



EMPLOYMENT TRIBUNALS

Claimant: Mr Waldeck Borak

Respondent: Whale Tankers Ltd

Heard at: Birmingham

On: 28 August 2018 through to
12 September 2018 (12 days in total)

Before: Employment Judge Hughes

Members: Mr R.S. Virdee and Miss W.A. Stewart

Representation

Claimant: In person (he and the Tribunal were assisted by Mrs Maria Lloyd, a Polish speaking interpreter);

Respondent: Mrs Victoria Duddles, Solicitor

JUDGMENT

1. The claimant's claims of unfair dismissal, direct race discrimination, harassment related to race and of victimisation are not well founded and are dismissed;
2. The claimant's claims of age discrimination and of indirect race discrimination are dismissed upon withdrawal.

REASONS

1. The Issues: The Claimant presented a claim form in April 2017, but as a result of there being no early conciliation certificate, it was rejected and resubmitted; eventually it was served on the 16 June 2017. The relevance of that date is that, prior to that date (and indeed, probably for a few days after that) the Respondent was unaware of the Tribunal proceedings. At that stage the Claimant had made complaints of race discrimination and age discrimination and had submitted very brief details of his claim; these were in the bundle at pages 6 and 7. It was said that the complaint was about a final written warning for something that the claimant had not done, and that he had been treated differently to others. The dates referred to in the claim form [page 7] were in November 2016 going through to March 2017 and therefore, at that point, the claim appeared to be a

relatively small claim (in the sense of its scope).

2. The Respondent submitted a response in time. The response form denied that the final written warning had been discriminatory and contended that it was fairly imposed. The Respondent also said that it was not in a position to answer the more general allegation of different treatment.

3. The Claimant was asked to provide further details of what he meant by different treatment and on the 25 June, he did so [at pages 21 through to 37 of the bundle]. It is apparent from the length of that document that the claim was no longer as small in scope as might previously have been thought.

4. The Respondent submitted amended grounds of resistance [pages 40–52].

There was a Case Management hearing before Employment Judge Dimbylow that took place on 13 November 2017, resulting in an Order bearing that date. We see at page 57 that the Claimant had sought to add five more allegations, these being allegations 35-40 (because by this point, there were already 34 allegations rather than the allegation relating simply to the final written warning). The relevant parts of the Order were firstly that it would be necessary for there to be an amendment to add the various claims which had arisen after the claim form had been presented; there were two possibilities in this respect, one of which was to seek an amendment, the other one was to lodge a further claim form.

5. It was also noted in that Order that the Claimant had at that point applied to add 14 named individuals as Respondents, but that Judge Dimbylow had refused because that was disproportionate, particularly since the Respondent was not relying upon the statutory defence- in other words, the Respondent was accepting responsibility for any acts of named individuals working for the Respondent which were found to be discriminatory. The Claimant, following that, wrote to the Tribunal [paragraph 6 on page 66], on 27 November 2017 saying that he was withdrawing a claim for age discrimination and was not making a claim for indirect race discrimination. He confirmed that at the next preliminary hearing before Employment Judge Coaster on 1 May 2018.

6. He also said he wished to amend his list of incidents as in the attached letter, (this being page 68) which now consisted of allegations 35 through to 42 as, obviously, other things had arisen. The Claimant also, in that letter, indicated that he intended to put in a further claim in respect of unfair dismissal. It is worth noting (because the issue came up before us) that it does not appear that at any point a formal decision had been taken as to whether to allow the amendment or not; it is fair to say that the statement “I wish to amend my list of incidents” could have been taken to be an amendment application at that point.

7. At page 70 the Respondent submitted further amended grounds of resistance. Those grounds dealt with matters 35 through to 42, which were the incidents the Claimant wished to add. In the amended grounds of response to the first claim, the Respondent also denied all of the allegations of discrimination

including the additional ones ie: 35 through to 42. There was also a clarification sent by the Respondent's Solicitors to the Claimant on the 11 December [page 82] saying that whilst there were CCTV cameras in the location where incidents had occurred, none of the incidents were within the field of view of any of the cameras, consequently there was no CCTV footage before us.

8. A second claim form was submitted on the 28 December 2017 in which the Claimant claimed he was unfairly dismissed; he did not (in that claim form) specifically mention allegations 35 through to 42, but as already indicated that may well have been because he thought he had already applied to amend the first claim in order to add those allegations.

9. There was a second response form submitted [page 97 of the bundle] and again the Respondent denied the Claimant had been unfairly dismissed.

10. There was a further Case Management Hearing before Employment Judge Coaster which took place on the 01 May 2018 [page 103]. In that Order, it was recorded (under "other matters" -page 105, paragraph 15), that the Claimant had confirmed he was on medication for depression and anxiety and consequently would need rest-breaks during the Hearing. We have in fact run the Hearing with breaks so that no part of the Hearing has taken more than about an hour and a half before a break, (it may be that we sat for slightly longer in the afternoon on occasion when trying to finish a witness's evidence). We were also mindful that our interpreter might need breaks, and she confirmed that she would let us know if that was the case.

11. At the hearing before Judge Coaster, it was clarified that the claims that the claimant was pursuing were of direct discrimination because of race, harassment related to race, victimisation and unfair dismissal. The respondent, in addition to denying all of the claims, argues that substantial elements of the race and victimisation claims are out of time. The claimant first contacted ACAS to conciliate on 12 April 2017, so that anything that occurred prior to 13 January 2017 is potentially out of time. The claimant had identified that he was relying on his Polish national or ethnic origins as his protected characteristic in this respect.

12. Judge Coaster (paragraph 11 of her summary) directed that Mr Borak should identify his claims in the form of a Scott schedule. The allegations were numbered 1-42 in a document he provided dated 21 May 2018, which we have used to identify the allegations in this judgement.

