EMPLOYMENT TRIBUNALS

Claimant: **Mr K Besz**

Respondent: **Multi Packaging Solutions Limited**

Heard at: **Nottingham** **On:** **29th 30th and 31 August 2017**

Before: **Employment Judge Legard**

Members: **Mr J Akhtar**
Mr W J Dawson

Representation
Claimant: **Mr T Perry of Counsel**
Respondent: **Mr T Gosling of Counsel**

RESERVED JUDGMENT

1. The complaint of ordinary unfair dismissal is not well founded and is dismissed.

2. The complaint of automatically unfair dismissal contrary to s103A of the 1996 Act is not well founded and is dismissed.

3. The complaint of direct race discrimination is well founded and succeeds.

4. The complaint of harassment related to race is well founded and succeeds.

5. The complaint of "whistleblowing" detriment is not well founded and is dismissed.

REASONS

1. Issues

1.1 At the outset of the hearing, by reference to the pleadings and with the assistance of both Counsel to whom we are indebted, invaluable time was spent in defining both the legal and factual issues that the Tribunal had to decide. The issues were agreed as follows:-

Unfair Dismissal

(a) What was the reason for dismissal?

(b) If the reason was a potentially fair reason within the meaning of s.98(2), did the Respondent act reasonably in treating it as a sufficient reason for dismissing the employee?

(c) If conduct was the reason for dismissal that would inevitably involve consideration of the so called '**Burchell'** guidance; namely:

(i) whether or not the Respondent formed a genuine belief in the misconduct in question;

(ii) whether that belief, if genuine, was based upon reasonable grounds;

(iii) was that belief the product of a reasonable investigation?

(d) Was dismissal a fair sanction in all the circumstances?

(e) We were also invited to determine at the 'liability' stage, if relevant, contributory conduct and "**Polkey.**"

(f) The Claimant contended that the following procedural matters rendered the dismissal unfair:-

(i) the involvement within the disciplinary process of an HR employee, namely Jane Wood;

(ii) the involvement of Tom Victory, the Claimant's Line Manager within the investigative process;

(iii) the alleged fabrication of interview minutes.

Race Discrimination (Direct and Harassment)

(a) The Claimant makes six distinct and separate allegations of race discrimination and harassment related to race. Each allegation is predicated on the basis that it constitutes discrimination within the meaning of ss.13 and 26 EA rendered unlawful by s.39(2) of the same Act.

(i) The first such allegation concerns an alleged remark by Mr Victory, made in the presence of the Claimant's work colleagues, whilst he himself was away in Poland, namely "*I hope it's a one way ticket*". (allegation A).

(ii) The second allegation, alleged to have taken place in March 2016, arose out of a discussion about Brexit during which Mr Victory is alleged to have said words to the effect that "*after Brexit I will vote to send you back to Poland*" (allegation B).

(iii) The third allegation, also alleged to have taken place in or around March 2016, is attributed once again to Mr Victory where he is alleged to have said "*I don't understand Dick at language*" when purportedly attempting to read a note written by the Claimant (allegation C).

(iv) The fourth allegation relied upon is said to have taken place in or around April 2016. It is again attributed to Mr Victory who is alleged to have said to the Claimant that he (i.e. the Claimant) *"…did not understand English.."* and accordingly "*…did not know how to use a computer*" (allegation D)

(v) The final allegation concerns the Claimant being earmarked for disciplinary process in connection with an incident involving the watching of a confidential CCTV recording (allegation E)

(vi) The Claimant also contends that his dismissal was in itself an act of direct race discrimination (but not harassment).

s.13 EA (direct discrimination)

(b) If we are to find that any or all of the above incidents happened as alleged, did the same constitute less favourable treatment and, if so, were they done because of the Claimant's race? (s.13).

[The Claimant relies upon a hypothetical comparator for the purposes of establishing less favourable treatment.]

s.26 EA (harassment)

(c) If the above acts are proven, did they together or independently amount to unwanted conduct and, if so, were they related to race?

(d) If so, did it or they have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

(e) If so, was it reasonable for such conduct to have that effect taking into account both his perception and the other

circumstances of the case?

Time

(f) Are all or any of the above complaints in time?

(g) If not, would it be just and equitable to extend time?

Public Interest Disclosure (Whistleblowing)

Section 47B Detriment

(a) Did the Claimant make any disclosure of information which qualifies for protection within the meaning of s.43B of the 1996 Act?

The Claimant relies upon 3 potential disclosures:-

(i) The reporting of forklift truck forks lying on a high voltage cable in or around April 2014;

(ii) The reporting of damage to storage racks in or around January 2016; and

(iii) A complaint concerning the running of vehicle engines within the warehouse made in or around December 2015.

(b) Did all or any of the above constitute disclosures of information which in the Claimant's reasonable belief tended to show that the health or safety of individuals within the work place had been or was likely to be endangered (see s.43B(1)(d))?[1]

[1] The relevant subsection relied upon by the Claimant

(c) If so, were the same made in the public interest?

(d) Was the Claimant subjected to any detriment and, if so, when and what was it?

The Claimant relies on the following detriments:

(i) Being denied overtime;

(ii) Being twice subjected to a disciplinary process (in both March and June 2016);

(iii) The same allegations (excluding dismissal) which are encompassed within the racial discrimination complaint.

(e) Is the above complaint in time and, if not, was it reasonably practicable for the claim to have been brought in time?

Whistleblowing dismissal (s.103A)

(a) Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the fact of him having made one or more of the above protected disclosures?

2. Evidence

2.1 We were provided with a bundle comprising 83 pages incorporating (in the main) documents relevant to the disciplinary investigation and dismissal hearing. Given the nature of the complaints before us (and although ultimately a matter for the parties to put before us documents they consider relevant to the issues) we expressed surprise that the bundle did not include any pleadings; any policy documents (such as the Respondent's policies on grievance, disciplinary, bullying and harassment and equal opportunities); any contract of employment or indeed any correspondence or documents (if any existed) relevant to the events that formed the subject matter of the Claimant's discrimination and/or

whistleblowing complaints. Subsequently, and during the course of the hearing, the parties provided the Tribunal with a supplemental bundle comprising many of the documents highlighted above.

2.2 The Tribunal heard evidence from Mr White, a newly appointed Operations Director and the dismissing officer and from Mr Wilkinson, Finance Director and Appeals Officer. We then interposed one of the Claimant's witnesses, namely Mr Wolski, a former shopfloor colleague and supervisor. We then heard from Mr Victory, the Warehouse Coordinator and the Claimant's Line Manager. Finally we heard from the Claimant himself and two further colleagues, namely Messrs Webster and Gilbert.

2.3 We also had an unsigned statement from Mrs Lisa Harrison before us. We elected not to take that statement into account for two reasons: firstly the statement was unsigned and secondly the author (or the purported author) of the statement did not attend the Tribunal and accordingly her evidence could not be tested under cross-examination. Otherwise all the above witnesses were thoroughly cross-examined by Counsel.

3. Findings of Fact

3.1 The following findings of fact are unanimous and made on the balance of probability. We make findings only in relation to those facts that are material to the determination of the issues before us and accordingly we do not pass comment on each and every matter that has been canvassed before us in evidence.

