EMPLOYMENT TRIBUNALS

Claimant: **Mr R Atkinson**

Respondents: **1. Cape Industrial Services Limited**
2. Mr Mark McCoag

Heard at: **Hull** **On: 9 to 12 January 2018**
24 January 2018 (deliberations in chambers)

Before: **Employment Judge Cox**

Members: **Ms B R Hodgkinson**
Mrs L Benstead

Representation:

Claimant: Ms A Brown, counsel
Respondents: Mr S Sweeney, counsel

RESERVED JUDGMENT

1. By consent, the claim of harassment related to race in relation to comments made by the Second Respondent on 4 May 2016 succeeds.

2. By consent, the First Respondent shall pay the Claimant £8,000, on behalf of both Respondents, in respect of that claim within 28 days of the date this Reserved Judgment is sent to the parties.

3. The remaining claims under the Equality Act 2010 fail and are dismissed.

4. The claim of unfair dismissal fails and is dismissed.

REASONS

1. Mr Atkinson resigned from his job as Rope Access Regional Manager with Cape Industrial Services Limited ("the Company") on 28 July 2016. The Company provides maintenance services on onshore and offshore oil and gas installations. Mr Atkinson's job involved identifying and managing suitable controls for the safe execution of activities involving rope access on the assets (such as oil rigs and the plant and machinery used on them) belonging to the Company's clients, including Perenco.

The highest level of qualification for this work was "green" level, which means that an individual is able to supervise others and train them to achieve the same level. Mr Atkinson had attained green status.

2. Mr Atkinson presented a claim to the Tribunal alleging that the Company had unfairly constructively dismissed him. He also alleged that the Company and Mr Mark McCoag had racially discriminated against him.

The discrimination allegations

3. One of Mr Atkinson's allegations of discrimination related to a comment made by Mr McCoag on 4 May 2016. In a conversation with colleagues during which Mr McCoag was complaining about his son's lack of application at work, and in Mr Atkinson's hearing, Mr McCoag made the comment: "all I've done is work like a fucking nigger all my life". Mr Atkinson alleged, and the Company and Mr McCoag accepted, that this comment amounted to harassment related to race for which both Mr McCoag and the Company were liable.

4. Mr Atkinson's other discrimination allegations were made against the Company only, and related to its response to the grievance Mr Atkinson presented about that incident. The specific allegations are dealt with in turn below but, in summary, Mr Atkinson said that the Company had prejudged the outcome of his grievance and treated racially abusive language as less serious than non-racially abusive language. Originally, Mr Atkinson alleged that the Company's response to his grievance amounted to indirect discrimination, but he withdrew that allegation at a Telephone Preliminary Hearing held to clarify the issues in the claim on 30 August 2017 and it was dismissed. At that Preliminary Hearing his representative confirmed that he was alleging that the Company's response was either direct discrimination because of race or harassment related to race. He was ordered to provide an amended claim setting out the factual assertions he was making in relation to the Company's handling of his grievance.

5. In his amended claim and in further discussion at the main Hearing, Mr Atkinson clarified that the actions he alleged amounted to direct discrimination or harassment were as follows:

    a. In a telephone conversation between Mr Atkinson and Mr Colin Beardsell on 16 May 2016, during which Mr Atkinson had told him about Mr McCoag's comment, Mr Beardsell said that he could speak to Mr McCoag but Mr Atkinson should "expect some flack back".

    b. At a meeting on 27 May 2016 to discuss Mr Atkinson's grievance, Mrs Jane Atkinson and/or Ms Johanna Guerin told Mr Atkinson that Mr McCoag's comment was not considered to be gross misconduct.

    c. Mrs Atkinson and/or Ms Guerin failed to engage proactively and/or appropriately with Mr Atkinson in the conduct of the grievance investigation, by not informing him of the outcome of Mr McCoag's disciplinary proceedings. (On the fourth day of the main Hearing and after all the evidence relating to this allegation had been heard,

