Case No: 2303096/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr D Davis

Respondent: Clarion Housing Group Limited

Heard at: Ashford

On: 14th, 15th, 16th, and 17th January 2019

Before: Employment Judge Pritchard
Members: Mr G Anderson
Mr D Newlyn

Representation
Claimant: In person
Respondent: Mr T Gillie, counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

1 The Claimant's claims that he was unfairly dismissed under sections 98 and/or 103A of the Employment Rights Act 1996 are not well-founded and are accordingly dismissed.

2 The Claimant's claim that he was directly discriminated against because of his race is dismissed.

3 The Claimant's claim that he was subjected to a detriment for having made a public interest disclosure is dismissed.

4 The Claimant's claim for holiday pay is dismissed.

REASONS

1. The Claimant claimed direct race discrimination, unfair dismissal ("automatic" unfair dismissal for having blown the whistle and "ordinary" unfair dismissal), detriment for having blown the whistle, and holiday pay. The Respondent resisted the claims.

2. The hearing proceeded on the basis that the Tribunal would consider

liability only at this stage and hold a further hearing to consider remedy if the Claimant were to succeed in any of his claims. The Tribunal heard evidence from the Claimant and from the Respondent's witnesses: Philip Miles (Director of Community Investment at relevant times); Helen Parker (Head of Employee Relations); Andrew Goddard (Operations Manager); Terry Durling (Estate Manager); David Beckford (Head of Estate Services); and Susan Clinton (Head of Housing). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing, the parties made oral submissions, Mr Gillie amplifying his comprehensive written submissions. The Tribunal heard evidence and submissions over the first three days using the remainder of the time to deliberate and prepare this decision.

The issues

3. At the outset of the hearing the parties agreed that the following issues prepared by the Respondent in pursuance of a Case Management Order issued by Employment Judge Corrigan were the issues in the case:

Unfair dismissal

4. The parties agree that the Claimant was dismissed.

5. What was the reason for the Claimant's dismissal? The Respondent submits that the reason for the dismissal was misconduct and therefore a potentially fair reason under section 98 of the Employment Rights Act 1996.

6. If the Claimant did make a protected disclosure (see below) was the protected disclosure the reason or the principal reason for the Claimant's dismissal such that the dismissal was automatically unfair under section 103A of the Employment Rights Act 1996?

7. Was the Claimant's dismissal an act of less favourable treatment because of his race (see below)? The Claimant clarified during the course of the hearing that he describes himself as black.

8. If the dismissal was for a potentially fair reason:

    8.1. Did the Respondent act reasonably in all the circumstances in treating the Claimant's misconduct as sufficiently serious to justify his dismissal under section 98(4) of the Employment Rights Act 1996?

    8.2. Did the Respondent have a genuine belief based on reasonable grounds that the Claimant had committed misconduct?

    8.3. Did the Respondent conduct a reasonable investigation?

9. Was the Respondent's decision to dismiss the Claimant within the range of reasonable responses of a reasonable employer?

10. Did the Respondent follow a fair procedure? The Claimant submits that the

procedure was unfair because the same person chaired the disciplinary hearing held on 31 August 2017 (which resulted in a Final Written Warning) and the disciplinary hearing held on 20 October 2017 (which resulted in the Claimant's dismissal). The Claimant alleges that this was a breach of the Respondent's policies and the ACAS Code.

11. If the procedure was unfair, what is the likelihood that the Claimant would have been dismissed in any event had a fair procedure been followed?

12. Did the Claimant's actions cause or contribute to his dismissal?

Discrimination

13. Did the following alleged acts take place?

    13.1. The Respondent relocating the Claimant to other teams: once in 2015, and twice (once on a temporary basis and then on a permanent basis) in 2016;

    13.2. The Respondent failing to pay the Claimant relocation/travel costs;

    13.3. Ms Helen Parker sending the Claimant an email on 17 August 2017;

    13.4. The Respondent inviting the Claimant to a disciplinary hearing which was held on 31 August 2017 which led to a Final Written Warning which resulted in the Claimant not being entitled to a future pay award or bonus;

    13.5. Mr Terry Durling unscrewing the Claimant's chair in early October 2017;

    13.6. The Respondent inviting the Claimant to a disciplinary hearing which was held on 20 October 2017; and/or

    13.7. The Claimant being dismissed?

14. If so, did each act constitute an act of less favourable treatment because of the Claimant's race?

    14.1. For the allegation at sub-paragraph 13.7 above, the Claimant relies on an actual comparator, Mr Terry Durling, a white male. Otherwise the Claimant relies on hypothetical white male comparators.

    14.2. Are all of the alleged complaints of discrimination in time? Has the Claimant proved there was a continuing course of discriminatory conduct? If not, would it be just and equitable to extend time?

Whistleblowing detriments

    14.3. Did the Claimant disclose information to the Respondent that he reasonably believed was made in the public interest and tended to show that the health and safety of any individual has been, is being or is likely to be endangered?

14.4. The Claimant is relying on the following alleged disclosure:

14.4.1. Information contained in the Employee Accident Report Form he completed dated 9 October 2017;

14.5. If the Claimant made a protected disclosure, was he subjected to the following alleged treatment as a result and did the treatment amount to a detriment (section 47B of the Employment Rights Act 1996)?