3.2 The Respondent company specialises in the design and production of cardboard packaging materials principally, insofar as we are concerned, for the pharmaceutical industry. The Respondent undertaking is part of a global business and has 4 factory sites at which the packaging is manufactured. The finished product is then sent to the warehouse at Swadlincote in Nottingham (essentially a warehouse logistics site) where the packaging products are unloaded and stored on racks awaiting onward distribution to the customer. It is this warehouse site with which we are concerned.

3.3 The site operates by way of a continental rolling shift system ('days', 'lates' and 'nights'). Each shift comprises approximately 3-4 warehouse operatives together with a supervisor. At the time in question there were approximately 22 warehouse operatives and 7 supervisors employed at the site of which 5 were of East European origin. That number maybe a little inaccurate as it is taken from an overtime analysis which may include employees who were, by the time of the events in question, no longer employed.

3.4 The Claimant, a Polish national, was employed by the Respondent as a Warehouse Operative from 29 August 2011 until his summary dismissal which took effect on 4 July 2016. At all material times the Claimant's Line Manager and Warehouse Coordinator was Mr Victory. Mr Victory in turn reported to the Warehouse Manager Mr Oakley. The Claimant's shift, at the material time, comprised himself, Mr Webster, Mr Lovatt and possibly Mr Gilbert. His job involved, amongst other things, unloading pallets (which contained flat packed product from lorries), stacking the pallets on racking or shelving and then "picking" the same and loading lorries for onward distribution to order. Most of the work appears to have been carried out by way of forklift truck. There were two types of forklift truck operated by the Respondent, namely a "reach truck" and a "counter balance truck". The Claimant was trained and licensed to drive the latter but not the former. Notwithstanding he regularly operated both types of forklift truck in the course of his duties and, excepting one minor incident, appears to have done so without any undue difficulty.

3.5 It became increasingly evident through the course of the hearing that there was a culture of "prank playing" and low level bullying prevalent on the shop floor. This appears to have been perpetrated principally between shifts. On any objective view, such behaviour had, by the time of the Claimant's dismissal, crossed acceptable lines and appears to have gone either unnoticed by junior management or supervisors or was behaviour to which a Nelsonian eye was being turned. We are informed that, since these events, the Respondent has taken steps to grip this culture. If true (and

there was no evidence of it before the Tribunal) then it is an intervention long overdue. Nevertheless against this backdrop it is clear that there was a degree of polarisation as between shifts.

3.6 On 24 April 2014 the Claimant raised a health and safety concern (by way of a 'SHE incident form') on discovering that the forks of a forklift truck had been left in contact with an electric cable within the charging area of the warehouse (the cable being on the floor instead of hooked up and out of harms way.) The report was acknowledged by Mr Victory and, according to the report form, Mr Victory took immediate corrective action. However, before such action could be implemented, there was a further incident involving the Claimant and the said cable resulting in the Claimant submitting a further 'SHE form.' Once again the second form was acknowledged by Mr Victory and corrective action was implemented. On any view it is clear that this issue (which took place in April 2014) was the subject of a clear and transparent audit trail. It is also clear that, as part of the corrective action, Mr Victory arranged an inspection. No further complaint or concern was raised in respect of this matter or any similar matter by the Claimant or so far as we are aware anyone else subsequent to 2014.

3.7 The next event with which we are concerned took place over one year later in or about August 2015. The Claimant raised a concern (again to his Line Manager Mr Victory) regarding the practice of lorry drivers leaving their engines running in the warehouse whilst, no doubt, the same were in the process of being loaded or unloaded by warehouse operatives. The Claimant complained that the engine fumes were causing him to suffer headaches. According to the Claimant, Mr Victory, rather then expressing solidarity and concern, was angered by his remarks and told the Claimant *"listen I can sack you for not having licence which will hurt you more than any headache so go back to work".* The reference to not having a licence was of course a reference to the Claimant lacking a licence to drive a reach truck.

3.8 However, under cross examination, the Claimant agreed that, following his complaint (and it is common ground that such a

complaint was made), Mr Victory arranged for the Transport Manager, Mr Shaun Meadows, to come down to the shop floor and explain to the Claimant that this practice of running an engine presented no health hazards to the workforce on the shop floor. Indeed the Claimant recounted how Mr Meadows had spoken to him about various engine filters and so forth, and how Mr Meadows had explained that, to all intents and purposes, being in the warehouse whilst the engines were running was no different to breathing "fresh air." Whilst we as a Tribunal may express some surprise at this we lack the necessary expertise to challenge it. Nor indeed is it our job or task to do so. Importantly, from our point of view, was the fact that Mr Victory took action to reassure the Claimant with regard to his entirely legitimate concerns (something which the Claimant himself acknowledges) by involving the Transport Manager. Once again there was no further complaint (formal or otherwise) and indeed no further reference to this practice. On balance we are not persuaded that Mr Victory threatened to sack the Claimant in the manner alleged.

3.9 In or around September 2015 a Supervisor or Team Leader position became vacant. Both Mr Webster and the Claimant wished to be considered for the role. No formal application process was required and it was very much in the gift of Mr Victory. It came with approximately £150.00 per month pay rise. We are satisfied that the Claimant did express an interest in this role and did write a letter or similar in support of his application. We are further satisfied that Mr Victory made it quite clear to the Claimant that he was wasting his time and that he would be better off putting his application in the bin. In evidence Mr Victory was unable to satisfactorily explain why, if the role was vacant and in fact remained so, he took no action whatsoever to encourage or assist the Claimant in applying for the role. There was a clear animus between the Claimant and Mr Victory (of which more below) and, on this point, we preferred the evidence of the Claimant. We were further supported in our view by the evidence given by Mr Gilbert on this point.

3.10 In or about September 2015 the Claimant had taken unauthorised holiday in order to visit family members in Poland. He left a voice

message on Mr Victory's mobile informing him of where he was and his intended date of return. We are satisfied, on balance, that Mr Victory played that message in earshot of work colleagues and did so deliberately. We are further satisfied that, whilst doing so, Mr Victory said words to the effect *"Let's hope it's a one way ticket"*. In reaching that finding, we found the evidence from Mr Webster very helpful.

3.11 In December 2015 Mr Victory, concerned about faulty racking within the warehouse, raised that very issue with his immediate Line Manager, namely Mr Oakley. There is an e-mail to that effect within the supplementary bundle in which he (Mr Victory) asks the question "see attached photos of damages. When are the racking guys in again to do the inspections?" It is clear from that e-mail that the question of faulty racking was very much on Mr Victory's radar and it was something about which he was concerned. It is common ground that the Claimant also raised his own concerns regarding faulty racking with Mr Victory in or around January 2016.