Mr Atkinson applied for leave to include Mr Simon Atterton, who conducted Mr McCoag's disciplinary hearing, in this allegation. Leave was refused, for reasons provided to the parties at the time.)

d. The Company treated racially abusive language as less serious than other abusive language, as evidenced in the conduct of the grievance process in relation to Mr Atkinson's grievance and the disciplinary process in relation to Mr McCoag, including the sanction imposed upon Mr McCoag (which was a final written warning). Mr Atkinson alleged that the Company had dismissed Mr Julian Irving for non-racial abusive language whereas it had not dismissed Mr McCoag.

e. These acts of discrimination were, individually or cumulatively, conduct that breached the implied term of mutual trust and confidence and were an effective cause of Mr Atkinson's decision to resign, making his constructive dismissal an act of unlawful discrimination.

6. Direct race discrimination arises where, because of race, an employer treats an employee less favourably than it treats or would treat others (Section 13(1) of the Equality Act 2010 – the EqA). For the purposes of this comparison, there must be no material difference between the circumstances relating to each case (Section 23(1) EqA). Mr Atkinson is black. At the main Hearing, he confirmed that he was not alleging that he had been treated less favourably because of his own race, but rather that the Company had responded less favourably to his complaint, because it related to racially abusive language, than it would have done had his complaint related to non-racially abusive language. In particular, the Company had been unwilling or averse to dealing with his complaint effectively and appropriately because it related to racially offensive language.

7. Harassment related to race arises where an employer engages in unwanted conduct related to race and the conduct has the purpose or effect of creating a hostile or offensive environment for an employee (Section 26(1) EqA). Mr Atkinson confirmed at the main Hearing that he alleged that the Company's response to his grievance amounted to harassment related to race because the way in which it was conducted related to the racial nature of the subject matter of his complaint.

The unfair dismissal allegation

8. For the purposes of his unfair dismissal claim, Mr Atkinson needed to satisfy the Tribunal that his case fell within Section 95(1)(c) of the Employment Rights Act 1996 (the ERA), that is, that he had resigned in circumstance in which he was entitled to resign without notice by reason of the Company's conduct.

9. Mr Atkinson alleged that he was entitled to resign without notice because the Company had acted in breach of its implied obligation not, without reasonable and proper cause, to act in a way that was likely to destroy or seriously damage the relationship of trust and confidence between itself and him (Courtaulds Northern Textiles Limited v Andrew [1979] IRLR 84).

He said that he had resigned in response to that conduct, which amounted to a fundamental breach of his contract.

10. In his amended claim and at the main Hearing, Mr Atkinson clarified that the discriminatory conduct that he alleged amounted to a breach of trust and confidence, individually or cumulatively, were the acts of discrimination set out in paragraphs 5 (a) to (d) above; he did not allege that Mr McCoag's act of harassment was a breach of contract by the Company. In addition, Mr Atkinson alleged that the Company had told him that he should not notify Perenco of a breach of safety protocols that had occurred on its oil rig. This action compromised his reputation and integrity as an employee with high-level health and safety responsibilities and also amounted to, or contributed towards, a breach of the implied term.

11. The Company accepted that, if Mr Atkinson had been constructively dismissed, it had no potentially fair reason for its repudiatory conduct falling with Section 98 ERA and his dismissal would therefore be unfair.

Findings on the allegations

12. The Tribunal heard oral evidence from Mr Atkinson. For the First Respondent, it heard oral evidence from: Mrs Jane Atkinson, Operations Director at the relevant time, who investigated Mr Atkinson's grievance about Mr McCoag's comment; Mr Colin Beardsell, an Operations Manager and Mr Atkinson's line manager when he first joined the Company but promoted to General Manager by the time of the events relevant to this claim; Mr Barry Noakes, Operations Manager and Mr Atkinson's line manager at the relevant time; and Mrs Barbara Wilson, the Company's Human Resources Director. Mr McCoag did not dispute the claim against him and he did not give evidence.

13. On the basis of that oral evidence and the documents to which the witnesses referred it, the Tribunal made the following findings on the allegations Mr Atkinson made.