13. Documents: In terms of the documents which we had in front of us, there was a trial bundle which was in two arch lever files (and we called that R1), there was a list of issues that had been produced by the Respondent (which we called R2) and which I shall return to briefly in the context of the amendment application. There was a chronology produced by the Respondent which had not been agreed which we have called R3, and there was a cast list produced by the Respondent (which was also not agreed) and that was R4. Further documents were produced by the Respondent in response to a request from the Tribunal for organisation charts and those are R5 and R6 and the Respondent

also submitted written arguments on the penultimate day of the Hearing when we heard the submissions, and that is R7.

14. We had documents from the Claimant also; firstly C1 which was the Claimant's list of issues, secondly, C2 which was the Scott Schedule that had been produced by the Claimant and was contained in the bundle (referred to above). We have removed our copy for ease of use, because this was the document that set out the details of the allegations we had to deal with. In addition, the Claimant handed in (on the tenth day of the Hearing) some extracts of pages which were already in the bundle which he had underlined and annotated. The Respondent did not object to us seeing those documents, so we accepted a copy of them, but we did make the point that the underlining and annotating is not something we could take into account, because any questions regarding those documents or any points to be made about them would need to be put to the witnesses in relation to the contents.

15. The hearing: In terms of the progress of this Hearing, unfortunately the Judge who ultimately heard the case was unwell and it was initially thought that the Hearing would not be able to go ahead. On the first day of the Hearing, Judge Woffenden dealt with some housekeeping matters and the Lay Members spent the day reading. On the second day of the Hearing, because the Judge was still unwell, Judge Findlay dealt with matters briefly and indicated that it was likely that there would be a need either to postpone the Hearing, or try to find another Judge. The Claimant was most concerned that the Hearing should go ahead.

16. The consequence was that, on the third day of the Hearing, the Judge was well enough to come in to do some reading, and then evidence was heard on the 31 August, the 03 to 07 September and the 10 September. We heard submissions on the 11 September 2018, and were deliberating for the rest of that day (and indeed most of 12 September) and we are now handing down oral reasons on the afternoon of the last day of the Hearing.

Findings of Fact

From the evidence we saw and heard, we made the following primary findings of fact relevant to the issues that we had to consider.

17. On the 13 August 2012, the Claimant commenced employment with the Respondent. Just to explain briefly, the Respondent company is run and owned by three people. Employees are also shareholders of the Respondent company and there are about 200 or so staff, there is also another associated company in India which employs about 60 people. From the description given by the witnesses, it was clear to us that this is a non-hierarchical structure where the company owners are very hands-on and will get involved in conversations with people on the shop floor and so forth. It appears to be a friendly atmosphere in general. The other thing that became clear, was that the Claimant was regarded as being very good at his job and as being conscientious.

18. The Claimant made an allegation that he was told to use second-hand safety boots when he started work (Incident 1 in the claimant's list of issues), this being the week commencing the 13 August 2012. In terms of documentation around this and evidence, it was his case that he was not provided with a new pair of boots for several weeks. It's right to say that his letter of appointment [page 146] said that the induction process would be starting on the 13 August and asked the Claimant to bring with him any boots that he had on the first day and went on to say "if you do not have any, they will be ordered for you shortly after you arrived so as not to impede your induction". It appears that they were issued to the Claimant on the 31 August 2012 [page 157].

19. The Claimant made a complaint that a colleague who was not employed until considerably later than him was provided with safety boots on the first day that he started work, this being a Mr James Bond (who didn't in fact commence employment until June 2016) [page 272]. His letter had a similar sentence about "please bring any boots with you if you have them". The evidence from Mrs Terry was that the colleague concerned, Mr Bond, must have requested the boots in advance of starting employment on the 21 June, because the item is recorded as being issued on the 14 June [page 273]. The Claimant when cross-examining Mrs Terry suggested there was no evidence that Mr Bond had requested the boots in advance but as Mrs Terry pointed out (quite rightly in our view), the Respondent couldn't possibly have known what size boots to order for Mr Bond if he hadn't put in a request for them.

20. There was then an allegation by the Claimant that he was issued with a mobile phone (incident 2 on the claimant's list), again during the first week of his employment, which was defective. The person named in this allegation was named Libby White - she does not feature in any other allegation, and was not available to give evidence to us. The matter was dealt with in Mrs Terry's witness statement instead, where she provided evidence that it would be usual for employees to be given reconditioned phones. When a phone breaks, it's sent back to the company who supplied it by Libby White, in order that it could be repaired and returned. A spare phone would be provided in the meantime.

21. Mrs Terry also noted that a common fault with the work phones was the volume on them; she said that the Claimant had received a number of replacement phones, but that his problems were no different to anyone else's in that regard. She also said that Mr Borak had not complained very often about his phone not being repaired or replaced.

22. There was also a matter that was raised before us that didn't feature as an allegation, relating to the photograph of the Claimant which was displayed at work when he started work. It appears that it is the practice of the Respondent to put a photograph of a new employee up together with some information about them, so that colleagues will know who they are. The photograph concerned was dated 16 August (presumably 2012) and was at page 156. It gave the Claimant's name and said he would be joining the company in the Parts Department in the "Goods Inwards" area and went on to say he was Polish and had been living in the UK for six years and has two grown up children. It then

discussed the Claimant's hobbies and went on to say "Good luck from all at Whale".

23. The Claimant's position was that the picture concerned should not have referred to him as being Polish because in fact, although he is of Polish origin, he holds a German passport (which is what he would have given to the Respondent as proof of his right to work, a copy of which was at page 153). Mrs Terry explained that the content of a notice about a new employee would have been discussed in advance and agreed with him, and that this would have been the case for the Claimant as well. The Claimant denies that that is so, but it seems to us likely that Mrs Terry is right about that by the fact that, for instance, it refers to details of things like hobbies, which must have been provided by the claimant.