3.12 Again, in or around January 2016, the Claimant made a suggestion (in the form of a complaint) that the lorry drivers should themselves open up their trailer curtains prior to unloading, thereby saving the Warehouse Operative precious time. It was a 15 to 20 minute task and, in the view of the Claimant, would improve overall operational efficiency. The Claimant was aggrieved by seeing lorry drivers parking their vehicles; taking their sandwiches and then disappearing to the canteen. Perhaps not unreasonably, he thought that the least the drivers could do was help by opening their own trailer curtains thereby enabling the Warehouse Operatives to get straight to work. The task of opening trailing curtains is a straightforward and simple one albeit a little time consuming. Mr Victory's reaction to the Claimant's suggestion was, we find, hostile, unsympathetic and sarcastic. Rather than take it as a constructive suggestion Mr Victory asked the transport Manager, Mr Meadows, to come down to the shop floor and, in front of the remaining members of the shift and other warehouse staff, publically demonstrate to the Claimant how to open trailer curtains. This was notwithstanding the fact that the Claimant had been doing this task

for over 4 years. We find that this was an embarrassing and somewhat humiliating experience for both the Claimant and indeed Mr Meadows and was, in the circumstances, an unnecessary reaction to what was a perfectly legitimate suggestion (even if ultimately there was a good reason for not acting upon it).

3.13 In June 2016 there was, of course, a referendum on the United Kingdom's membership of the European Union. In March of that year the Claimant alleges that, during a conversation or debate about "Brexit" on the shop floor, Mr Victory had said words to the effect that "*after Brexit we will send you back*" or "*I'll be voting to send you back*." It is alleged that these remarks were addressed to the Polish operatives and said in an open forum when all or most of the relevant the shift was present. In evidence Mr Victory maintained that he never talked of politics "on the shop floor" and denied this allegation in its entirety. As well as the Claimant and Mr Victory, we heard evidence from both Mr Gilbert and Mr Webster on this issue. Mr Gilbert supported the broad thrust of the Claimant's allegation, namely that Mr Victory had made clear, in a hostile manner, the fact he would be voting to send Poles back to Poland. Mr Gilbert used the words "Polish wankers". Elsewhere there was reference to "Polish cunts" (see, for example, Mr Webster's evidence upon which he was also cross examined.)

3.14 On the Respondent's behalf, Mr Gosling very skilfully exposed a number of evidential inconsistencies, in terms of precise words used and the linguistic differences as between the pleaded case and the relevant witness statement. However our task is to make a finding on the balance of probability having regard to the totality of the evidence. Having done so, we unhesitatingly find that Mr Victory did say, during the course of a Brexit discussion, that he would be voting to send the Polish back to their country of origin. Whether he used the word "wankers" or "cunts" is, in our view, beside the point. We recognise and acknowledge that there was no contemporary complaint, record or investigation and we further acknowledge that there was a deeply rooted culture on the shop floor of sufferance. However, overall, we found the evidence of the Claimant and his supporting witnesses to be very persuasive on this

issue. Indeed the relative inconsistencies of their accounts contributed, rather than detracted, from its overall authenticity. We find that these remarks, although made openly and in earshot of the entire shift, were nevertheless directed personally by Mr Victory towards the Claimant.

3.15 In March 2016 it is alleged by the Claimant that Mr Victory, when attempting to read his (i.e. the Claimant's) notes relating to a pallet issue uttered the words "*I do not understand dick language*" or words to that effect. No-one from either party (nor indeed any member of this Tribunal) had encountered a reference to "dick" language before and no one could explain its meaning. Although "dick" can be, by itself, a common derogatory term depending upon the context in which it is used (and it is possible to use it within the context of describing someone's language or ability to spell) we did not find this particular allegation proven. The Claimant acknowledges that this may have been the product of him having misheard or misquoted the conversation. There was no contemporary record, testimony or complaint that may have helped to shed some light on it. On balance (the burden being on the Claimant to prove the underlying facts that he relies upon in support of his complaint) we find this particular allegation not proven.

3.16 In April 2016 the Claimant alleges that Mr Victory confronted him whilst he was on a computer undertaking a "booking out" task and told him, in no uncertain terms, to sweep the aisles because he "*did not understand English*" and had no clue what he was doing on a computer. This allegation was flatly denied by Mr Victory. On this allegation we prefer the evidence of the Claimant. His testimony on the point was clear, straightforward and entirely credible. It also neatly fits into the pattern of behaviour that characterised Mr Victory's general animus towards the Claimant.

3.17 The final alleged act of discrimination/detriment relates to an incident in March 2016 when the Claimant, amongst others, was discovered watching a CCTV recording of a forklift truck accident involving a colleague on Mr Victory's work computer in his office. By doing so, the Claimant was, by his own admission, committing

an act of misconduct. The recording was confidential and could only have been viewed by accessing, without authorisation, his Line Manager's computer. It appears to be common ground that an initial investigation took place resulting in the Claimant, but only the Claimant, being considered for potential disciplinary action. This was despite the fact that the Claimant had not been alone in the office when the recording was being viewed. Mr Wolynski, who is also Polish and was the Claimant's supervisor at the material time, was called to give evidence on the Claimant's behalf. He is no longer employed by the Respondent. Much of his evidence related to whether or not he was pressured into signing a statement, presumably one implicating the Claimant as a prime mover in this incident. Unfortunately we have not been provided with a copy of that (or indeed any) statement in connection with this particular incident. Shortly afterwards the Claimant, fearing that the reason why he was being targeted for potential disciplinary action was because he lacked the necessary "protection," joined the union.

3.18 As part of this case we were also provided with statistics regarding the amount of overtime provided to Warehouse Operatives and Supervisors. The Claimant's case is that, despite making repeated requests for overtime, his pleas were disregarded by Mr Victory (in whose gift the allocation of overtime ultimately lay) in favour of others, most notably (insofar as his shift was concerned) Mr Webster. The actual numbers (about which there is no dispute) show that in 2013 the Claimant undertook 72 hours of overtime; in 2014, 12 hours; in 2015, 56 hours and none in 2016. In comparison Mr Webster completed 216 hours in 2013; 384 in 2014; 276 in 2015 and 564 in 2016. On a broad comparison with other Warehouse Operatives the Claimant clearly received a minimal amount of overtime. There were one or two operatives that received even less than the Claimant but it was common ground that these particular individuals had expressly requested not to do overtime.

3.19 In evidence Mr Victory sought to explain this differential by stating that the Claimant had expressly asked <u>not</u> to be considered for overtime on account of childcare and other personal issues concerning the Claimant's wife and marriage. This was flatly

denied by the Claimant. Upon this issue we unhesitatingly preferred the evidence of the Claimant. Amongst other things, Mr Victory's explanation was wholly inconsistent with the actual figures from a temporal point of view. Mr Victory then appeared to explain the differential by the fact that the Claimant had simply failed to respond to offers or had been beaten to it by Mr Webster. We find this inherently unlikely. It is quite clear, on our finding, that Mr Victory deliberately denied the Claimant the opportunity to work overtime over a lengthy period. The fact that the Claimant failed to formally complain of this issue until after his dismissal we find not altogether surprising given the entrenched culture of Warehouse Operatives not wishing to be seen to complain and not wishing to jeopardise their respective jobs and/or livelihoods in circumstances where there was an inherent distrust of management (irrespective of whether or not that distrust was justified.)