Mr Beardsell's comment

14. In his evidence, Mr Atkinson said that he raised Mr McCoag's comment informally with Mr Beardsell, who said that he would speak to Mr McCoag but that Mr Atkinson should "expect some flack back". In contrast, in his evidence Mr Beardsell confirmed that he was absolutely certain that he did not say this.

15. The Tribunal prefers Mr Beardsell's evidence for several reasons. It was Mr Beardsell's uncontested evidence that he asked Mr Atkinson if he wanted to put his complaint in writing and Mr Atkinson said that he did not. Mr Beardsell then pushed Mr Atkinson on this, and mentioned the Company's procedure for investigating such matters. That is not consistent with Mr Beardsell trying to discourage Mr Atkinson from making a complaint. Even though Mr Atkinson said he did not want to put his complaint in writing, Mr Beardsell talked to Mr Noakes the following day, to ask him what he knew about Mr McCoag's comment. Again, a manager who wanted to discourage a complaint was unlikely to have

been proactive in that way. Further, Mr Atkinson and Mr Beardsell agreed in their evidence that they had a good and supportive relationship. Mr Beardsell had in the past supported Mr Atkinson in making a complaint to the police after he was the subject of a racially aggravated assault. Given Mr Beardsell's support for Mr Atkinson in the past, the Tribunal found it unlikely that he would want to discourage Mr Atkinson from making a complaint on this occasion. Mr Beardsell's alleged comment was not raised in Mr Atkinson's grievance email or in his letter of resignation. The Tribunal was satisfied that Mr Atkinson did not raise it in his grievance meeting with Mrs Atkinson either: the notes of that meeting were not a verbatim account of what was said, but the Tribunal would expect there to be some reference to Mr Atkinson raising Mr Beardsell's comment, if he had in fact made it. Mr Atkinson was sent these notes to check and amend and he made no amendment to say that he had raised this particular issue.

16. In summary, the Tribunal is satisfied that Mr Beardsell did not make the alleged comment.

Comment at the grievance meeting

17. Mrs Atkinson, supported by Ms Guerin, Senior HR Business Partner, met Mr Atkinson on 27 May 2016 to talk about his grievance. In his witness statement, Mr Atkinson said that "it was indicated to me that the matter was not considered to be gross misconduct". He did not say who made the indication or what words were used. It was only during cross-examination that he said that he had asked Mrs Atkinson whether they would see Mr McCoag's comment as misconduct or gross misconduct and Mrs Atkinson replied that it was misconduct. In contrast, Mrs Atkinson's evidence was that no indication was given to Mr Atkinson in the meeting that Mr McCoag's comments were not gross misconduct.

18. The Tribunal prefers Mrs Atkinson's evidence for several reasons. Mrs Atkinson has been a senior manager for over 25 years and has conducted many grievance hearings. During the meeting on 27 May she was supported by a senior HR adviser. It is inherently unlikely that she would have said at an initial interview with a person raising a grievance that the conduct about which they were complaining was not gross misconduct. Her role was to investigate the grievance; another manager, who dealt with any resultant disciplinary proceedings, would be making the decision as to whether it was in fact gross misconduct. In any event, all of the documentary evidence relating to the disciplinary process involving Mr McCoag that resulted from Mr Atkinson's grievance indicates that the Company viewed his comment as potential gross misconduct. The Company's disciplinary procedure provides that an employee who is alleged to have been guilty of gross misconduct "should" be suspended, pending investigation. Mrs Atkinson considered whether to suspend Mr McCoag. She would not have been doing so had she not considered his comments to be potential gross misconduct. That is another reason why it was unlikely that she would have indicated to Mr Atkinson that Mr McCoag's comment was not gross misconduct.

19. In summary, the Tribunal is satisfied that Mr Atkinson was not told at the meeting on 27 May that Mr McCoag's comment was not considered to be

gross misconduct.