24. There are several allegations against Mr Paul Sharpe, who was the Manager of the section where the Claimant worked, albeit that there would be a Supervisor as well. The first allegation (incident 3) was that Mr Sharpe had shouted at the Claimant; in fact, there is an allegation that this happened the week commencing the 13 August and there was another allegation about the 20 August, and another one about the 18 December (incident 4) - the latter being an allegation that Mr Sharpe had told the Claimant what he thought about immigrants.

25. In relation to this, Mr Sharpe's evidence was that he does not shout at people, although he may raise his voice in conversation and if the conversation requires it. Mr Sharpe denied that he pointed a finger at the Claimant at this time and Mr Sharpe also denied that he'd said anything about immigrants, (the context of the latter being an allegation relating to the 18 December, but we will deal with it now). It was alleged that the Claimant had been to a Citizenship Ceremony, having obtained British Citizenship and that in relation to that, Mr Sharpe had not congratulated him, and had gone on to say that it would be better if the UK had no immigrants (or words to that effect). It is fair to say that during his evidence, the Claimant wasn't clear whether the word was "immigrants" or something similar.

26. There are other matters that cause us to think that Mr Sharpe's account is accurate - one of which (although it doesn't relate to an allegation in front of us) is that during the very early period of the Claimant's employment, the Claimant had become upset because Mr Sharpe was making statements like "oh, are you back again?" and "it's nice to see you again", and so on, when the Claimant would turn up for work. Mr Sharpe's account of this was that he did this as a joke in a friendly fashion, but that at some stage the Claimant had become upset with him and told him that he thought it was an inappropriate sort of thing to say. Not only that, the claimant had suggested that the comments might be something to do with the Claimant's race. Mr Sharpe said that, rather than take offence at this suggestion, he'd simply apologised if he caused any upset in order that things could move on. It's right to say the Claimant did not complain about those jokey remarks at the time, and it's also right to say that in evidence the Claimant said that if Mr Sharpe had been called a racist, he should have done something about it.

27. It seemed to us that Mr Sharpe had simply thought that it was a misunderstanding, and had tried to draw a line under the situation - but the main reason for referring to this incident is that Mr Sharpe said that, effectively, it caused him to treat the Claimant with “kid gloves” and to be careful what he did and said around him. We accept this and, that being so, we think it’s unlikely that the comment about immigrants was made – indeed, we also think it unlikely that Mr Sharpe shouted as alleged, and do not accept that. It’s also worth pointing out that the Claimant made no complaint about any of these matters at the relevant time (which is back in 2012), but that much further down the line he suggested that Mr Sharpe was, as the Claimant described it, “the architect of all of his problems at work”.

28. On the 02 January 2013, the Claimant asked Mrs Terry to assist him with a reference in terms of accommodation. He was seeking to move so that he would be nearer to work, and it involved moving from the Birmingham Local Authority area to Solihull. The Claimant says that Mrs Terry had deliberately delayed providing the reference and that he had had to make a number of phone calls to her to chase her up (incident 6 on the claimant’s list). However, it’s pretty clear from the correspondence in the bundle that this simply can’t be right. The first email relating to this was sent by the Claimant on the 02 January 2013 which said, “Hello Lisa, Happy New Year to you, I tried to change my accommodation to live in Solihull or nearby and I think a letter of reference from Whale Tankers would be very helpful”. If there had been a previous requests of this sort, verbally or by telephone, the letter would not have set out an explanation and it would have simply said “I have asked you to provide this, where is it” or words to that effect. That email was sent at 12.39pm on the 02 January. Mrs Terry responded at 1.04pm that day to say, “Happy New Year to you too. What we normally do is a reference upon request from the rental people and if you give them my contact details we can do it straight away, the reason we do it like this is because they all ask for different information so it’s a bit easier, I hope that’s ok”.

29. On the 03 January the Claimant replied saying he’d found a letter from his former employer and could show her what he meant by a reference, he concluded by saying “I hope you can help me”. Mrs Terry replied about 10 minutes later [page 169] “As I’ve said, we don’t really do generic references, the only thing I can do is a letter saying, you’re employed here and have been since your start date.” The Claimant then replied to that (at 16.17pm on the 03 January) to say, “Thank you Lisa that’s it”. So, the point is that this reference request was dealt with effectively within about one working day; the request was made about lunchtime on one day and had been dealt with by 4 o’clock the following day.

30. There is an allegation that the Claimant made about Mr Chris Samuels who supervised him which was that he was “treated like a slave” during training at dispatching (incident 7 on the claimant’s list), that he had to come to Mr Samuels immediately if he couldn’t shut down his computer and if he wanted the toilet. The background to this is that the Claimant was working in “Goods In”, but that it was common practice for people to be trained in “Dispatching” as

well (and presumably vice versa) so that cover could be provided if there was annual leave or similar.

31. Firstly, the Claimant said that this training was supposed to happen at the end of the working day at about 3 o'clock, but Mr Samuels said that there was no way that it would have taken place then because that was the busiest time. Mr Samuels also said the atmosphere at work was "very relaxed" and there was no one preventing someone from taking a break or going to the toilet as and when they needed to.

32. There is a background to the relationship between the Claimant and Mr Samuels (which we shall have to come back to in more detail) but in short, Mr Samuels was very clear in saying that the Claimant was reluctant to accept instructions from him and frequently would instead go to someone more senior (being, at that point, Mr Sharpe - or subsequently Mr Faughey, who took over from Mr Sharpe). Mr Samuels also said that there was an attempt to train the Claimant at dispatching, but it was supposed to take place over a week and that in fact after two days it stopped because the Claimant had fallen out with a colleague called Nathan who worked in Dispatching.