3.20 We then turn to the events of 4 June 2016 which ultimately led to the Claimant's dismissal. Mr Wolski, also a Polish national, was a Warehouse Operative on an alternate shift to the Claimant. On 4 June 2016 Mr Wolski arrived at or around 6 o'clock in the morning shortly before the start of his shift. The Claimant (together with Daniel Lovatt and Mr Webster) were coming to the end of their particular shift. Mr Wolski had brought with him a plate of food (apparently a traditional Polish dish comprising dumplings or similar) which his wife had freshly prepared for him that day. He entered the canteen in which there was a microwave. He placed the dish next to the microwave and placed cling film over the top and left it there, intending to eat it either at the end of his shift at 2 pm or during an authorised break at 10 am. Eating was strictly prohibited during a shift itself. Mr Wolski's shift began at 6am. He was not permitted to eat during the shift and he had no intention of doing so.

3.21 Approximately 10 to 15 minutes later the microwave caught fire causing the canteen and corridor to become enveloped in thick smoke and creating a potentially serious health and safety incident. Indeed a Supervisor who was later interviewed as part of the appeal process (Mr Riley Hart) was to say that "*I am glad to be honest*

Marcin found the fire like, otherwise the building would have gone up. For me where I was working, I am not sure I'd get down". It is important to bear in mind that the warehouse was stacked full of combustible cardboard. It is common ground that the fire was caused by Mr Wolski's plate of food having been placed in the microwave which had then been turned to the maximum possible time setting, causing it to overheat and catch fire. It was Mr Wolski himself who spotted smoke in the corridor, saw it emanating from the canteen and who, on opening the door, was confronted by thick smoke, the sight of the microwave door effectively blown open and his plate of food partially destroyed and on fire. Mr Wolski reported the incident immediately to his supervisor, the incident was brought under control and an investigation was subsequently launched.

3.22 The warehouse Manager, Mr Oakley, reviewed the CCTV of the outside corridor. It is a recording which the Tribunal has not seen (presumably on the basis that this is essentially a '**Burchell'** enquiry and in the absence of any complaint of wrongful dismissal.) The CCTV records the movement and presence of individuals within the corridor outside but not within the canteen itself. According to Mr Oakley (and neither party appeared to contest this) the CCTV shows Mr Wolski entering and leaving the canteen shortly before 6 am. He is followed, albeit separately, by Mr Lovatt and the Claimant who both enter the canteen. At one point, whilst Mr Lovatt is within the canteen, the Claimant stands by the doorway. The Claimant and Mr Lovatt are then seen to laugh at something as they leave the canteen. They are then seen standing together outside the canteen door before leaving the building together. Mr Webster was the only other person who entered the canteen within the relevant period and he does so for a period of approximately 9 seconds shortly after the departure of Mr Lovatt and the Claimant.

3.23 Later the same day Mr Oakley interviewed Mr Webster. Mr Webster confirmed that, when he entered the canteen, the microwave was on; that he had heard the Claimant and Mr Lovatt laughing whilst he had been in the locker room and that the incident involving the microwave was nothing to do with him. Mr Wolski was then interviewed. He explained to Mr Oakley that he had simply taken

his food into the canteen, had left it to the right of the microwave with cling film over the top in order to prevent it 'smelling the room out', that he had then gone to the toilet before spotting smoke in the corridor. On entering the canteen he found it full of thick, acrid smoke from burning plastic. He then opened the doors to let the smoke out and went to find his Supervisor. He had bought his food from the fridge at home. It was chilled and not frozen and he confirmed that he had left it to the right hand side of the microwave.

3.24 The following day, when the Claimant and Mr Lovatt were back on shift, Mr Wolski was further interviewed by Mr Victory. It was at this point that Mr Wolski began to describe that he had been, over a number of months, the victim of a number of "pranks" and bullying behaviour which included name writing on the back of his car, his shoes being hidden (later found wet and in the shower) and his locker being removed and hidden from him. He suspected that the microwave incident was another prank, albeit one with serious and perhaps unintended consequences.

3.25 A decision was taken that both the Claimant and Mr Lovatt should face formal investigation. On 7 June the Claimant was interviewed by Mr Victory. The Claimant denied being responsible for placing Mr Wolski's food in the microwave and suggested that it was Mr Wolski who had himself done it but had subsequently forgotten about it. He described Mr Wolski as a liar who had simply made up his story in order to get himself out of trouble. Mr Lovatt was also interviewed that same day. However the Tribunal was not provided with the notes of Mr Lovatt's investigation or indeed any of his subsequent interviews or disciplinary proceedings.

3.26 Mr Victory determined that there was a case for the Claimant (and indeed Mr Lovatt) to answer and the matter was duly escalated to a disciplinary hearing. This took place on 20 June and was chaired by Mr White. Mr White, although an experienced Manager, was only newly in post and had no prior knowledge of or any dealings with any of the individuals associated with the incident. Indeed he had never met the Claimant before. We were unanimously struck by the clarity and objectivity which Mr White brought to bear upon

this disciplinary process. We have no doubt whatsoever that at all times he acted with complete independence of mind and thought and was not in any way, shape or form swayed and/or influenced by Mr Victory, an individual with whom he had had little, if any, contact or indeed by any matter unrelated to the microwave incident itself.

3.27 During the course of the disciplinary hearing the Claimant, and his accompanying colleague Mr Webster, brought a number of matters to Mr White's attention. They specifically sought to blame Mr Wolski for this incident effectively asserting that he had inadvertently placed his own food in the microwave, presumably turned it on to the maximum heat for the maximum time and subsequently forgotten about it notwithstanding that he had no intention of eating his meal until at least 10 in the morning. Interestingly Mr Webster was, of course, only one of four people who could have been responsible. He was, however, discounted by Mr Victory and Mr Oakley and subsequently by Mr White on the basis of his own evidence and in part because, on entering the canteen, he had seen the microwave "on" with the table turning.

3.28 Mr White, instead of proceeding to a decision there and then, decided to adjourn and conduct his own enquiries. He went to great lengths to reassure both the Claimant and Mr Webster that no decision had been made. Towards the end of the hearing Mr White said in clear terms to the Claimant "*I am not in a position at the moment where I think anyone should be dismissed*". On this point we unhesitatingly believe him. Indeed it is borne out by what followed. He was also at pains to make clear that the decision rested with him and with him alone.

3.29 Mr White then re-interviewed Mr Wolski on 28 June. As part of his case the Claimant now alleges that the minutes of this meeting between Mr White and Mr Wolski are a fabrication. Indeed it is Mr Webster more than the Claimant who presses this point. This is despite the fact that the allegation of fabrication does not appear within the Claimant's pleaded case. Mr Webster's basis for asserting the same is tenuous to say the least and appears to emanate from a remark made by Mr Wolski at the appeal stage

when, in answer to a question from Mr Wilkinson, he replied that he had said to Mr Gilbert that "he didn't know" Mr White. We find this allegation of fabrication to have no basis whatsoever. First we accept Mr White's evidence. It is inconceivable, in our view, that a newly appointed Manager, tasked with conducting a disciplinary hearing into alleged misconduct would have had any reason to fabricate a set of minutes (presumably with the connivance of HR) in order to bolster a case for dismissing an employee. In any event it was always open for the Claimant, through his Solicitors to seek a witness order in respect of Mr Wolski if they thought there was any truth in the allegation. Further the remark made by Mr Wolski (at the appeal hearing) has to be read in context in order to be properly understood. Specifically it is to be read against the background of bullying and prank playing within the warehouse and the distinct possibility, if not probability, that Mr Wolski was attempting to distance himself from the formal investigative and disciplinary process whilst being interrogated by one of the Claimant's colleagues, in circumstances where he had been the recipient of bullying behaviour. Furthermore the level of detail contained within the minutes (such as references to incidents involving Guy Marshall and punches to the face and so forth) must mean that, if they were fabricated minutes, the author of the same must have had the most vivid of imaginations.