14.5.1. Being invited to a disciplinary hearing which was held on 20 October 2017 and subsequently being dismissed.

Unpaid holiday pay

14.6. Was the Claimant paid correctly on termination in respect of his accrued statutory holiday pay? If not, what is he owed?

Findings of fact

15. The Respondent is a provider of social housing responsible for a number of housing estates. The Respondent's workforce is ethnically diverse and comprises approximately 4,000 individuals. The Claimant commenced employment as a Caretaker with Affinity Sutton in November 2014. His employment transferred to the Respondent under the Transfer of Undertakings Regulations at the end of 2016. Among other things, his duties included cleaning, sweeping and putting bins out for collection.

16. The Claimant's contract of employment provided, among other things:

You agree to work to the best of your ability and to use your best endeavours to promote the interests and reputation of Affinity Sutton. At no time will you do anything that will or may bring Affinity Sutton into disrepute.

Your normal place of work will be Unit 1, Ashgrove Industrial Estate, Ashgrove Road, Bromley, Kent BR1 4JW. You will be required to work from time to time at different locations and may be required to transfer to another place of work either temporarily or indefinitely. You will be given reasonable notice if you are required to transfer.

During the first and final years of employment your holiday entitlement will be accrued on a prorated basis.

In circumstances where you are dismissed you will not be entitled to a payment in lieu of any holiday in excess of your entitlement under the Working Time Regulations which you have not taken

17. The contract made no provision for the payment of expenses or travel costs that might be incurred should an employee be transferred to another place of work under the contract. Although the Respondent might pay such expenses or costs on a discretionary basis should an employee be

transferred outside the borough in which they work, the Respondent will not give consideration to making such payments when the transfer is within the borough in which they work.

18. Initially the Claimant was employed in Team 6 working at three of the Respondent's residential estates in Orpington within the London Borough of Bromley ("the Borough"). The Respondent's greatest concentration of stock is situated in the Borough and there is a frequent movement of staff within it.

19. In July 2015, the Respondent received a complaint that the Claimant had made offensive comments to a tenant about being in receipt of state benefits. The complainant's mother said she was concerned about the Claimant's rudeness, offensiveness and "aggressiveness". The Respondent considered this to be a disciplinary matter and the Claimant was required to attend a disciplinary meeting with David Beckford in August 2015. The Claimant admitted he had made a comment to the tenant about her being on benefits but that it was in response to her racial abuse against him. Mr Beckford interviewed others on the estate: one witness, who did not witness the incident, said the tenant in question was known to use abusive language and that the Claimant was a "very nice gentleman who is polite and kind to all"; however, another tenant, who had overheard parts of the altercation, said that both parties were as bad as each other and did not think the tenant had been racially abusive. Mr Beckford reconvened the disciplinary hearing and issued the Claimant with a verbal warning to remain on the Claimant's personnel file for six months. This meant that, under the Respondent's policy, the Claimant would not be entitled to any bonus or pay award while the warning remained live.

20. Mr Beckford told the Tribunal that when dealing with disciplinary matters he will make a fair assessment of the situation and will not hesitate to carry out further investigation if necessary. The documents prepared by Mr Beckford, during this disciplinary matter and the others referred to below, clearly indicate his thoroughness. He was a most impressive and credible witness.

21. The Claimant appealed against the imposition of the verbal warning and, following an appeal hearing with Susan Clinton, the sanction was reduced to an informal warning such that there would be no impact on any potential bonus or pay award.

22. In October 2015, the Claimant was subjected to what can be described as a racially aggravated assault and racial abuse while carrying out his duties. Three of the alleged assailants, who lived in the flat above the Claimant's storeroom, were arrested but released without charge.

23. The Respondent gave the Claimant the option to move to a different work location and he confirmed that he would be prepared to move to another team or another area. Upon discussion, the Claimant agreed to move to the Cotmandene area within the Borough, on a temporary basis.

24. On 20 November 2015, the Claimant was involved in an incident while putting bins out in the Cotmandene area. A van driver complained to the Respondent that the Claimant had used offensive language and shown

aggression while he had been sitting in his van. Andrew Goddard carried out an investigation during which the Claimant denied having used offensive language and said that the driver's van had been blocking his way. An independent witness supported the driver's version of events. This led to the Claimant being required to attend a disciplinary meeting with David Beckford in January 2016. The Claimant made counter allegations against the van driver. However, Mr Beckford was not convinced that the Claimant had not made inappropriate comments and that he provoked the situation. He issued the Claimant with a verbal warning to remain on his file for six months.

25. The Claimant appealed against the imposition of the verbal warning. Susan Clinton chaired the appeal meeting in February 2016. Following further investigation, Ms Clinton informed the Claimant that his appeal had been unsuccessful. Ms Clinton was of the view that the Claimant had not given a consistent version of events and took into account the fact that an independent witness had corroborated the driver's complaint.

