnes' treatment of the disclosures of information made by the claimant relevant to the drawing of inferences about the reason for the claimant's dismissal. We found that, contrary to Mr Barnes' evidence, he did not speak to Mr Herniman about the issues raised. He did not raise the matter with anyone else. Mr Barnes reacted angrily when the claimant raised the matter again on 2 September 2015. He told the claimant (incorrectly) that he had investigated the matter and the claimant should not tell him how to do his job and all was well. He told the claimant that the claimant should pay more attention to his own figures and business.

159. We consider Mr Barnes' friendship with the MDs of Staffgroup Ltd to be significant; he was particularly friendly with Mr Flynn as he had worked on the same team as Mr Flynn in the past, attended Mr Flynn's wedding and had a night out together when they were both on holiday in Ibiza. Paul Flynn and Mark Znowski were the founders of Staffgroup Limited. Cordant Dynamics and Staffgroup Ltd were rival businesses. Mr Barnes demonstrated partisanship towards Staffgroup by sitting back and not intervening when the claimant was subjected to hostile questioning by Mr Flynn and, in particular, Mr Znowski, on 2 September 2015, and failing to correct an incorrect assertion by Mr Znowski that there was no market for contractors in dynamics. We note that Mr Barnes' affiliation to Staffgroup Ltd was such that he later led an unsuccessful attempt at a management buy out of that business, and that he would have been CEO of the business if the MBO had taken place. The affiliation with Staffgroup would be consistent with Mr Barnes reacting badly to the claimant raising protected disclosures relating to the conduct of Staffgroup.

160. Considering all relevant evidence, we conclude that we are able to draw inferences from the above matters which allow us to conclude that the reason or principal reason for the claimant's dismissal by Mr Barnes, whether conscious or unconscious, was that the claimant had made protected disclosures to Mr Barnes in a telephone call towards the end of July, at a meeting on 30 July and at a meeting on 2 September 2015. We conclude that the complaint of unfair dismissal under section 103A Employment Rights Act 1996 is well founded.

Direct race discrimination

161. The claimant pleaded, in the alternative to his complaint of s.103A ERA unfair dismissal, that he was treated less favourably because of his race when steps were taken to remove him from office, false allegations of poor performance made against him and he was dismissed. The claimant has succeeded in his complaint of s.103A ERA. However, we have still considered the complaint of direct race discrimination.

162. We have concluded that the claimant has not proved sufficient facts from which we could have concluded that the claimant's dismissal and the steps leading up to it were because of his race. We have found that Mr Barnes made comments to the claimant relating to his race which the claimant found offensive. However, the evidence does not suggest to us that Mr Barnes had any hostile feelings towards the claimant because of his race. A witness, Ms Till, considered comments to be all in jest. Although the claimant complains of comments relating to his race from the first time he met Mr Barnes, he does not otherwise make complaints about Mr Barnes' treatment of him until after he made the protected disclosures. It appears to us more likely that Mr Barnes' comments were ill judged and misplaced humour rather than a manifestation of hostility to the claimant because of his race. Given this, we do not consider the race-related comments to be enough by themselves to prove facts from which we could conclude that the claimant's dismissal and the steps leading up to it were because of his race. The burden of proof does not pass to the respondent. We conclude that the complaints of direct race discrimination are not well founded.

Harassment

163. The clamant alleges that the respondent harassed him within the meaning in the Equality Act 2010 by the following conduct:

163.1. Mr Barnes making comments about the claimant's "strong and thick accent";

163.2. Mr Barnes saying that the claimant dressed like a gypsy or a "Gypo";

163.3. Mr Barnes, at the meeting on 2 September 2015, saying that the claimant looked like a tinker and asked him "where did you leave your horse and cart";

163.4. Mr Barnes calling the claimant "Pikey" and/or "Paddy"; and

163.5. Mr Barnes, at dinner on 2 September 2015, continuing making similar offensive comments related to the claimant's race.

164. We found that Mr Barnes commented on the claimant's accent at their first meeting, saying "you have a pretty thick Irish accent don't you".