Information about the outcome of Mr McCoag's disciplinary

20. When writing to Mr Atkinson with the outcome of her investigation, Mrs Atkinson confirmed that Mr McCoag was to be referred to a formal disciplinary hearing because of his comment, but the outcome of that process would be confidential. She added: "In regards this point the Company now considers this issue closed." In his evidence to the Tribunal, Mr Atkinson accepted that he was always aware that the Company did not intend to inform him of Mr McCoag's disciplinary outcome.

21. On 13 July 2016 Mrs Atkinson and Ms Guerin met Mr Atkinson to tell him the outcome of his grievance, and Ms Guerin told Mr Atkinson that either Mrs Atkinson or the disciplining officer would give Mr Atkinson feedback following Mr McCoag's disciplinary. On 28 July, in an email to Mrs Atkinson, Mr Atkinson acknowledged that he had been told the outcome would not be shared with him but he would be told when the disciplinary process had been completed. Mrs Atkinson replied the same day to confirm that she believed the disciplinary process was over, but there were some actions that needed to be followed up on, including a suggested meeting between Mr Atkinson and Mrs Wilson to see how the Company could support him further. In fact, the disciplinary process had only just been concluded: Mr Atterton, who dealt with Mr McCoag's disciplinary hearing, sent Mr McCoag a letter confirming his decision to impose a final written warning on 26 July.

22. The Tribunal saw no evidence that Mrs Atkinson or Ms Guerin failed to engage proactively or appropriately with Mr Atkinson by failing to notify him of the outcome of the disciplinary process against Mr McCoag. The Company's position, of which Mr Atkinson was aware, was that he would not be told the outcome. The Tribunal accepts that the Company had reasonable and proper cause for this position, namely, that that information was confidential to the disciplined employee. Mr Atkinson said that the Company's argument that it needed to maintain the confidentiality of the disciplinary outcome was undermined by the fact that it had informed Perenco of the result of the disciplinary process against another employee, Mr Irving. (The circumstances of Mr Irving's case are dealt with further below.) The Tribunal accepts that the Company did this in order to address the concerns of an important client about Mr Irving's behaviour towards its own employee. The Tribunal heard no evidence to indicate that the Company routinely departed from the principle of confidentiality.

23. There may have been a very short delay between Mr McCoag's disciplinary process having been completed and Mr Atkinson being told it had ended, but that was nowhere sufficient to amount to conduct likely, objectively assessed, to destroy the relationship of trust and confidence between the Company and Mr Atkinson, particularly when Mrs Atkinson at the same time informed him that the Company intended to follow up on the disciplinary process by discussing what support it could give to Mr Atkinson.

24. In summary, the Tribunal is satisfied that Mrs Atkinson and Ms Guerin engaged proactively and appropriately with Mr Atkinson in the conduct of the grievance investigation. Further, there was no evidence from which the Tribunal could reasonably infer that Mrs Atkinson and Ms Guerin's failure to tell Mr Atkinson immediately that Mr McCoag's disciplinary process had been completed was in any way because of or related to the fact that the grievance that had led to it involved a racial comment.

Conduct of the grievance and disciplinary processes

25. Mr Atkinson's allegation that the Company had treated his complaint about racially abusive language less seriously than it had treated the complaint of abusive language by Mr Irving was not supported by the evidence. The oral evidence of Mr Noakes, who dealt with Mr Irving's disciplinary hearing, and Mr Beardsell, who dealt with his appeal against dismissal, was fully supported by the documentary evidence and established the following relevant facts about Mr Irving's case.

26. Mr Irving was subject to a disciplinary process because he had said to a Perenco team leader: "Who the fuck said we couldn't have a tea break?" Mr Noakes's initial decision was to impose a final written warning on Mr Irving, mindful of the fact that, although Mr Irving had a history of unsatisfactory behaviour, this had never been formally addressed with him through a disciplinary process. Perenco would not, however, have Mr Irving back working on any of their projects and the Company tried to find Mr Irving work with another client. When no work could be found, Mr Irving was dismissed. He appealed against his dismissal and the Company continued to try to find other work for him pending the hearing of his appeal. Mr Atkinson took part in those efforts.