26. The Tribunal is satisfied that the investigation and disciplinary process was fair and thorough.

27. In June 2016 the Claimant was involved in a further incident in the Cotmandene area when he was physically assaulted by a resident's boyfriend. Although the police were called, they took no action. The Claimant moved by agreement to work in the Beckenham / Penge area in Team 3 on 15 June 2016 on a temporary basis to cover staff absence.

28. Dorothy Andrews, Operations Manager, met with the Claimant and discussed a vacancy which had arisen in Team 1 where a Caretaker was required to work at the Respondent's estates at Crystal Palace within the Borough. Dorothy Andrews informed the Claimant that it was "highly unlikely" that the Respondent would pay additional travel costs. The Claimant accepted the move to Team 1.

29. At a meeting on 1 July 2016, Dorothy Andrews told the Claimant that the Respondent would not pay relocation expenses but that he could apply for an interest free loan with which to purchase a train season ticket. The Claimant subsequently applied for the loan which was approved. The Claimant did not use the loan to purchase a season ticket. In January 2017, the Claimant wrote to the Respondent's Chief Executive complaining about the cost of travelling to Crystal Palace, the move having been prompted by a physical assault at work. He stated that the deductions from his salary to reimburse the loan was leaving him little to live on. He complained that his requests for a relocation package had been refused.

30. Susan Clinton replied on behalf of the Chief Executive. Having set out a summary of the Claimant's employment, as described above, she said:

> *Shortly after this hearing, a fourth altercation occurred and for safety reasons with your consent you were transferred to another estate in the Bromley area.*

Ms Clinton referred to the mobility clause contained in the Claimant's contract of employment and informed the Claimant that he was not entitled

to relocation costs or additional travel expenses.

31. The Claimant remained dissatisfied and again wrote to the Chief Executive on 30 January 2017. Among other things, he maintained that he had not consented to the move to Crystal Palace and that he had been moved there by Dorothy Andrews and David Beckford for his own safety. Helen Parker replied on the Chief Executive's behalf informing the Claimant that, having discussed the matter with David Beckford, the Claimant had asked to be moved from the Orpington estates and accepted the transfer to Crystal Palace. Ms Parker noted that there did not appear to be a significant difference in terms of time and travel between the locations. She informed the Claimant that he was not entitled to relocation costs or additional travel expenses.

32. The Claimant still remained dissatisfied and again wrote to the Chief Executive on 20 February 2017. The Respondent decided to deal with the Claimant's complaint under its formal grievance procedure. Matt Parsonage, Head of Neighbourhood Investment, held a grievance hearing on 23 March 2017. By letter dated 3 April 2017, Mr Parsonage informed the Claimant of his decision. Among other things, Mr Parsonage noted that the Claimant's contract of employment contained a mobility clause and that the Claimant had moved employment within the Borough. Mr Parsonage concluded that the Claimant was not entitled to travel expenses and his appeal was not upheld.

33. Mr Parsonage was also concerned that the Claimant had been granted a season ticket loan from 1 August 2016 to 31 July 2017 but drove to work and used the money for fuel. This was to be investigated separately.

34. The Claimant appealed against Mr Parsonage's decision. Philip Miles held a grievance appeal meeting on 25 April 2017. The Claimant claimed that before his move to Crystal Palace he had been spending £100 per month on petrol but this had now risen to £400. By letter dated 9 May 2017, Mr Miles informed the Claimant that his appeal had been unsuccessful. It is clear that Mr Miles had given the Claimant's grievance careful consideration. Mr Miles concluded that the Claimant was not entitled to travel expenses and failed to understand the Claimant's contention that he was spending an extra £300 per month on petrol given that the extra distance was only 4.3 miles (8.6 miles per day). With regard to the Claimant's contention that his expenses claim had been approved by his line manager, Leonard Johnson, this had been in error. The Claimant's assertion that he was unable to use the loan to purchase a season ticket because the first deduction from his wages had been made before the loan had been made was demonstrably untrue.

35. The Claimant then commenced proceedings against the Claimant in the County Court. Proceedings had been served on the Respondent at an unoccupied address and, after the County Court issued judgment in default, the Respondent made an application to set the judgment aside. (The Tribunal was informed that the Claimant had made a number of claims against the Respondent in the County Court, which had been struck out, and that the Court had issued a General Civil Restraint Order. The Tribunal was also told that the Claimant had made an application for judicial review in the High Court and that a Civil Restraint Order that

applies to some High Court proceedings had also been made against the Claimant).