33. On the 17 April 2013, Mr Sharpe confirmed that the Claimant's pay was going to be increased - this we mention in the context of the fact that the Claimant alleges that Mr Sharpe didn't want him to work for the Respondent and as we say, alleged that Mr Sharpe had made the comments about immigrants and so forth. In relation to the specific context of the pay increase (although it's not an allegation before us), the Claimant did say that Mr Sharpe had appeared, as what he originally described as "nervous" about (but what was later clarified helpfully by our interpreter to mean "annoyed or angry at") having to give the Claimant the pay increase. Mr Sharpe's evidence was that it was entirely within his remit. It was his decision to give the Claimant a pay increase and consequently he would not have been angry about it - he could simply have chosen not to give the Claimant a pay increase had he been reluctant to do so. He also said (in the context of whether he wanted the Claimant to work for the Respondent or not) that, of course, he had been responsible (along with Mrs Terry) for recruiting the Claimant.

34. On the 21 August the Claimant was sent a Staff Status Letter. Although this is not of significance in relation to this point in the chronology, it is worth explaining that the Staff Status Letter is a letter which an employee receives after being employed for a year, which confirms increased entitlement to sick pay as a result of having not taken any sickness absence during that year. Staff Status Letters are sent annually for a period of time, and we will come back to that, but the point is that having been there for just over a year, the Claimant received his first one.

35. On the 07 October 2013, Mr Sharpe recommended another pay increase for the Claimant and we've already pointed out the relevance of that.

36. In December 2013, Mr Paul Newman (who is one of the owners of the business and a Director) provided a reference for the Claimant in order to assist him because he was having some problems with his housing situation.

36 There is an allegation that is undated that, at some point in 2013, Mr Samuels had shouted at the Claimant for making an error (incident 10 on the claimant's list). It appears to be common ground that Mr Samuels had used words along the lines of "pay attention to detail". Mr Samuels said he might well have said something like that because he would point out errors if they occurred, but he denied that he would have shouted at the Claimant and he denied he'd treated him differently than the colleague Dave Elms in terms of pointing out errors. He did explain that he may well have been assertive (rather than shouting) and said that this was because the Claimant frequently challenged things which he said to him.

37 It's fair to say that Mr Samuels couldn't recall the specific incident concerned. Of course, telling somebody to pay attention to detail if you are a supervisor is a fairly run-of-the-mill thing to occur in a workplace, and it's the kind of incident that, if it occurred in 2013, is unlikely to be recalled unless there had been some consequences at the time - for instance, if the Claimant had complained, or if Mr Samuels had taken some formal action against the Claimant for making an error. Mr Samuels explained that the latter scenario would never happen, because it was difficult to do the goods inwards jobs without making errors sometimes due to the pressure of work. The point is, that this is an incident which now features in Tribunal proceedings, but was at the time (at least as far as Mr Samuels was concerned) an incident which would have been trivial and run-of-the-mill, where nothing further had resulted at the time. It's hardly surprising that, five years down the line, it's difficult for people to recall the specifics of what might be regarded as day-to-day interchanges in any workplace. The same applies, it's fair to say, to quite a number of the things which feature in the Scott Schedule.

38 There is also an allegation that at some point during 2013, the Claimant had problems with booking holidays (incident 8 on the claimant's list). His case is that he had been sent by Mr Sharpe to Mr Samuels who then sent him back to Mr Sharpe etc... and that he felt like "a tennis ball". This is again an occasion which neither Mr Sharpe nor Mr Samuels could recall, although both said the Claimant had not (as far as they knew) experienced any problems getting holidays. It does appear from the evidence before us that the first port of call should have been Mr Samuels, and that the claimant may have gone to Mr Sharpe who sent him back to Mr Samuels - and in that regard, we refer back to the fact that Mr Samuels said that the Claimant frequently "bypassed" him in his role.

39 As to the specifics of this allegation, when asked about it under cross-examination, the Claimant said "I have no problems with getting holidays, the problem was the way I was treated when I asked", but again, this was not something which he complained about at the time.

40 There was an allegation that, again at some point in 2013, Mr Sharpe had shouted and pointed his finger at the Claimant and that Mr Samuels had suggested the Claimant should complain to Human Resources (incident 9). In relation to that, Mr Samuels said that he vaguely recalled a conversation with Mr Borak in which he threatened to do some physical harm to Paul, being Mr Sharpe (paragraph six of his witness statement). Mr Samuels said “Mr Borak did tell me he thought Paul was racist, and also that he thought that Paul didn’t like him”, and that he’d asked him what the issue was but wasn’t provided with any details.

41 Mr Samuels had then pointed out that there were policies in place (such as the bullying policy) that could be used, and it was open to the Claimant to speak to Human Resources. Mr Samuels went on to say that Mr Sharpe was a bit of a joker, and it was possible that the Claimant did not always understand his humour - he gave an example that if there was a lot of work to be done, Mr Sharpe might say jokingly to whoever was nearby “are you at work today?”. Obviously, that corroborates the kind of things that Mr Sharpe said he was saying at the start of employment as jokes that the claimant took seriously. Another example given by Mr Samuels was that if someone had had a couple of days off, Mr Sharpe might say “nice of you to join us today” and that this was the sort of thing he would say to anyone. As we have already said, Mr Sharpe said that once the Claimant had reacted badly to the comments he’d made early on in the Claimant’s employment, he had stopped making such comments to the Claimant. We accepted it was likely that he would have done.