27. By the time Mr Irving's appeal hearing was eventually held, the Company had work to offer him but this was "ad hoc" work, rather than the "core crew" work with Perenco that he had been employed on before he was dismissed, and he did not find that offer acceptable. As a result, he entered into a settlement agreement with the Company relating to the termination of his employment. His dismissal was therefore not because the Company viewed his comments as justifying dismissal in all the circumstances, but because the client with whom he had been working refused to have him back and the Company could not find other work for him. By the time of the appeal hearing, there was work available but Mr Irving preferred to enter into a settlement agreement.

28. There were so many differences between the circumstances of Mr Irving's case and that of Mr McCoag that the Tribunal found it inappropriate to draw any inferences from the different steps that the Company had taken to deal with them. In any event, Mr Noakes's initial decision had been to impose a final written warning on Mr Irving, the same disciplinary sanction chosen by Mr Atterton in relation to Mr McCoag's comment.

29. There were no other facts that would support an inference that Mr Atterton's decision to impose a final written warning on Mr McCoag rather than dismiss him was in any way because of or related to the racial nature of his comment. The Tribunal did not hear oral evidence from Mr

Atterton, but it did have the reasoned letter that he sent to Mr McCoag notifying him of his decision. He said: "The reason I have decided not to dismiss you for gross misconduct is based on the context in which the comment was made, as well as your immediate attempts to rectify the situation. I have also taken into account your previous record with Cape." The Tribunal is satisfied that the reference to "context" relates to the fact that the abusive language was not directed at Mr Atkinson, the reference to "attempts to rectify the situation" refers to Mr Atterton's conclusion that Mr McCoag had apologised for his comments and the reference to "your previous record with Cape" referred to Mr McCoag's previous clean disciplinary record.

30. Mr Atterton had substantial evidence before him to justify his conclusion that Mr McCoag had apologised for his comment. At their interviews during the course of Mrs Atkinson's investigation of the grievance, Mr McCoag and the other two employees who had been part of the conversation, Mr Bolton and Mr Long, all said that when Mr Atkinson had challenged Mr McCoag about his comment, he had immediately apologised to Mr Atkinson. Mr McCoag said he had telephoned Mr Atkinson again first thing the following morning to apologise again and Mr Noakes and Mr Bolton said that Mr McCoag had told them that he intended to do that or had done that. Mr Atkinson himself accepted that Mr McCoag had impliedly acknowledged immediately after making the comment that what he had said was inappropriate and offensive and had expressly apologised to Mr Atkinson for making the comment a couple of days later.

31. Mr Atkinson alleged that the Company's decision not to suspend Mr McCoag during the course of the investigation of his grievance established that it did not view his conduct as gross misconduct. The Tribunal does not accept that. The Company's disciplinary procedure provides for suspension in cases of alleged gross misconduct. Mrs Wilson accepted in her evidence that failing to suspend Mr McCoag breached this provision (although this did not in itself breach the express terms of Mr Atkinson's contract, as his written particulars of employment confirmed that the Company's disciplinary procedure did not form part of his contract of employment).

32. Mrs Wilson's evidence on why she did not advise that Mr McCoag be suspended was unconvincing. She appeared to consider that there was no reason to suspend because there was a two-week delay between the comment being made and Mr Atkinson's grievance. The Tribunal does not consider that a simple passage of time provides a justification for a decision not to suspend. She also said that the case was "complicated" and that the Company needed to understand the complaint and what had happened. The Tribunal is unclear what was "complicated", since the Company already knew what Mr McCoag had admitted he had said.