36. In response to a letter dated 7 August 2017 from the Claimant to Philip Miles demanding a further four months' travel costs in the sum of £1,200, by email dated 17 August 2017, Helen Parker replied to the Claimant follows:

> *Dear Mr Davis*
>
> *I am writing to acknowledge receipt of your letter dated 7 August 2017 which was addressed to Mr Philip Miles and sent to 6 More London, Tooley Street.*
>
> *As previously advised in my letter of 7 July 2017, the Clarion offices at 6 More London are closed due to refurbishment and therefore this correspondence has only just been picked up and forwarded to Jenny Stark and myself. As requested could you please send any future correspondence to the Head of Employee Relations, ….. and also email it to …..*
>
> *We will respond to your latest letter in detail next week as we are both out of the office. However, you already appear to have lodged two claims in respect of this matter, claim [number] and [number], and these are still waiting to be considered by the court. I would suggest that you wait until these court proceedings have been concluded before submitting an additional claim, as to raise another claim, for the same issue, at this stage, would be frivolous duplication.*
>
> *Your sincerely*
>
> *Helen Parker*

37. The Claimant replied the following day as follows:

> *Helen Parker, you are an idiotic and stupid individual. Do not send me email of this kind type again.*
>
> *How dare you dictate to me as to how I must conduct my litigation and court proceedings against the Clarion Group.*
>
> *Anymore letter of this type and you will have serious problems from me.*
>
> *I hope all the above are quite clear.*
>
> *Donovan Davis*

38. Ms Parker, particularly concerned about the implied threat in the third sentence, forwarded the Claimant's email to David Beckford asking for his views. Mr Beckford thought the Claimant's conduct unsatisfactory and that the matter should be escalated to a disciplinary hearing.

39. By letter dated 23 August 2017, the Claimant was required to attend a disciplinary meeting with Mr Beckford on 31 August 2017. The Claimant informed the Respondent that he would not be attending the "silly" disciplinary meeting which had been arranged. Despite the Respondent writing to the Claimant to encourage him to attend the disciplinary hearing and referring the Claimant to the Disciplinary Policy Procedure, the Claimant did not attend the disciplinary meeting. Mr Beckford considered the evidence before him and concluded that the Claimant should be issued with a Final Written Warning to remain live for 12 months.

40. The Claimant did not appeal against the imposition of the Final Written Warning.

41. Concerns were raised by the the Claimant's colleagues alleging that the Claimant had been swearing, shouting and displaying aggression in relation to an issue surrounding a dustpan, and alleging that the Claimant had instructed disposal of filing cabinet containing a colleague's belongings. Andy Goddard carried out an investigation in to the issues which had been raised and held a meeting with the Claimant on 1 September 2017. Andy Goddard noted that he had concerns about the Claimant's behaviour which was becoming erratic and asked if he had any health issues or whether the Respondent's occupational health team might be able to assist. The Claimant denied any wrongdoing and said he had no health problems. Andy Goddard said he would continue to investigate.

42. Jenny Stark, Head of Employee Relations, advised Andy Goddard that the concerns about the Claimant should either be addressed at a one to one meeting or at an informal meeting. Andy Goddard held an informal meeting with the Claimant on 15 September 2017 regarding this alleged conduct. The Claimant denied the allegations. Mr Goddard informed the Claimant that any future allegations of misconduct could lead to the Claimant losing his job. The Claimant's response was that if that happened, he would take the Respondent to court.

43. On Friday 6 October 2017, Terry Durling complained to the Respondent that the Claimant had accused him of removing bolts from his chair and that the Claimant had used foul language. Mr Durling complained that the Claimant's manner made him fearful of physical assault. Mr Beckford instructed the Claimant's colleagues to stay away from the lock-up used by the Claimant. Terry Durling sent a detailed note of his complaint to Mr Beckford the same day.

44. On Monday 9 October 2017, Andy Goddard was appointed to investigate the matter. Andy Goddard interviewed Terry Durling. Mr Goddard's note records Mr Durling saying that the Claimant had been waving his arms about and being very aggressive, that his language was appalling and that he felt threatened. The note records that Terry Durling looked visibly shaken.

45. Later that day, Mr Goddard interviewed the Claimant who said that at around 8.30 in the morning of 6 October 2017 he had seen Mr Durling with an Allen key undoing the screws to his chair and that after Mr Durling had left he had refitted the screws to the chair. The Claimant also said that Terry Durling had apologised later that day. The Claimant denied using foul

language or being disrespectful towards Mr Durling. The Claimant stated that the screws had also been removed the day before causing him to fall and hurt his back. Mr Durling was further interviewed and he again denied removing screws from the Claimant's chair.

46. On the same day, the Claimant completed an Accident Report Form stating that Terry Durling had removed screws from his chair causing him to fall and bruise his back. The stated date of the incident is shown as 5 October 2017.

47. Mr Goddard further interviewed the Claimant on 10 October 2017. The Claimant denied the allegations and said that if disciplinary action was taken, he would issue court proceedings.

48. The Tribunal is required to make its own findings as to whether or not Terry Durling unscrewed the Claimant's chair which, the Claimant alleges, amounts to unlawful discrimination. The Claimant's own version of events was confused: at first, he gave the impression that he had fallen off the chair on Friday 6 October 2017: he says this in ET1 Claim Form and in his witness statement. However, in his Accident Report Form he had deleted 6 October 2017 and replaced that date with 5 October 2017 and when pressed in cross examination he said he fell off the chair on 5 October 2017.

49. Terry Durling gave clear evidence that he did not enter the lock-up on 5 October 2017 because, having arrived at the site and still sitting in his van, he received a telephone call to say his brother was seriously ill causing him to seek permission to leave immediately. This was supported by Andrew Goddard who granted the permission.