42 In terms of whether there was shouting and the pointing of a finger, it’s difficult to say whether that happened or not in the sense that Mr Sharpe says that he does not point his finger at employees. On the other hand, what the Claimant has told us (and this may be what was referred to by Mr Samuels), was that he had said to Mr Samuels that if Mr Sharpe pointed his finger at him again, he’d grab the finger and twist it and might well break it. The situation is, therefore, that whilst we can’t be sure whether Mr Sharpe pointed at the Claimant or not on this occasion, it does appear that if he did, the claimant’s reaction was somewhat out of proportion, in other words the threat to potentially break Mr Sharpe’s finger. It’s also right to say that no complaint was made by the Claimant at the time, notwithstanding having been told by Mr Samuels that the mechanism to do so would be to go to Human Resources.

43 On the 06 January 2014, the Claimant was told that Mr Faughey would be taking over from Mr Sharpe. In terms of the allegations before us, that was the end of any allegations about Mr Sharpe or any direct involvement that he had with the Claimant - in other words, the matters relating to him date back to 2012 and 2013 - but as I have already mentioned, some four years down the line, the Claimant was referring to Mr Sharpe as the architect of (what he saw as) problems he was having at work. It appears that the Claimant believed that Mr Sharpe was encouraging other people to treat him badly, although there was no direct evidence that Mr Sharpe ever did that.

44. On the 27 January 2014, there was a meeting between Mr Samuels, the Claimant and Mr Trapp. The background to this is that the Claimant had made

a complaint to Mr Samuels that Mr Trapp had deliberately closed a shutter door into the warehouse when he was bringing goods along to go into the warehouse on a forklift truck (see incident 11 on the claimant's list). Mr Samuels said that he'd asked Mr Trapp about it and Mr Trapp had said it was simply an accident, he'd just pressed the button to shut the door and nothing was deliberate. Mr Samuels said that at that point he thought no more of it but then Mr Trapp had made a complaint to him shortly afterwards about the Claimant's behaviour towards him, the consequence of all of this, was that Mr Samuels had a meeting with both of them on the 27 January, the original incident being the 22 January. The outcome of this meeting (which has been described as a sort of "clear the air" meeting - the first, but not the last in relation to this case - was a document [183] describing the incident that Mr Borak had reported to Mr Samuels.

45 The claimant felt he'd been unfairly treated by Mr Trapp, and he wondered if it was because of his nationality. Mr Samuels had met with them both and they both put their point of view across. He had reminded them of the company's policies relating to bullying and prejudice/discrimination, but Mr Trapp had reassured Mr Borak that this was not the case and had apologised for any hurt caused. He said he would be more mindful of his actions in the future, and they both shook hands and agreed to get on in the future and they both confirmed they were happy with how this situation was dealt with.

46 That document [183] was signed by Mr Borak, Mr Trapp and Mr Samuels and to all intents and purposes it appeared that that was the end of that matter.

47 It should be said that when Lisa Terry was questioned about this document (because she is accused of victimisation) she accepted that she would have seen it and would have been responsible for filing it, but she said that she had not thought it was intended to be an allegation of discrimination and had thought very little of it, because it appeared that the situation was resolved.

48 On the 26 August 2014, the Claimant received his second Staff Status letter.

49 On the 01 September 2014, there is an incident which features in the allegations and which relates to a Mr Jake Fletcher - this is the only allegation relating to Mr Fletcher (incident 5 on the claimant's list). The allegation reads "blaming me for not my fault, it wasn't my fault, nobody else was blaming me even if they did make a mistake". The allegation relates to a part that had been delivered and the Claimant had signed for it. The part concerned was damaged. Mr Fletcher had to investigate this because he was leading the project for which the part had been supplied. He sent an email [page 188] to the Claimant (which was copied in to a number of people including Mr Mason and Mr Warmington) saying that he'd been to look at the delivery from a company called Salamander, and had noticed that one of the legs had broken off the "Hose storage" rack. He asked whether the item had come in damaged or whether the damage had happened on the site, and whether anyone had been made aware that there was damage either on site or at Salamander.

50 He asked the Claimant to let him know what had happened so he could sort the problem out appropriately. Mr Borak, when cross-examining Mr Fletcher (and indeed giving evidence) made it clear that he was unhappy that amongst others, Mr Warmington (who is one of the owners) had received this email because the Claimant understood the email to be critical of him.

51 The first point to be made is that the email is not critical of the Claimant, it is asking for information as to where the part may have been damaged. The second point to be made is that Mr Warmington and those others named were part of the Project Team and Mr Fletcher explained that it would be his practice to copy them in to such things (particularly in relation to Salamander, who had previously delivered things where there had been some problems about the quality of the manufacture). In any event, at [189] the Claimant replied saying “nothing had happened on site” and that the part “arrived that way, it was in bubble-wrap” but also pointed out it had been sent in a crate that was too small, with no lid, and that he had seen no signs of damage when he took delivery of it. Mr Fletcher replied [at 190], still on the 01 September 2014, saying it was not noticed upon delivery and they’d signed for delivery without putting details of the damage on the delivery note for Salamander, so that it would be more difficult for him to put the point across to Salamander that they needed to package things properly. He said that “in future it would be necessary to check fabrications from Salamander carefully” and also that if the claimant needed help from him because he was unsure about items, he should just call Mr Fletcher.

52 At [191] The Claimant replied saying Mr Fletcher was right and he hadn’t noticed it because from the outside the package was in perfect condition, so there was no reason to check the inside. He said that he had called Mr Fletcher that morning, but it was more to do with which labels to stick on parts, and not because he thought the part was damaged. He also pointed out that Salamander would have known how they’d packed it and that it was risky to have sent it that way. Mr Fletcher again responded the same day, saying he’d get in touch with Salamander and explain the situation so that the problem would not arise in the future, and he went on to say “the quality of welding is not up to standard to be honest and that’s another problem they need to be informed of, thanks for your help” [192]. Mr Mason sent a further email telling the Claimant “not to worry, that Mr Fletcher would revert to Salamander about the packing issue and the fact that the weld was poor” [193]. The Claimant at [194] responded saying “thank you Glen” and that was the end of that exchange.