33. Mrs Wilson was not, however, in charge of investigating Mr Atkinson's complaint, Mrs Atkinson was. Mrs Atkinson took the view that suspension was not justified in this case and would cause unnecessary disruption to the business. Mr Atkinson and Mr McCoag worked as part of the same team but were based in different office locations, in Hull and Great Yarmouth respectively. Although Mrs Atkinson did not consult with Mr

Atkinson in advance about whether he could continue to work with Mr McCoag whilst the investigation took place, she asked Mr Noakes and Mr Beardsell to ensure there was limited contact between Mr Atkinson and Mr McCoag and that they did not meet face to face. Ms Guerin asked Mr Atkinson during the course of their investigatory interview with him whether he felt OK to be in work with Mr McCoag and he did not say he was not. In his initial email of grievance Mr Atkinson said that he did not want Mr McCoag to speak to him about the subject matter of his grievance; he did not say that he did not want to have any dealings with Mr McCoag at all. In his evidence to the Tribunal, Mr Atkinson accepted that Mr McCoag was courteous and professional in all his dealings with him, whether by email or by telephone, in the time after he lodged his grievance. On one occasion Mr Atkinson was due to be taking part in a meeting by Skype that Mr McCoag was also due to attend and he asked Mr Beardsell if he could be excused attendance. Mr Beardsell granted that request immediately. At the grievance outcome meeting he had with Mrs Atkinson, Mr Atkinson confirmed that he had been asked to raise any concerns about contact with Mr McCoag as they occurred. When Mrs Atkinson proposed that Mr McCoag go to someone other than Mr Atkinson for technical advice, to avoid contact with him, Mr Atkinson confirmed that he was "fine" with that.

34. The Tribunal accepts that the Company's disciplinary procedure provides for suspension during the investigatory stage in every case of alleged gross misconduct. However, as the ACAS Code on disciplinary procedures makes clear, suspension is not a form of disciplinary sanction, to be imposed automatically in cases of serious misconduct. It is a protective step taken when necessary, for example, to ensure no further incidents of misconduct occur, or where there are grounds to believe that an employee might interfere with witnesses or other evidence if allowed to remain at work. In this case the Company had reasonable and proper cause for its decision not to suspend Mr McCoag, namely that there were no grounds for believing that Mr Atkinson would be exposed to further misconduct by Mr McCoag during the course of the investigation and suspending Mr McCoag would therefore cause unnecessary disruption to the business. Further, there were no facts from which the Tribunal could reasonably infer that the decision not to suspend Mr McCoag was in any way because of or related to the fact that his comment was racial in nature or because the managers involved were reluctant to engage with Mr Atkinson's complaint because it involved a racial comment. The Tribunal notes that, while Mrs Wilson accepted that the Company had acted outside its procedure in not suspending Mr McCoag, it was she who, on Mr Atkinson's own evidence, encouraged him to pursue a formal complaint about Mr McCoag's behaviour.

35. Mr Atkinson alleged that the managers involved in the grievance process had failed to provide as much support to him as they had to Mr McCoag, indicating that they were not taking his complaint seriously. The Tribunal does not accept this. The Company did support Mr McCoag, which was not unreasonable in circumstances where he had admitted he had made the comment and expressed his regret and distress at having made it. The Company also, however, supported Mr Atkinson. Mrs Atkinson took steps to ensure that Mr Atkinson's contact with Mr McCoag was

minimised. When at the grievance outcome meeting Mr Atkinson said that he had been having a horrendous time and was having to take medication to sleep at night, Mrs Atkinson said that it was important he looked after himself. The Company provides access to an employee assistance programme for employees who are going through difficult times. The Company will normally fund six sessions. When Mr Atkinson told Mrs Atkinson that he had found the counselling very supportive, she asked him to contact Ms Guerin so that she could consider authorising additional sessions for him. In the letter Mrs Atkinson sent Mr Atkinson confirming the outcome of his grievance, she acknowledged that this had been a difficult and distressing time for Mr Atkinson. Mrs Atkinson clearly did provide support to Mr Atkinson throughout the grievance process. The Tribunal also notes that Mr Atkinson had access to Mr Beardsell throughout, with whom he had a good and supportive relationship.