50. The Tribunal heard a heated exchange between the Claimant and Mr Durling during cross examination. On balance, the Tribunal prefers Terry Durling's evidence that he did not enter the lock up on 5 October 2017 and remove the bolts from the chair which caused the Claimant to fall from it.

51. The Claimant was required to attend a disciplinary meeting on 16 October 2017 with Mr Beckford. The Claimant failed to attend and failed to provide any notification or excuse. The meeting was postponed to allow the Claimant another chance to attend.

52. By letter dated 16 October 2017, the Claimant was required to attend a disciplinary meeting on 20 October 2017.

53. During the course of the hearing the Claimant repeatedly told the Tribunal that he had not received a copy of the letter inviting him to the re-scheduled disciplinary meeting to take place on 20 October 2017. However, in the Claimant's ET1 Claim Form, he states:

> *I was then requested to attend a disciplinary hearing on 20 October 2017, I telephoned the writer of that request to say I would not attend because this was victimisation against me…*

54. In his witness statement, the Claimant states:

> *I was later requested to attend a final disciplinary meeting on 20 October 2017 and was warned that I would be dismissed from my job*
>
> *I then telephoned the writer of the letter informing her….*

55. At the commencement of the hearing the Claimant agreed that an issue falling for determination would be whether the Claimant had been discriminated against or subject to a detriment for having made a public interest disclosure by "being invited to a disciplinary hearing which was held on 20 October 2017 and subsequently being dismissed".

56. An extract from the notes of the disciplinary hearing, which Ms Clinton said referred to the disciplinary meeting of 20 October 2017 record:

> *DD [the Claimant] reiterated that he'd told ER [Employee Relations] he wouldn't be attending because he'd had an accident at work*

57. The Tribunal has doubts about the credibility of the Claimant's evidence. As submitted by counsel, the Claimant's evidence before the Tribunal was littered with inconsistences, inaccuracies, and bald assertions. By way of an example, the Claimant asserted that an email prepared Mr Gowing (at page 191 of the bundle) was a forgery and sought to demonstrate this by suggesting to the Tribunal that different fonts had been used on the document. He also pointed to the fact that Mr Gowing had sent the email to himself. Firstly, the Tribunal was unable to discern a difference in the font on the first and second pages of the document (the Claimant asserted that the first page was in bold print) and the fact that Mr Gowing created the email on his Iphone does not lead to the conclusion that the email is a forgery.

58. The Tribunal finds it highly likely that the Claimant did receive the letter inviting him to attend the disciplinary hearing to be held on 20 October 2017.

59. The Claimant failed to attend and the meeting was held in the Claimant's absence. Mr Beckford considered all the evidence before him, noted that the Claimant had a live written warning for similar allegations of misconduct, and decided that the Claimant should be dismissed and paid in lieu of notice.

60. Mr Beckford had ascertained that the Claimant was at work that day and he decided to communicate his decision to the Claimant personally. He attended the Claimant's workplace. Mr Beckford's note prepared on 23 October 2017 records that the Claimant took the decision calmly until Mr Beckford asked for return of company property at which stage the Claimant became irate and verbally abused him.

61. The Claimant's employment ended on 20 October 2017. He contacted ACAS on 23 October 2017 and ACAS issued an Early Conciliation Certificate on the same day.

62. By letter dated 25 October 2017, the Claimant appealed against Mr Beckford's decision.

63. The Claimant presented his claim to the Tribunal on 31 October 2017.

64. Ms Clinton held the appeal hearing on 23 November 2017. Ms Clinton carried out further investigation following the appeal hearing by interviewing Terry Durling and the Claimant's line manager, Len Johnson. By letter dated 8 December 2017, Ms Clinton informed the Claimant that his appeal had been unsuccessful and set out the reasons why.

Applicable law

Time limits under the Equality Act 2010

65. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of:

    (a) the period of 3 months starting with the date of the act to which the complaint relates, or

    (b) such other period as the Tribunal thinks just and equitable.

66. Under section 123(3)

    (a) conduct extending over a period is to be treated as done at the end of the period;

    (b) failure to do something is to be treated as occurring when the person in question decided on it.

67. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:

    (a) when P does an act inconsistent with doing it; or

    (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

68. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686 the Court of Appeal held that when determining whether an act extended over a period of time (expressed in current legislation as conduct extending over a period) a Tribunal should focus on the substance of the complaints that an employer was responsible for an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably on the grounds of a protected characteristic. This will be distinct from a succession of unconnected or isolated specific acts for which time will begin to run from the date when each specific act was committed. One relevant but not conclusive factor is whether the same or different individuals were involved; see: Aziz v FDA 2010 EWCA Civ 304 CA.

69. In Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and

equitable to extend time so the exercise of the discretion is the exception rather than the rule.

70. In accordance with the guidance set out in British Coal Corporation v Keeble [1997] IRLR 336, the Tribunal might have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay; the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case. It is sufficient that all relevant factors are considered. See: Department of Constitutional Affairs v Jones [2008] IRLR 128 CA; Southwark London Borough Council v Afolabi 2003 ICR 800 CA. It was said in Aberawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 CA that factors which are almost always relevant are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing it or inhibiting it from investigating the claim while matters were fresh).