53 On the 15 October 2014, this relates to incident 12 on the claimant’s list, there was an incident between the Claimant and Mr Samuels; the Claimant’s version was that Mr Samuels had shouted at him and pointed his finger physically threatening him and had followed him to his office, and that this had occurred in front of two witnesses plus CCTV cameras. In relation to that, the Claimant had when giving evidence and being cross-examined explained that it related to a steel delivery, which should be (at least) a job for two people, if not three (and frequently three but with assistance from the driver). It was put to the Claimant that Mr Samuels had asked him where he was in order to get him to assist with the steel delivery, but the Claimant said that Mr Samuels had simply

asked where he was, and there was a dispute about who ended the telephone conversation.

54 The Claimant said that Mr Samuels had not asked him to help Mr Coleman with the job, Mr Coleman being a person who was newly working in “goods-in” - the Claimant said “no he didn’t ask, it was our job”. The Claimant also denied refusing to do it, and said “no Mr Samuels had been shouting and pointing at him” and acting in what he described as a “horrible way” and said that this would have been shown from cameras. Mr Samuels said that the Claimant had refused to do the job. The Claimant said “that he walked away” saying “don’t shout and don’t point” calmly and that Mr Samuels had followed him. Mr Samuels had a rather different account of that - he said that he hadn’t been aggressive, he wasn’t shouting or pointing, that he had pointed out to the Claimant that he was a supervisor, because he was asking the Claimant to carry out some duties. He said that it wasn’t professional of the Claimant not to do it.

55 Mr Samuels said that he hadn’t shouted but that he was assertive, he said that when he asked, the Claimant had “shrugged”. He also gave evidence that this was often the case when the Claimant had been asked to do things by him - he said that he tried not to “rise to the occasion”, but that on that day he felt he had to be assertive because Mr Coleman was a new member of staff and he did not want him to think it would be alright to speak to Mr Samuels in that way. He went on to say that Mr Borak did this “all the time” and had a “negative attitude” and that this had caused him to tell him that he was behaving inappropriately and to say “I expect better from you”. He said that Mr Borak had walked away, and that in the end Mr Samuels had helped Mr Coleman with the steel delivery himself.

56 There are some other things that it’s important, we think, to point out in relation to this matter - the first of which is that when giving evidence, Mr Samuels made the point that it was his belief that if anyone had behaved in a racist manner it was Mr Borak, when behaving that way towards him. His evidence was that when Mr Borak first started working for the Respondent, they had got on quite well, they were both from minority backgrounds and they discussed their backgrounds and their families and so forth. He said that Mr Borak had said that he was concerned that people didn’t like him, and that he (Mr Samuels) had said “you shouldn’t worry about it, it’s a big company and not everybody is going to get on with everybody”. Mr Samuels had also said “you know, I am accepted” as a black person of African Caribbean origin, and therefore the Claimant would no doubt be accepted similarly. He went on to say that after a few such conversations, he got the gist that what was being suggested to him was that it was an “us against them” situation, and that this had prompted him to say to the Claimant “you’ve got to be careful how to judge things, I’m a black person and if they accept me they are more likely to accept you because you’re white, you need to give it some time and concentrate on people who are friendly towards you”.

57 Mr Samuels specifically said that he had never himself felt discriminated against, but that he did question why the Claimant had found it difficult to accept instruction from him as a supervisor and gave the opinion that that may well be

because of racial factors. The other thing that Mr Samuels said in this regard was that he had never done anything about the claimant's attitude, because as far as he was concerned, he was best to try and get on with work and not report things.

58 We should also say, that this resulted in a somewhat heated exchange between the Claimant and Mr Samuels, where the Claimant was saying that if Mr Samuels had thought he was racist he should have reported him and Mr Samuels (perhaps with some justification) pointed out that if he had done so (and if he had taken any action against the Claimant) doubtless this would be an allegation that he would be facing during these Tribunal proceedings.

59 It isn't for this Tribunal to make a decision about whether Mr Samuels is right or wrong about his feelings regarding Mr Borak's behaviour towards him. Mr Samuels did not complain about it at the time, but what we can say is that we are in no doubt that Mr Samuels genuinely felt that way about the situation - more to the point, he felt that he was undermined by the Claimant as a supervisor. He said that he found the Claimant a very challenging person to manage, and that he'd even resorted to reading to self-help books to try to gain some assistance in this regard. That's quite an important point because obviously, the perspective of Mr Samuels is very different in this instance from that of the Claimant.

60 On the 23 October 2014 the Claimant, reported Mr Samuels to Mrs Terry [page 198]. He said "Hi Lisa, I had a very unpleasant incident with Chris Samuels last Wednesday (15/10/14) he shouted and pointed his finger at me in front of my new colleague Keegan [this is Mr Coleman], delivery drivers and other Whale workers. He questioned my posture and understanding of English. He upset me so much, I was not able to do my normal duties" and went on to say that he had been treated differently by Mr Samuels. He went on to say, "there are a few people who are not happy to work with me" referring to Mr Sharpe, Steven Trapp (and also in that context to the fact that Mr Samuels had managed to bring his problems with Mr Trapp to an end), but also Mr Samuels.

61 In that email, he did say "it looks like managers and the owners made a mistake, they accepted my application knowing my background, but they did not ask Steven Trapp for his opinion". In terms of that email, Mrs Terry was questioned about whether she read that as an allegation of race discrimination, albeit that it was potentially an allegation about Mr Trapp rather than Mr Samuels, and she said that she did not. It's fair to say that, certainly from our perspective, we thought it was possible to read it as an allegation of race discrimination but we did accept that Mrs Terry had not read it that way, particularly because she confirmed to the Tribunal panel (following questions from one of us) that she would not have read it as an allegation of race discrimination if, for example, it had been Mr Samuels complaining against the Claimant.