36. During the course of his interview with Mrs Atkinson, Mr McCoag spoke to her about his belief that Mr Atkinson was overly sensitive about comments in the workplace, which he perceived to be racist when they were not, and gave her some examples. Other witnesses also raised this issue with her and mentioned these examples. The Tribunal makes no findings of fact in relation to these other comments and the context in which they were made, having heard no direct evidence on them. It accepts that it is possible that one or more of these comments were racially offensive but equally possible that one or more of them could not reasonably bear that interpretation. In her investigation report, submitted to Mr Atterton, under a heading "Mitigating factors/other considerations", she noted: "None of the employees interviewed have undergone equality or diversity training" and: "Several of the witnesses have said that they feel as if they have to 'walk on eggshells' when Raymond is about as they are worried he may take what they say the wrong way. Several examples have been given to show why they feel this way."

37. The Tribunal was concerned to know why these historical incidents and Mr Atkinson's perceived over-sensitivity about them were mentioned in Mrs Atkinson's investigation report, when the subject of her investigation was Mr McCoag's comment, which was clearly and unequivocally racially offensive. Mrs Atkinson's explanation was that she thought it was important to identify that tensions had arisen from comments in the workplace, which could have been addressed had the workforce had equality and diversity training. The Tribunal accepts her evidence, which was supported by the fact that one of the action points agreed by Mrs Wilson and Ms Guerin arising from Mr Atkinson's grievance was to conduct dignity at work training across all regions. The Tribunal notes that such training would benefit the entire workforce, and would also have benefited Mr Atkinson had he remained with the Company.

38. In summary, the Tribunal found that the Company's conduct of the grievance process was thorough and objective and its decision to impose a final written warning on Mr McCoag was based on reasons supported by the evidence before the disciplinary manager. There were no facts to support an inference that the conduct of either the grievance process or the disciplinary process was because of or related to the racial nature of Mr McCoag's comment.

The health and safety incident

39. Mr Atkinson said that the Company had compromised his reputation and integrity by telling him that he should not notify Perenco of a breach of safety protocols that had occurred on its oil rig.

40. The breach came to light on 22 May 2016 when a Perenco employee sent Mr Atkinson photographs of an individual for whom the Company was responsible working at height carrying out a piece of work on a Perenco rig some six weeks earlier. There should have been a Rope Access Method Statement and Rescue Plan (RAMS) covering this task, setting out the work involved, the hazards, the risks in involved and the necessary control measures, including the rescue plan. Mr Atkinson identified that no such document existed. He emailed Mr Noakes pointing out that if there had been an accident while the work was being carried out, the Company would have been in serious trouble with SNS Auditors (an external contractor employed by Perenco as a technical adviser to help it manage rope access procedures on its assets), Perenco and the Health and Safety Executive. He asked Mr Noakes: "Should we bring this to the attention of SNS Auditors and Perenco just yet or wait until we have carried out an investigation."

41. Mr Badcock, a Company Supervisor on the rig, confirmed that he had discussed the matter with Mr Barry Tibble, the Perenco Offshore Project Manager, and Mr Tibble did not feel it warranted any further input from Perenco. Mr Noakes confirmed that the matter should be dealt with by an internal investigation, which Mr Atkinson then conducted.

42. In cross-examination, Mr Atkinson accepted that Mr Noakes had not expressly told him that he could not report the incident to Perenco. Mr Atkinson also accepted that he had not said to Mr Noakes or Mr Beardsell that they needed to go to Perenco about the incident. In the course of cross-examination, Mr Atkinson said that on 28 July, the day he resigned, he had a conversation with Mr Noakes in which Mr Noakes told him what disciplinary action had been taken against the employees involved in the incident. According to Mr Atkinson, during this conversation he asked Mr Noakes "Are we now going to tell the client?" and Mr Noakes replied, "No, we are going to keep it internal." Mr Noakes denied that Mr Atkinson had ever asked him this question, and the Tribunal prefers his evidence to that of Mr Atkinson. If this exchange had happened, the Tribunal would have expected to see it mentioned in Mr Atkinson's witness statements, or in his letter of resignation, which he wrote on the same day as the alleged exchange.