3.30 What is abundantly clear is that, on interviewing Mr Wolski, Mr White's view not only of what happened but how, in what sequence and who was responsible was reinforced. In terms Mr Wolski came up to proof notwithstanding the fact that Mr White deliberately put him under a degree of pressure. Mr Wolski gave a further consistent account of his actions that day. Mr White believed him and he was fully entitled to do so. Accordingly it was clear in his mind that the only reasonable and plausible explanation was that the microwave incident was caused by Mr Lovatt and the Claimant acting in concert, intending to play a further prank upon Mr Wolski but which ended up having serious or potentially serious consequences. He came to that decision and he came to it alone and following careful analysis of the evidence before him.

3.31 On 4 July Mr White reconvened the disciplinary hearing with an intention to effectively announce his decision. His remarks were met with a degree of hostility principally from Mr Webster who had to be asked to calm down and the meeting soon developed into a relatively heated affair. Interestingly during the course of this meeting Mr Webster was to say, on a number of occasions, that it was Mr Lovatt who was the guilty party. Amongst other things, Mr Webster is recorded as saying: "*Daniel is lying. Daniel has done it, I know he has done it. Daniel is guilty. The food was in the microwave. Cam is innocent, Daniel did it. Everyone in the warehouse thinks Dan has done it*".

3.32 The Claimant's dismissal was confirmed in writing by letter dated 4 July and an explanation provided by Mr White as to how he came to his view. Of particular relevance and importance was the CCTV footage which of course we have not seen. Mr White incorporated within his letter the following:-

"I am aware of your history and that you have been involved in incidents previously which have resulted in disciplinary action being taken against you. I am also aware that your conduct behaviour towards management is not to an acceptable standard. We have also received allegations that you were involved in incidents whereby you have a history of playing practical jokes on Marcin."

That said it is clear, on our findings, that the reason that Mr White elected to dismiss the Claimant was because he had concluded that the Claimant was responsible, albeit in concert with Mr Lovatt, for the microwave incident.

3.33 The Claimant was offered the right of appeal which he exercised. Mr Lovatt was also dismissed but he elected not to appeal. In the interim Mr Oakley, by way of an e-mail, explained his finding as to why he considered the Claimant and Mr Lovatt to be the most likely culprits. Mr Oakley also gave a detailed summary of the CCTV recording that he had recovered. Interestingly it appears that the decision as to whether Messrs Lovatt and the Claimant should be progressed to a disciplinary hearing ultimately rested

with Mr Oakley and perhaps not with Mr Victory (perhaps not surprising given their relative levels of seniority). The Claimant's grounds of appeal were 4 in number:-

- That it was a pre-mediated decision.
- That there was a very poorly conducted investigation.
- That there was a monumental misjudgement of Mr Wolski's character.
- That there had been an exaggerated slur on his character.

3.34 The appeal was heard by Mr Wilkinson. We found Mr Wilkinson to be an impressive witness who took his task extremely seriously. He determined to conduct his appeal by way of a complete rehearing as opposed to a review. Mr Wilkinson was thoroughly objective in his approach and had had very limited contact with the relevant personalities. Indeed, in his own evidence, the Claimant was at pains to say that he "could trust" Mr Wilkinson and that it was Mr Wilkinson who "went through the procedure properly".

3.35 In order to try and obtain a better understanding of the culture and background that lay behind this incident Mr Wilkinson spoke to Mr Riley Hart, a Supervisor. That discussion was enlightening in that Mr Riley Hart made reference to a culture of bullying on the shop floor including name calling (much of which was of a racial nature) and pranks (including the hiding of shoes and lockers and so forth). In doing so, Mr Riley Hart was very even handed in his observations stating, for example, that Mr Wolski was also somebody who "*winds everyone up and he knows he is doing it*".

3.36 Mr Wilkinson held the appeal hearing on 15 July during the course of which the grounds of appeal were the subject of discussion. The Claimant was provided with every opportunity, together with the assistance of his work colleague Mr Gilbert, to put his case, which he duly did. Mr Wilkinson then adjourned the process in order to re-

interview Mr Wolski for the third (or fourth) time. Once again Mr Wolski's account was entirely consistent with that which had gone before. Mr Wilkinson also conducted a further interview with Mr Webster.

3.37 The appeal hearing was reconvened on 25 August 2016. Once again the Claimant was given every opportunity to comment upon and make observations upon the evidence collated as part of the appeal investigation. This evidence also included an e-mail addressed to Mr Oakley from Mr Gilbert dated 3 August 2016 which describes another colleague witnessing Mr Wolski putting his food into the microwave on another occasion and further describing his method being to turn the microwave on full before opening the door when he was ready to take the meal out. The Claimant thought that this might assist his case in casting doubt upon Mr Wolski's evidence. However, on the contrary, it does nothing but support Mr Wolski's position, namely that he only placed his food in the microwave at the time he wished to eat it, namely 10 am and that he was present at the time he "cooked" his meal. Having taken time to consider the evidence presented to him Mr Wilkinson confirmed his decision in writing by letter dated 30 August which was to uphold the decision to dismiss. This was a five page letter containing a detailed explanation as to his findings and the conclusions that he had arrived at.

4. Relevant Law

Unfair Dismissal

4.1 The law relating to unfair dismissal is well rehearsed. In summary it is for the employer to establish a potentially fair for dismissal. Should it do so, the Tribunal will go on to consider whether it *"acted reasonably in treating (the reason) as a sufficient reason"* within the meaning of s.98(4) of the 1996 Act and in doing so will take into account, amongst other things, the size of the Respondent's undertaking and the administrative resources at its disposal. The test of

'reasonableness' is to be determined "…*in accordance with equity and the substantial merits of the case."*

4.2 Misconduct is a potentially fair reason. However in order for the Respondent to have *"acted reasonably"* the Tribunal must be satisfied that the decision itself fell within a *"range of reasonable responses"* and a fair procedure was followed. At all stages, including the determination as to whether dismissal is an appropriate sanction, the Tribunal should apply the range of reasonable responses test - *Sainsburys –v- Hitt*.

4.3 *British Home Stores Ltd – v – Burchell [1978] IRLR 379* which is still a leading case on this issue, makes clear that, in general terms, an employer must show that he genuinely believed that the employee committed the misconduct in question; that he had reasonable grounds on which to sustain that belief and that his belief, genuinely and reasonably held, was the product of a reasonable investigation.

4.4 Finally the Tribunal is also charged with determining whether the sanction (dismissal) was a fair one in all the circumstances. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see the decision of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91* and of the Inner House of the Court of Session in *Gair v Bevan Harris Ltd [1983] IRLR 368*).