165. We found that, on 2 September 2015, at the start of the meeting, Mr Barnes made a comment about being glad to see that the claimant had made it there on his horse and cart. We found that, during drinks after the meeting on 2 September, Mr Barnes said, in front of others, that the claimant was the only person who could wear good clothes and still look like a gypsy.

166. We found that, at various times, Mr Barnes referred to him as a "pikey" or a "paddy" and said that the claimant was "scruffy", "dressed like a gypsy" or a "gypo" or looked like a tinker.

167. We conclude that all these comments clearly related to the claimant's Irish origin and/or his traveller background and that the comments, therefore, clearly related to race.

168. We have accepted the claimant's evidence that he found the comments offensive, although he did not show this in an obvious way at the time. We accepted the claimant's explanation for the email he sent, attaching a picture of a man with a horse and cart, as an attempt to "call out" Mr Barnes' racist comments and get him to stop. We have no evidence that it was Mr Barnes' purpose to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Mr Barnes' conduct may have been intended in a light hearted manner. However, we are satisfied that Mr Barnes' conduct had the effect of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and it was reasonable for Mr Barnes' comments to have this effect.

169. We, therefore, conclude that, subject to the time limit issue, the complaints of harassment are well founded.

170. The last incident complained of was 2 September 2015. The claim was presented on 20 June 2016, there having been a period of early conciliation with ACAS 5-13 May 2016. The complaints of harassment were, therefore, presented some months out of time. The internal grievance procedure came to an end on 19 April 2016. The claimant acted within a few weeks of the end of that process in going to ACAS and presented his claim just over a month after the ACAS conciliation period ended. We accepted the claimant's evidence as to why he did not submit his complaints of harassment until 20 June 2016. The claimant was still employed by the respondent until 28 March 2016. He eventually raised his concerns with Mr Steers on 24 December 2015, including allegations about Mr Barnes making racist comments, after the respondent had started disciplinary proceedings against him. The claimant said that, at the end of the respondent's internal process, when this had come to nothing, he felt that he had no choice but to bring his claim. He said the delay was because the respondent had buried it. In the circumstances, where the claimant had sought to resolve matters internally before bringing a claim and the greatest part of the delay in starting proceedings was due to the respondent's delay in dealing with the grievance, we consider it just and equitable to consider the complaints out of time.

Victimisation

171. The claimant asserted, in an alternative to the claim of detrimental treatment under section 47B ERA, that he was victimised when the respondent:

171.1. Failed to follow its own grievance procedure;

171.2. Failed to carry out a reasonable investigation of the claimant's complaints;

171.3. Failed to interview the claimant, to allow him the chance to put his side of the story, to provide further information in relation to his grievance and the response from those interviewed; and

171.4. As a result, failed to overturn the decision of Sid Barnes to dismiss and failed to reinstate the claimant.

172. The claimant asserted that he carried out a protected act when he made a complaint of discrimination by his written grievance sent to the respondent on 24 December 2015. We conclude that this was a protected act. The grievance included an explicit allegation of racist comments by Mr Barnes, giving examples. This was clearly an allegation of a breach of the Equality Act 2010. The claimant was not making a false allegation in bad faith; we have found that his allegations were true.

173. We found that the respondent did fail to follow its own grievance procedure, did not carry out a reasonable investigation of the claimant's complaints and failed to interview the claimant to allow him the chance to put his side of the story and to provide further information in relation to his grievance and the response from those interviewed. The claimant's grievance was not an appeal against his dismissal and we are not satisfied that it followed necessarily that, if the claimant's grievance had been upheld, the decision to dismiss him would have been overturned and he would have been reinstated.

174. The claimant has not proved facts from which we could conclude that the various failures in relation to dealing with the claimant's grievance were due to him having done a protected act. It is not enough that the claimant did a protected act and then the respondent fell into error in dealing with the grievance. There has to be something more to satisfy the tribunal of the possible causal link; the claimant has not provided that something more. We, therefore, conclude that the complaint of victimisation is not well founded.

Employment Judge Slater
10 July 2017

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
14 July 2017

FOR THE TRIBUNAL OFFICE