43. Mr Atkinson accepted that he knew at the time that Mr Badcock had spoken to Mr Tibble, who had agreed that Perenco did not need to have any input. Mr Atkinson asserted that Mr Tibble did not have the authority to make that decision; the manager authorised to make that decision was Mr Ian Moulton and it was therefore him who had to be informed.

44. The Tribunal did not accept that that was the case. Mr Noakes's unchallenged evidence was that as Perenco's Offshore Project Manager, Mr Tibble was responsible for all that happened on the rig, including rope access work. He had authority to raise a Management of Incident Report

(MOI), to be investigated through Perenco's own procedures rather than by the Company, if he considered that the incident merited it. Mr Moulton is Deputy Operations Manager for Perenco for the whole of the UK with special responsibility for rope access. There was no evidence before the Tribunal to support Mr Atkinson's position that Mr Moulton was the only person to whom the Company could properly have reported the incident.

45. In summary, Mr Atkinson's case was that he was told that he should not inform Perenco about a serious breach of health and safety procedures, leaving his reputation and integrity at risk. The Tribunal is satisfied from the oral evidence it heard and the documentation, including Mr Atkinson's own emails, that a senior manager within Perenco had in fact been informed about the incident and was satisfied that the matter should be dealt with internally by the Company. Mr Atkinson had conducted the internal investigation without expressing any concerns about it. The Company's actions in response to the incident in no way put Mr Atkinson's reputation and integrity at risk, even taking into account his special health and safety responsibilities as Rope Access Regional Manager, and were not capable of amounting to, or contributing towards, a breach of trust and confidence.

Reason for resignation

46. The Tribunal is satisfied that the reason Mr Atkinson resigned was his realisation that Mr McCoag had not been dismissed for the comment he made. It reaches this conclusion because of Mr Atkinson's clear expectation, first expressed at his initial investigation meeting with Mrs Atkinson, that Mr McCoag would be dismissed for what he had said, and the promptness with which he resigned when he realised this had not happened. Within three hours of being told that Mr McCoag's disciplinary proceedings had been concluded, Mr Atkinson sent his resignation email. That email made clear how disappointed Mr Atkinson was that Mr McCoag had not been dismissed. It opened with these words: "I would like to take my last opportunity to express my disappointment in the stance Cape PLC has taken towards an employee who has committed an unlawful act and criminal offence while representing Cape PLC as an employee."

47. The Tribunal does not accept, for reasons already explained, that the decision not to dismiss Mr McCoag amounted to an act of discrimination, nor does it accept that it otherwise involved a breach of the implied term of mutual trust and confidence. For the reasons set out above, the Tribunal accepts that Mr Atterton's decision was rational and based on the evidence in front of him. Mr Atkinson did not, therefore, resign in response to a fundamental breach of contract by the Company.

Summary of conclusions and remedy

48. The sole allegation of discrimination that the Tribunal upholds relates to Mr McCoag's comments on 4 May 2016. For that act of harassment, the Tribunal orders the Company to pay Mr Atkinson the agreed sum of £8,000 in compensation, covering its own liability and that of Mr McCoag. All the other allegations of discrimination fail because the Tribunal is satisfied on the evidence it has heard that either they did not happen as

Mr Atkinson alleged or they happened but were not because of or related to race.

49. In relation to the unfair dismissal claim, the Tribunal is satisfied that the Company's actions of which Mr Atkinson complains either did not happen as he alleged, or they happened but were for a reasonable and proper cause and/or were not likely, objectively assessed, to destroy or seriously damage the relationship of trust and confidence between the Company and Mr Atkinson. More specifically, the Tribunal is satisfied that the reason for Mr Atkinson's resignation was the decision not to dismiss Mr McCoag, which was not a breach of trust and confidence. As Mr Atkinson has not established that he was dismissed, his claim of unfair dismissal also fails and is dismissed.

Employment Judge Cox

Date: 12 February 2018