4.5 In determining whether the Respondent has acted reasonably or otherwise, it is not the role of the Tribunal to enter the arena and conduct its own mini-trial of the Claimant (or indeed any other employee). The one clear and consistent principle which has always been applied is that it is not for the Tribunal simply to substitute its own

opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently. See also *Collin v United Distillers* and the case of *London Ambulance Service v Small* and specifically the quote from Mummery LJ which begins with the words "it is all too easy even for an experienced Tribunal to slip into the substitution mindset". See also the guidance set out in *Iceland Frozen Foods v Jones [1982] IRLR 439*.

4.6 A so-called 'Polkey' reduction reflects the chance that the employee might have lost his job, irrespective of how the redundancy exercise had been conducted. A Tribunal may err in law if it fails to consider and/or speculate on what might have happened - *Fisher v California Cake and Cookie Ltd* [1997] IRLR 212. In *Scope v Thornett [2007] IRLR 155* the Court of Appeal emphasised that the task is for the tribunal to identify and consider any evidence which it can with some confidence deploy to predict what would have happened. To fail to do this could lead to over compensating the employee, which would not be a just outcome. Pill LJ stated:

- *'The EAT appear to regard the presence of a need to speculate as disqualifying an employment tribunal from carrying out its statutory duty to assess what is just and equitable by way of compensatory award. Any assessment of a future loss, including one that the employment will continue indefinitely, is by way of prediction and inevitably involves a speculative element. Judges and tribunals are very familiar with making predictions based on the evidence they have heard. The tribunal's statutory duty may involve making such predictions and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation.'*

4.7 In *Software 2000 Ltd v Andrews [2007]* IRLR 568 (Elias P presiding) the EAT concluded, amongst other things, that in assessing

compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice; that the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence and that the Tribunal must take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

Discrimination (jurisdiction)

4.8 For the Tribunal to accept jurisdiction, proceedings must be brought within 3 months of the date of the complaint in question subject to an overriding discretion to extend time on 'just and equitable' grounds – s.123 EqA. Conduct extending over a period is to be treated as done at the end of the period – s.123(3)(a) EqA. These time limits are now to be read, of course, to the ACAS conciliation time 'extension.'

4.9 In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to the nature and conduct of the discriminatory conduct of which complaint is made - *Hendricks v Metropolitan Police Comr* [2003] IRLR 96, CA. As Mummery J pointed out in *Hendricks*, in order for there to be 'an act extending over a period' the Claimant has to prove that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'.

4.10 The Tribunal is limited to considering those matters complained of in the originating application – *Chapman v Simon [1994] IRLR 124, CA.*

Race Discrimination (Direct)

4.11 s.13 of the Equality Act 2010 ('EA') defines direct discrimination as follows:

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

4.12 Direct discrimination is taken to occur where one person is treated less favourably than another is (or has been or would be) treated in a comparable situation because of (race).

4.13 It follows that the key question, in direct discrimination claims, is one of causation – was race the effective (even if not the sole) cause of the treatment, judged objectively?

4.14 The burden of proof provision is set out at s.136 (2) EA and provides as follows:

"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."

4.15 There is abundant case law on both the subject of direct discrimination and the circumstances in which the burden of proof (reversal) provision falls to be applied. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246 CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it. The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer [race] discrimination, and, in deciding whether there is enough to shift the burden of proof to the respondent, it will often be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof—see Bahl v Law Society *[2003] IRLR 640, EAT* per Elias J, later approved by the Court of Appeal. See also *Khan v Home Office* [2008] All ER (D) 323 in which the Court of Appeal conducted a comprehensive review of the law relating to the reversal

of the burden of proof, and commented that 'the recent statutory provisions…need not be applied in an overly mechanistic or schematic way'. This approach was endorsed by the Supreme Court in *Hewage v Grampian Health Board [2012] ICR 1054 SC*.

4.16 A tribunal, faced with alleged discrimination, must be careful to link any finding of discrimination with specific evidence presented to it - *Bradford Hospitals NHS Trust v Al-Shabib* [2003] IRLR 4, EAT. What cannot be emphasised too strongly, however, is that before the crucial decision as to the drawing (or not drawing) of an inference of discrimination is reached, the tribunal must have properly dealt with the factual allegations on which the inference of discrimination depends - *Anya v University of Oxford* [2001] IRLR 377, CA. The recent case of *Efobi v Royal Mail Group Ltd UKEAT/0203/16* casts doubt on the traditional *Igen v Wong* approach, indicating that it is simply a question of the Tribunal being satisfied that there are facts from which they could conclude discrimination without there necessarily being any formal burden on the Claimant at 'stage 1.'

Harassment Related to Race (s.26 EA)

4.17 s.26 EA provides as follows:

(1) *A person (A) harasses another (b) if-*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

4.18 Conduct shall be regarded as having the effect referred to if, having regard to all the circumstances, including in particular the perception of the person, it should reasonably be considered as having that effect. Liability for harassment requires an investigation either into the alleged

perpetrator's state of mind or into the form their conduct takes. The conduct must be unwanted and have negative consequences for the victim.

4.19 It is well established, as in other areas of discrimination law, that the simple fact that an employer has behaved badly will not, of itself, prove anything. This point was made by Underhill J in *HM Prison Service v Johnson [2007] IRLR 951, EAT at para 64*, a case in which it had been found by the employment tribunal that the claimant's health problems had been incompetently and insensitively dealt with. But that is not enough to prove discrimination or harassment. The employment tribunal in that case was found to have fallen into error by taking the fact of bad treatment as dispositive of the question whether disability (or something related to it) was the reason for that treatment.

4.20 The fact that the individual is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist. In giving general guidance on 'harassment' in *Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT* Underhill P said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose *or* effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not per se a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

'Whistleblowing'

4.21 'Whistleblowing' is protected under PIDA if, but only if, it constitutes a 'protected disclosure' (ErtsA s.43B). A protected disclosure concerns a

past, present or anticipated wrongdoing. Wrong doings covered by PIDA are crimes, miscarriages of justice, failure to comply with legal obligations, risks to health and safety, damage to the environment and the covering up of any of these (s.43B).

4.22 The Act provides a very broad definition of what amounts to a disclosure and 'any disclosure of information' will qualify (ERA 1996 s 43B(1)). There must still be a 'disclosure of information' as such and not simply 'allegations' about the wrongdoer (see *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38, EAT* and *Smith v London Metropolitan University [2011] IRLR 884, EAT*).

4.23 In all cases, the worker making the disclosure must have a 'reasonable belief' that the disclosed information 'tends to show' the wrongdoing (s.43B(1)) and there is the added requirement that the disclosure be made 'in the public interest' – for which, read Underhill LJ's analysis (paragraph 37) in the recently decided case of *Chesterton Global Ltd v Nurmohamed*.

4.24 'On the ground that' means that the employer's conduct was caused or at least influenced by the fact of the disclosure having been made; it is not a 'but for' test nor will it be enough to consider whether the act was 'related to' the disclosure in some looser sense: *Harrow London Borough v Knight [2003] ICR 140, EAT*. See also *Pothecary Witham Weld v Bullimore [2010] IRLR 571*.