62 There was a meeting (because this alleged incident had been apparently brought as a formal grievance) between Mr Borak, Mrs Terry and Mr Faughey on the 27 October 2014 [201-202] and the Claimant now says that the record of

that meeting is inaccurate and it is fair to say it's not a verbatim record and it's a synopsis. The specific points that we draw from this is firstly Mr Borak was saying that Mr Samuels was showing Mr Coleman how to treat him and where his place was, secondly, saying that Mr Samuels should show him what to do and then leave him to do it, because he did not have to ask what should be done next. The claimant then went on to say, "now I do not need a supervisor". The Claimant now denies that he said that, but it does rather corroborate Mr Samuels' account that the Claimant was unwilling to accept direction from him.

63 The Claimant was specifically asked whether they could have a "clear the air" meeting between himself and Mr Samuels and Mr Coleman, and the Claimant said, "he wanted to raise it as a formal grievance". In relation to that, one of the points that Mr Samuels made in the context of his belief that he was being treated badly because of his race, was that this was the first time that the Claimant had raised a formal grievance against anyone, notwithstanding the fact that he had already made complaints about a number of people (as will be clear from the history we've been through so far).

64 There were a number of investigations which occurred in relation to this matter. Firstly, there was an investigation meeting with Mr Samuels himself, where Mr Samuels said that "the Claimant had shrugged his shoulders and "given attitude" and was mumbling and "had walked off and left him to do the job with Keegan" and that he had responded to the Claimant by also giving attitude but not by raising his voice, and that the Claimant had subsequently refused to talk about it. There was also an investigation meeting with Mr Coleman, where Mr Coleman said that Mr Samuels was only putting his point across and had told the Claimant "his attitude was not right in his opinion".

65 He went on to say that he had found the Claimant to be rude and gave an example of the Claimant saying "I don't need your help, you stay on your side of the bench", he said "I've been trying with him. If I had been rude, I would say so, but he is rude. I've been taking it as I don't want to be seen as a troublemaker because I'm new, but I do not know where he has got it from, I don't know why he thinks I've got something against him". He went on to say "that the Claimant would rant and say I'm up here and you're down there" and also that during the last few days, the Claimant had not been assisting him - in fact, when helping with some boxes, he'd reached out but the Claimant had thrown the box in his face. In terms of his opinion of Mr Samuels, he said he was "the type that you can ask a 100 times and he would help...I have no problems with Chris at all". He also said, he couldn't remember any finger-pointing, all that he could remember was Mr Samuels saying Mr Borak's attitude was wrong.

66 There was also an attempt to speak to the driver who had been delivering, this was at [208], but Mr Faughey confirmed that the driver said that he could recall an argument between Mr Samuels and the Claimant, but did not feel he had seen enough to make a statement. So those were the investigations into the claimant's grievance which were undertaken by Mr Faughey.

67 It's also right to point out that at the same time, Mr Faughey had sent an email to Mrs Terry, [203] referring to incidents involving the Claimant, Mr

Coleman and Mr Samuels, specifically that on his return from holiday, Mr Samuels had told him of a dispute over the steel, which is the one we've referred to, and that when he spoke with Mr Coleman, he'd said that the Claimant had been very rude and aggressive to him over the last couple of weeks and had given examples of the Claimant saying "are you trying to take my job, maybe you're not the right person for the job, I will have to speak to Scott and Lisa about this, I'm up here and you're down there". This had caused Mr Coleman to worry about the security of his own new job, and Mr Faughey had consequently reassured him that he was doing an excellent job and that feedback was good.

68 Mr Faughey also said he'd spoken with the Claimant and that the Claimant's belief was that someone had told Mr Coleman to change his behaviour towards the Claimant and not to respect him. Mr Faughey had sought to say, he did not think this was the case. Mr Faughey noted that the Claimant said Mr Coleman was not asking for help anymore but instead asking other people, which Mr Faughey thought would make sense if the Claimant was, as he described it, "now being funny with him". He said that Mr Coleman had said that there was very little communication now from the Claimant "other than one word answers" and he went on to say "this is very disappointing from Wal, you will see in my last performance review that I commented communication and team work must improve and that his attitude is unacceptable at times" He went on to refer to issues which the Claimant had had with others, specifically Nathan Ibrahim, Stephen Trapp, Dave Elms, Paul Sharpe and somebody called Terry Williams "to name but a few", as well as Mr Samuels and Mr Coleman.

69 There was then a grievance meeting between the Claimant and Mr Newman on the 3 or 4 November 2014. One of the matters that has come up in these proceedings is that the Claimant refers to an earlier statement to the one on pages 201-202. The Claimant said there was an earlier statement that looked like a few lines only, making it look like he was drunk. We have not actually seen that statement, and no one seems to recall it having been taken other than the Claimant, but nevertheless that was referred to. In terms of the grievance meeting, the Claimant disputed that he was rude and made some quite strange comments we didn't quite understand at [212] such as "can you rape a prostitute"? The result was that Mr Newman took the view that the situation had gone too far, and that everybody needed to be able to work together. Mr Newman pointed out that Mr Samuels did not believe he'd done wrong. Also, because the Claimant was upset by what Mr Coleman had said about him, Mr Newman said "that is his opinion but we need to look at moving forward". He then suggested having a meeting with all concerned, so that they could try to find a way forward, because otherwise the situation would not get any better.

70 The Claimant said that in his mind, this meant that the meeting would take place before the outcome of the grievance. Mr Newman was quite clear that it was a separate process that would need to happen in any event, and we accepted that but think it likely there was a misunderstanding. The meeting did go on for a considerable time because it runs through to page 215.