71. As identified in Miller v Ministry of Justice UKEAT/003/004/15 at paragraph 12, there are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

72. If a Claimant advances no case to support an extension of time, he is not entitled to one. However, even if there is no good reason for the delay, it might still be just and equitable to extend time. See for example: Rathakrishnan v Pizza Express Restaurants Ltd UKEAT 0073/15.

Direct discrimination

73. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his, amongst other things, by subjecting him to a detriment or by dismissing him.

74. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

75. The House of Lords has considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council’s motive, which had been benign, was besides the point. In that case the council had applied a criterion, though on the face of it gender

neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

76. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.

77. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual.

78. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see: Ahsan v Watt [2007] UKHL 51.

79. Whether there is a factual material difference between the position of a claimant and a comparator cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

80. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

81. Thus, it has been said that the Tribunal must consider a two-stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.

82. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the

Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

83. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

84. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

85. If the Claimant does not prove such facts, his or her claim will fail.

86. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

87. It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the Igen test … The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment. See London Borough of Islington v Ladele [2009] IRLR 154.

Public interest disclosures (whistleblowing)

88. Section 43A of the Employment Rights Act 1996 provides that a protected disclosure is a qualifying disclosure which is made by a worker in accordance with any sections of 43C to 43H. Section 43B provides that a qualifying disclosure includes any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show that the health or safety of any individual has been, is being or is likely to be endangered.

89. In determining whether an employee has made a qualifying disclosure, the Tribunal must decide whether or not the employee believes that the information he is disclosing meets the criterion set in one or more of the subsections of section 43B and, secondly, decide objectively, whether or not that belief is reasonable; see: Babula v Waltham Forest College [2007] IRLR 346 CA.

90. Section 43C provides, amongst other things, that a qualifying disclosure is made if the worker makes the disclosure to his employer.

91. Section 103A provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.

92. In Kuzel v Roche Products Ltd [2008] IRLR 530 the Court of Appeal held that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, such as making protected disclosures, he must adduce some evidence supporting the positive case. That does not mean that the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason. Having heard evidence from both sides relating to the reason for dismissal, it will be for the Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence. The Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. This is not to say that the Tribunal must find that if the reason was not that asserted by the employer then it must be that asserted by the employee. It may be open for the Tribunal to find that the true reason for dismissal was not that advanced by either side. It is for the employer to show the reason for the dismissal; an employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it is.

93. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. Section 48 provides that a Tribunal shall not consider such a complaint unless it is

presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months.

94. Section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done. In London Borough of Harrow v Knight [2003] IRLR 140 the Employment Appeal Tribunal stated that the ground on which an employer acted in victimisation cases requires an analysis of the mental processes (conscious or unconscious) which cause him to act. Merely to show that "but for" the disclosure the act or omission would not have occurred is not enough. In Fecitt v NHS Manchester [2011] IRLR 111 the Employment Appeal Tribunal held that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show the ground on which any act or any deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatever on the ground of the protected act.

Unfair dismissal

95. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

96. The reason for the dismissal is the set of facts or the beliefs held by the employer which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

97. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.

98. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, as explained in Sheffield Health & Social Care NHS Foundation Trust v Crabtree [2009] UKEAT 0331, the Tribunal must consider a threefold test:

98.1. The employer must show that he believed the employee was guilty

of misconduct;

98.2. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

98.3. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

99. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

100. In Sainsburys Supermarkets v Hitt [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

101. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. The Tribunal's function is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. See: Iceland Frozen Foods v Jones [1982] IRLR 430; Post Office v Foley [2000] IRLR 827.

102. It was said in London Ambulance Service NHS Trust v Small [2009] IRLR 563 "It is all too easy, even for an experienced Employment Tribunal, to slip into the substitution mindset. In conduct cases the claimant often comes to the Employment Tribunal with more evidence and with an understandable determination to clear his name and to prove to the Employment Tribunal that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the Employment Tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

103. Wincanton Group plc v Mr L M Stone and Mr C Gregory UKEAT/0011/12/LA is authority for the proposition that if a Tribunal is not satisfied that a first warning was issued for an oblique motive or was manifestly inappropriate or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning would be valid. Where the earlier warning is valid then the Tribunal should take into account the fact of that warning and not to go behind that warning to

take account of factual circumstances giving rise to it. The appeal judgment reminds Tribunals that a final written warning always implies, subject only to the individual's terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur. Also see: Davies v Sandwell Metropolitan Borough Council [2013] EWCA Civ 135 in which the Court of Appeal held that only in the exceptional case of bad faith or a manifestly inappropriate warning should a Tribunal conclude that it was unreasonable to rely on it. There would need to be exceptional circumstances for a tribunal to reopen the earlier disciplinary process where there has been no appeal against a final written warning.

104. Mr Gillie referred the Tribunal to the following further authorities:

104.1. MacIsaac v James Ferries and Co Ltd EAT 1442/96 as authority for the proposition that dismissal for swearing at a superior can be fair if it constitutes a threat to management authority, undermines the employee/employer relationship and causes irreparable breach in the employment relationship.