4.25 In *Martin v Devonshires Solicitors UKEAT 0086/10 [2011] EqLR 108 the EAT*, while agreeing with the test in *Khan*, went on to hold that 'there would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable'. According to Underhill P: *'it would be extraordinary if these provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint'*.

4.26 In *NHS Manchester v Fecitt [2012] IRLR 64*, *CA* the Court of Appeal held that an act was 'done on the ground that ' if it was done 'because of', which in turn required an investigation of the 'reason why' the act was done; and, critically, in relation to whistleblowing at least, subjecting a worker to detriment was unlawful if the worker's whistleblowing was a material factor in the employer's decision so to act.

4.27 Under ERtsA s 103A it is automatically unfair to dismiss an employee if the reason or principal reason for that dismissal is that they have made a protected disclosure.

4.28 The proper approach to be adopted by Tribunals in s.103A cases, where there are opposing reasons for dismissal put forward by the parties, was explained by the Court of Appeal in *Kuzel* v Roche Products Ltd*, [2008] IRLR 530*. Although it is for the employer to prove that he dismissed the employee for a fair and admissible reason, it does not follow, as a matter of law, that if he fails to establish this, the Tribunal must accept the alternative reason advanced by the employee. If the employee puts forward a positive case that he was dismissed for a different reason, he must produce some evidence supporting that case.

Time (ERA)

4.29 By s.48(3) ERA, a Tribunal is precluded from hearing any PIDA complaint unless presented within 3 months of the act complained of (subject to a 'reasonably practicable' escape clause).

4.30 The onus of proving that presentation in time was not reasonably practicable rests on C – see *Porter v Bainbridge [1978] ICR 943, CA.* Only in very rare circumstances will a Claimant be able to cite 'ignorance of rights' in support – *Avon CC v Haywood-Hicks [1978] ICR 646.*

5. Submissions

5.1 Lengthy oral submissions were made by both Counsel, the contents of which we do not propose to rehearse within the context of this judgment. With the exception of one authority (namely *Frames Snooker Centre v Boyce [1992] IRLR 472*), neither representative provided us with any case law and both focussed their respective submissions on the facts as opposed to legal principles. That said, Counsel did address the Tribunal on time issues and in respect of what constituted a protected disclosure.

5.2 Insofar as time limits were concerned, it was agreed by both Counsel, taking into consideration the ACAS notification date and the date of presentation of the claim form, that any alleged act or omission for the purposes of a discrimination complaint that occurred before 24 June 2016 was prima facie out of time, subject to the exercise of any just and equitable discretion.

5.3 Credibility was, perhaps not surprisingly, a key feature of the respective submissions before us. Both Counsel addressed us at length on the evidence and the reasons why their witnesses' recollections ought properly to be preferred.

6. Conclusions

6.1 Applying the relevant law to the facts as we found them to be and dealing with each complaint in turn:-

Unfair dismissal

6.2 We have no hesitation in finding that the Respondent has discharged its burden of proving that the reason for the Claimant's dismissal was conduct, a potentially fair reason. We have then gone on to consider whether the Respondent acted reasonably in treating it as a reason for the Claimant's dismissal taking into account, amongst other things, the size of its undertaking, the administrative resources at its disposal and applying the so-called *'Burchell'* guidance.

6.3 We find that the belief in the Claimant's misconduct, held by Mr White, was not only genuine but also based upon reasonable grounds. Yet further we are entirely satisfied that the belief was the product of a reasonable investigation. Mr Oakley and Mr Victory were presented with an incident with potentially serious consequences. They launched an immediate investigation and, in carrying out that investigation, interviewed all relevant witnesses and specifically all those who could have played a part in it. They reviewed the CCTV recording. They discounted Mr Wolski for a number of reasons, all of which were entirely reasonable. First they believed him when he told them that he had left his food beside the microwave with a view to cooking it later, at a time when he was permitted to eat. They considered it inherently implausible that Mr Wolski would deliberately sabotage his own meal or that he would accidentally place his food in a microwave at 6 am and then forget about it when he had no intention of eating it until at least 10 am. It was fresh food not frozen. The microwave incident was set against a background of prank playing. The CCTV showed both Mr Lovatt and the Claimant acting suspiciously (ie standing outside the canteen doorway and laughing at the end of their shift.) It was equally reasonable to discount Mr Webster from the scope of the disciplinary hearing (even though he was correctly interviewed as part of the investigation) given that his participation lasted no more than 9 seconds. More importantly, Mr Webster's evidence was that he saw the microwave clearly on when entering the canteen. That was consistent with the evidence from the Claimant and Mr Lovatt. Therefore, for Messrs Oakley and Victory and latterly Mr White to have concluded that Mr Webster was in the frame must have meant a conclusion that both the Claimant and Mr Lovatt were themselves lying.

6.4 In any event there were ample grounds to suspect that Mr Lovatt and the Claimant were the obvious perpetrators of a prank gone wrong and accordingly to promote the matter to a formal disciplinary hearing. Even if there were failings at the investigatory stage, which, for the avoidance of doubt, we do not find, Mr White, by conducting an investigation of his own in a thoroughly objective and fair minded way, ensured that the process itself was a reasonable

one and was one that fell well within a band of reasonable responses. There were no procedural irregularities. Jane Woods' involvement is nothing to the point. She attended as a note taker and her participation was minimal. Mr Victory, as the Warehouse Manager, was inevitably going to be involved at the investigative stage, a matter acknowledged in evidence by the Claimant. For reasons already set out we have discounted any notion that interview minutes were fabricated.

6.5 Mr White came to an independent view following a detailed, thorough and impartial analysis of the evidence, with particular emphasis on the CCTV and concluded, quite reasonably in our view, that the Claimant and Mr Lovatt were to blame. We have taken particular care to remind ourselves that we must not, however tempted, substitute our view for that of the dismissing employer. We also note that in this case that there is no complaint of wrongful dismissal. Our enquiry is limited therefore to the traditional *Burchell* one. We conclude, without any hesitation, that the Respondent acted reasonably within the meaning of s.98(4). We further conclude that the sanction of dismissal was a fair one, (i.e. one that falls squarely within the band) a matter not seriously argued before us nor, given the potential seriousness of the offence, could it be.

6.6 Finally (and we recognise that this conclusion inevitably overlaps to some extent with the s103A complaint as well as the complaint that the dismissal was itself an act of race discrimination) we considered it inherently unlikely that the Respondent, through Mr White, targeted the Claimant as a troublemaker or on grounds of his race or indeed for any reason unconnected to the microwave incident. Had he done so, Mr Lovatt would essentially have become 'collateral damage', which we consider inherently unlikely.

6.7 Finally we were universally impressed by the evidence of Mr Wilkinson and, had there been any significant concerns with either the investigation or the dismissal process, we would have found that the same were "cured" by what was on any view a very thorough, detailed, objective and impartial appeal process. For those reasons the claim for unfair dismissal fails and is dismissed.

Race discrimination (direct).