104.2. Sketchley v Kissoon EAT 514/79 as authority for the proposition that where an employee's job brings him into contact with the public, customers or suppliers, the use of bad language could adversely affect the employer's business reputation and so justify dismissal.

104.3. Perkin v St George's Healthcare NHS Trust [2006] ICR 617 CA as authority for the proposition that dismissal may be a reasonable response where an employee guilty of misconduct is unlikely to change his behaviour.

104.4. Auguste Noel Ltd v Curtis [1990] ICR 604 as authority for the proposition that Tribunals must take into account previous warnings issued for conduct, even if such warnings related to different kinds of conduct from that for which the employee is ultimately dismissed.

Holiday pay

105. Regulation 14 of the Working Time Regulations 1998 provides that where a worker's employment is terminated during the course of his leave year and on the date on which the termination takes effect ("the termination date") the proportion he has taken of the leave to which he is entitled in the leave year [as provided under the Regulations] differs from the proportion of the leave year which has expired, then the worker's employer must make him a payment in lieu of accrued but untaken leave.

Conclusion

106. The Tribunal first considers the reason why the Respondent dismissed the Claimant.

107. Having considered the relevant documents in the bundle, and having heard their evidence, the Tribunal is satisfied that David Beckford and Susan Clinton held a genuine belief in the Claimant's misconduct, namely the

Claimant's abusive and aggressive behaviour towards another member of staff. It was for a potentially fair reason relating to conduct.

108. The Tribunal also concludes that those individuals held that belief on reasonable grounds following as much investigation as was reasonable in the circumstances. As to whether Terry Durling loosened the bolts in the Claimant's chair, the Respondent was faced with conflicting evidence. There were no independent witnesses to alleged events. Andy Goddard twice interviewed both Terry Durling and the Claimant. In circumstances in which there were no independent witnesses to interview, it cannot be said that the investigation fell outside the band of reasonable responses.

109. In the Tribunal's judgment, the Respondent was entitled to have regard to the likelihood that Terry Durling's version of events was more credible: Terry Durling's initial statement was very detailed and he had immediately reported the incident; he sounded very shaken when Mr Beckford spoke to him; it was unlikely that a manager would want to unscrew bolts in a chair which might cause harm to a colleague with whom he regularly worked; there had been no prior reports of conflict between the Claimant and Mr Durling. Unlike the Claimant, Mr Durling had no history aggression or threatening behaviour.

110. Although the Claimant failed to attend the disciplinary hearing, the Tribunal accepts Mr Beckford's evidence that he nevertheless considered all the information before him before reaching his decision.

111. At the appeal hearing with Ms Clinton, the Claimant was given full opportunity to state his case. Ms Clinton carried out further investigation before reaching her decision. It is clear that Ms Clinton approached the Claimant's appeal with an open mind.

112. The Tribunal finds that the decision to dismiss was well within the range of reasonable responses open to the Respondent. The language said to have been used by the Claimant, together with his physical actions giving rise to the fear of physical assault, make the allegations sufficiently serious for such a finding to be made.

113. The Claimant had a live warning on file at the time of his dismissal. The Claimant had not appealed against the imposition of that warning and no evidence was adduced to suggest that this is an exceptional case such that the Tribunal should reopen that earlier disciplinary process. In any event, there was no credible evidence to suggest that the Final Written Warning had been imposed for an oblique motive or was manifestly inappropriate. The Claimant's email in which he threatened Helen Parker that "anymore letter of this type and you will have serious problems from me" understandably caused her concern, regardless of what the threat might actually entail, and was reasonably and properly considered in the context of disciplinary proceedings. The Tribunal fails to understand the Claimant's assertion that the content of Ms Parker's email about the County Court proceedings was offensive, which clearly it was not.

114. There is nothing in the procedure adopted by the Respondent which causes the Tribunal concern. Contrary to the Claimant's submission that the Respondent failed to comply with its own procedure or the ACAS Code, the

Tribunal is unable to identify any such failure. In particular, there is nothing in the Respondent's policy or the ACAS Code which requires different managers to hold disciplinary meetings dealing with different disciplinary matters. The provisions of the ACAS Code were followed throughout.

115. There was no credible evidence to support the Claimant's assertion that Ms Parker influenced the decision to instigate disciplinary proceedings or the decisions made (the Claimant also accused Ms Stark on occasion during the course of the hearing but failed to explain how or why). In particular, the Tribunal is unable to infer that Ms Parker's email to David Beckford asking what he thought about it was an instruction for action to be taken. Ms Parker was involved in the disciplinary process only to the extent that it was proper and appropriate for a member of human resources to be involved. In particular, the Tribunal accepts the clear evidence adduced by the Respondent's witnesses that Ms Parker was not involved in the decisions to impose disciplinary warnings or to dismiss the Claimant. There was no evidence of a "witch-hunt" as alleged by the Claimant.

116. The Tribunal finds it unlikely that the Claimant reasonably believed, when completing and submitting the Accident Report Form, that he was making a disclosure in the public interest. Rather, the Tribunal finds that it was his reasonable belief that he was making it in his own interest. This is demonstrably the case: the report is made in strictly personal terms.