6.8 We have found that all but one of the factual allegations relied upon by the Claimant are proven, namely allegations A, B, D and E. Insofar as allegations A, B and D are concerned we further find that the same amounted to less favourable treatment in that such comments would not have been made to a British national in circumstances where there was no material difference (i.e. a British Warehouse Operative finding himself or herself in the same or not materially different circumstances to that of the Claimant). Applying ***Efobi*** we further find that there facts from which we could conclude that the reason why Mr Victory subjected him to such treatment was because of his race. We recognise that Mr Victory may not have treated all workers of either Polish or eastern European origin in an equally hostile manner and it is entirely possible that a manager can treat a Polish worker in a hostile but non-discriminatory way simply because for example he does not like them or there is a personality clash. Although we accept that in this case there was a personal animus we nevertheless find that there was an underlying racial ingredient to that hostility and that the conduct was racially motivated. We garner support for our view by the fact that the treatment complained of (for example the 'Brexit' comments and the reference to a 'one way ticket' was itself based on racial lines.

6.9 Each of the allegations found to have occurred was denied by the Respondent. In any event the Respondent has provided us with no evidence or indeed argument nor has it provided us with any explanation from which we could have concluded that the reason for the treatment had nothing whatsoever to do with the Claimant's race. Accordingly we find that the acts as alleged are proven and constitute direct race discrimination.

6.10 The one exception is allegation E. In this respect we find that the evidence of Mr Victory was (perhaps unusually given our findings above) to be preferred, namely that the reason why the Claimant was singled out for potential disciplinary action (in fact none was

proceeded with) was because, according to initial investigations and interviews, the Claimant was alleged to have been the person who entered the office, sat in Mr Victory's chair and operated (by pressing "play") Mr Victory's computer. It was for that reason and for that reason alone that he found himself facing potential disciplinary action. There was no evidence in respect of allegation E from which we could have concluded that the reason why he was singled out in this way was because of race. We find that the actual reason had nothing to do with his nationality or race and everything to do with the fact that he was or at least seemed to be (whether true or not) the principal player in this incident. For that reason we do not find that allegation E amounted to an act of direct race discrimination. The same also applies of course in respect of any claim for harassment. It was not related to race.

Harassment

6.11 Insofar as allegations A, B and D are concerned this was, in our judgment, clearly unwanted conduct. For reasons set out above the unwanted conduct was, again in our judgment, related to race. Having heard evidence from the Claimant it is clear that this conduct had the purpose or effect of creating for him a hostile, degrading, humiliating or offensive environment. This includes allegation A, despite the fact that the words were uttered whilst the Claimant was abroad. Those comments were subsequently communicated by a third party to the Claimant and caused him significant upset.

6.12 For the avoidance of doubt we found that such conduct perpetrated by Mr Victory was deliberate and accordingly the "purpose" test is met but, even if we were wrong on that, we are under no doubt whatsoever that the relevant conduct had the necessary 'effect.' We also find, taking into account the Claimant's perception and the wider circumstances of the case, that it was reasonable for the conduct to have that effect at the time.

Time

6.13 Allegations A to D are prima facie out of time. The question as to whether or not to exercise our just and equitable discretion in order to extend time sufficient for us to accept jurisdiction in relation to the same has been no easy task. We have considered with some care the competing arguments of Counsel and have carefully reviewed both the evidence and the legal principles upon which the discretion is to be exercised.

6.14 On one hand it is abundantly clear that, but for the Claimant's dismissal, it is unlikely that such complaints would have seen the light of day. The Claimant was a member of a union, albeit only from March 2016 although it is also right that union representation at this particular site left much to be desired. The Claimant sought legal advice from a firm in Derby, albeit only for approximately one hour shortly after he was dismissed and instructed his current solicitors in approximately September 2016. There were no internal processes engaged at any time.

6.15 On the other hand the Claimant clearly struggles with spoken English and has very limited understanding of British domestic law. He was not aware or made aware of internal grievance processes but, in any event, there was a clear culture of sufferance on the shop floor. An extension of time sufficient for us to accept jurisdiction would present little by way of prejudice to the Respondent. A fair trial is still eminently possible and the length of delay is not in our judgment extreme by any means.

6.16 On balance, and by the narrowest of margins, we have decided to exercise our discretion and extend time so that the complaints (which, for the benefit of doubt, we find to be linked so as to form a continuing state of affairs - per ***Hendricks***) are brought within time and accordingly each of the 3 allegations, namely A, B and D, succeed by reference to both ss.13 and 26.

Whistleblowing

6.17 We are satisfied that the three alleged disclosures qualify for protection within the meaning of s.43B(1)(d). Each of the same

amounts to disclosures of information; they clearly satisfy the 'public interest' test (see *Nurmohamed*) and they tend to show, in our judgment, but, more importantly, in the reasonable belief of the Claimant, that the health or safety of an individual was or was likely to be endangered.

6.18 We also find that, by being refused or overlooked for overtime, the Claimant suffered a clear detriment. The Claimant clearly suffered further detriments by reference to the findings that we have made above in terms of allegations A, B, D and E. Yet further still, the Claimant suffered detriments in that he was subjected to disciplinary proceedings in June 2016 in relation to the 'microwave incident' and was threatened with disciplinary proceedings in connection with the computer incident earlier in March.

6.19 That said we have found no evidence whatsoever to link any of the said detriments to the fact of the Claimant having made the protected disclosures in question. For example there is no evidence at all of Mr Victory taking against the Claimant for reasons connected with health and safety and more specifically the disclosures in question. On the contrary it is clear, in our judgment, that Mr Victory took health and safety seriously and responsibly. As he said in evidence, honestly in our judgment, it was in everyone's interest for health and safety matters to be brought to his and/or superior management's attention. There is no evidence of anyone, least of all the Claimant, being treated to their detriment as a consequence of having done so. The 'cable' incident occurred in April 2014. There is a clear audit trail in respect of that event and remedial action was undertaken and signed off in a wholly transparent way by Mr Victory. The matter was never raised again. No action or detrimental treatment flowed from it whatsoever. Likewise, in connection with the lorry engine issue, Mr Victory treated that complaint with the seriousness that it deserved and ensured that the Claimant was reassured by Mr Meadows the Transport Manager (that incident is to be contrasted of course with the trailer curtain issue.) Insofar as the 'damaged racks' complaint is concerned, it is abundantly clear to us that Mr Victory himself was concerned about the state of those racks and indeed it was Mr

Victory who had brought it to the attention of his own superiors. This, in our view, is clear evidence that he considered it a matter of concern making it inherently unlikely that he would have treated the Claimant detrimentally on account of the Claimant having brought it to his attention. There is simply no evidence to suggest any detriment about which the Claimant alleges having any connection whatsoever with the protected disclosures and for that reason we reject the same and dismiss the 'whistleblowing detriment' complaint in its entirety.

6.20 Equally, and for the avoidance of any doubt but for the same reasons, we also dismiss the s103A complaint. Yet further, we do not find that the dismissal of the Claimant was in any way motivated by his race. For the above reasons we have not gone on to consider any time point in connection with the whistleblowing complaints.

6.21 This matter will now be listed for a Remedy Hearing with a time estimate of one day, the same to be listed administratively.

Employment Judge Legard

Date 26th September 2017

JUDGMENT SENT TO THE PARTIES ON
29 September 2017
.....

.....
FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.