117. In any event, even if the Claimant had made a public interest disclosure within the Accident Report Form, the Tribunal would not conclude that he had been dismissed because he had done so. The Claimant adduced no positive evidence to show this was the case.

118. The Tribunal concludes that the Claimant was not unfairly dismissed.

119. The Tribunal next turns its attention to the Claimant's race discrimination claim.

120. With regard to time limits, alleged acts of discrimination occurring before 24 July 2017 (3 months before the Claimant first contacted ACAS) are potentially out of time. The Claimant gave no reason for delay in bringing claims of alleged discriminatory conduct before this date, in particular, the allegations relating to the job relocations. The Tribunal concludes that it has no jurisdiction to consider this aspect of the Claimant's claim.

121. The alleged failure to pay relocation/travel costs can be considered conduct extending over a period such that it is in time.

122. In case the Tribunal has wrongly concluded that the allegations relating to job relocation are out of time, for completeness the Tribunal has considered all of the allegations.

123. As to whether the alleged acts took place, the Tribunal concludes as follows;

    123.1. The Respondent did move the Claimant as alleged, albeit with his agreement.

123.2. The Respondent did not pay the Claimant relocation/travel costs;

123.3. Helen Parker did send the Claimant an email on 17 August 2017 as described above.

123.4. The Respondent did invite the Claimant to a disciplinary hearing which was held on 31 August 2017 which led to a Final Written Warning which resulted in the Claimant not being entitled to a future pay award or bonus.

123.5. Mr Terry Durling did not unscrew bolts from the Claimant's chair in early October 2017.

123.6. The Respondent did invite the Claimant to a disciplinary hearing which was held on 20 October 2017 (as found above)

123.7. As agreed, the Claimant was dismissed.

124. The Claimant alleged that in dismissing him, the Respondent treated him less favourably than Terry Durling who is white. The Tribunal does not accept that Mr Durling is an appropriate comparator under section 23 of the Equality Act 2010. Mr Durling had not been accused of using abusive and foul language and aggression; the Respondent did not believe Mr Durling was guilty of misconduct; and Mr Durling did not have a Final Written Warning on file.

125. The Tribunal has therefore considered all the Claimant's allegations as if he relies on a hypothetical comparator.

126. This is not a case of alleged inherent discrimination. It is a case in which the Tribunal must examine why the alleged discriminator acted as he/she did. What consciously or unconsciously was their reason? The Tribunal addresses the "reason why" as permitted in Laing and concludes as follows:

127. There were simply no facts adduced during the hearing which might lead the Tribunal to infer discrimination. The reasons in for the Respondent's actions had nothing whatsoever to do with the fact that the Claimant is black.

127.1. The fact that the Claimant is black and subjected to racial assault and abuse was simply the context and background to being relocated. The reason for moving him was twofold: the Respondent's care and concern for his welfare and his desire and agreement to move. Neither of those reasons are because the Claimant is black. Furthermore, the Respondent's witnesses gave evidence of white employees relocated because of assault and the Tribunal cannot unfavourable treatment. In any event, given that the Claimant welcomed the moves, it is difficult to conclude that they amounted to detrimental treatment.

127.2. With regard to the relocation costs/travel expenses, they were not paid because the Claimant had no entitlement to them. The

contract did not provide for such an entitlement. Nor can discrimination be inferred by reason of the Respondent's failure to make a discretionary payment in circumstances in which the discretion is not exercised by the Respondent when an employee is moved within the Borough. Further, the Respondent's witnesses gave evidence of white employees relocated because of assault who were not paid relocation costs/travel expenses.

127.3. The content of Helen Parker's email contains nothing which could be considered discriminatory. Nor was there any evidence, other than the Claimant's bald assertion, that she sent it because he is black. Ms Parker made it clear when giving credible evidence that she would have written to anyone in such terms, regardless of their colour, had they served duplicate sets of County Court proceedings on the Respondent.

127.4. The reason for inviting the Claimant to the disciplinary hearing which resulted in the imposition of a final warning was because of the implied threat contained in his email to Ms Parker. There was no evidence to suggest it was sent because the Claimant was black.

127.5. The Tribunal has found that Terry Durling did not remove the bolts from the Claimant's chair and the Tribunal need not consider this allegation further.

127.6. There was no evidence to suggest that the Claimant was invited to a disciplinary hearing and/or dismissed because he is black. The reasons are fully set out above. They relate to allegations of misconduct.

128. The Respondent did not directly discriminate against the Claimant because of his race.

129. As stated above, the Tribunal has found that the Claimant did not make a public interest disclosure and his detriment claim need not be considered further.

130. The basis of the Claimant's holiday pay claim appeared to be twofold: that he was entitled to holiday for a full year despite being dismissed before the end of the holiday year; and that he was entitled to be compensated for holiday which would have accrued during the notional notice period for which he was paid wages in lieu. Both aspects of this claim are misconceived. The Working Time Regulations make it clear that holiday accrual continues up to the Termination Date and not beyond. It would defy common sense if holiday entitlement were to accrue in respect of an employee no longer employed by the employer.

Employment Judge Pritchard

Date: 17 January 2019