71 On the 10 November 2014, Mr Newman wrote to the Claimant informing him of the outcome of the grievance. He expressed disappointment that it had

been raised formally and said it should have been dealt with locally because there were always two sides to a story. He went on to say there was insufficient evidence to take disciplinary action against anybody, and that he felt that there was an issue with teamworking that would require all parties to change their way of communicating with each other. In terms of the statements that had been taken during the course of the investigation (which, as I've said, Mr Borak was upset about), Mr Newman said he personally did not feel the language used was particularly harsh and that it may have been taken out of context by the Claimant and also pointed out the need for teamworking.

72 There was an undated document [at 218] where the Claimant appears to have been trying to challenge the statements that people had made and said some quite harsh things about Mr Coleman, specifically "he is a person without a spine, without balls, he's an ass-licker and he didn't notice the driver from Henley". That was fairly strong stuff and was part of what was before Mr Newman; nevertheless, Mr Newman decided that the productive way forward at this point was to try and sort out things between the team rather than take any action against anyone in respect of it, but it's right to say that the language the claimant used, in the context, is somewhat shocking and surprising. There was no appeal against the outcome of that grievance

73 There was an allegation in the Scott Schedule which was undated, but did relate to 2015, that after the grievance (for which we read the grievance against Mr Samuels), some colleagues, who had formerly been part of Paul Sharpe's team, had started loudly burping and farting whenever they saw or passed the Claimant (incident 13 on the claimant's list). That allegation was not made at the material time, and it's right to say that it arose some years later in the context of a meeting that we will come to when we reach that part of the chronology.

74 The specific people who are named in the Scott Schedule were a Mr Luke Houghton, a Mr Paul Harris and Mr Keegan Coleman, although Mr Keegan Coleman was not named when the investigation was carried out later and consequently was not asked about it. We have therefore taken this to be an allegation about Mr Houghton and Mr Harris [346]. The investigation with Mr Houghton took place on the 27 January 2017, so a year and a half or so later. We don't know what date in 2015, precisely, the allegation relates to. Mr Houghton disagreed that he burped at the Claimant and disagreed that he burped at others and said that if he did burp in such a way it wouldn't be appropriate behaviour. He was asked if the Claimant had ever complained to him about his behaviour and replied "he says nothing to me and just ignores me". Mr Harris [347] was interviewed on the same day; he said he rarely "burped" and confirmed he wouldn't like it if someone burped in his face. He also confirmed the Claimant had never told him he had a problem with him. Mr Sharpe was interviewed [348] and amongst other things said "he had not seen or heard anyone else" do or say anything offensive to the claimant. Part of the interview deals with allegations about Mr Sharpe which, although they date back to 2013 were investigated in 2017

75 There is an allegation here that, at some point in January 2015, Mr Warmington suggested to Mr Coleman that the Claimant may be causing problems for him (incident 14 on the claimant's list). This wasn't something that Mr Warmington could recall at all, although he did confirm in general terms that he would have conversations if he was walking around on site with people he met. The way the Claimant described the allegation in his witness statement was [paragraph 14] that Mr Warmington had brought pay-slips, that the claimant was in "Goods-in" with Mr Coleman, that Mr Warmington had given him a pay-slip and then, when he gave one to Mr Coleman, had asked Mr Coleman if he could work there without any problems, to which after a pause, Mr Coleman said, "no it's ok". So, it's fairly clear from the Claimant's witness statement that Mr Warmington had not said "are you having any problems with Mr Borak?" if he had said anything, he just asked him whether he was getting on ok at work or had any problems.

76 There is also an allegation in the Scott Schedule relating to a brochure concerning "50 years of Whale Tankers" (incident 15 on the claimant's list, also included in the list of acts of victimisation), photographs of which appear at 226 and 227 of the bundle. The situation is that there was going to be a commemorative brochure and Mr Warmington was involved in this because he is involved in part of the marketing and publicity strategy for the Respondent. At some stage there was a suggestion that it would be good to have a "collage" showing everyone who worked for the Respondent as part of the brochure, and that Mr Warmington had therefore gone around trying to take photographs of everybody that he could. This had included the Claimant and Mr Coleman, albeit that Mr Warmington couldn't recall precisely when he had taken their photographs.

77 Mr Warmington also explained that he had been concerned that he may leave someone out of the picture and asked someone else to check - in fact, it turns out that he had left out one of his fellow owners and directors (Mr Anderson) so that he had to use a file photograph of him, but he hadn't left anybody else out.

78 There are in the bundle at 228 JPEG files relating to the Claimant's photograph and that of Mr Coleman. The Claimant queries why one is horizontal and the other is vertical and we don't think anything much turns on that and we certainly don't think the document is fabricated; it's quite clear the images are the same as those on the brochure from the previous two pages, but the point is, in any event, that what is shown is that the JPEG image of the Claimant was taken on the 30 March 2015 and that of Mr Coleman on the 31 March 2015. This is at odds with the Claimant's account, which is that Mr Warmington had taken a photograph of Mr Coleman and had not taken one of him and had only come back later to do so - that does not in fact appear to be the case, in terms of the evidence about the order the pictures were taken in. The point is, that when questioned about this, the Claimant's eventual position was that he would not have been upset at the order at which the pictures were taken, but what had upset him was that he believed (at the time) that his picture would not be included in the brochure.

79 He does accept his picture was included in the brochure and to that extent he was treated the same way as everyone else. It's fair to say, that it's difficult to understand how it is that this allegation features in the Schedule before us in 2018 when, whatever the Claimant may have felt about the situation at the time, he knew perfectly well that his fear that he would have been left out was not in fact the reality of the situation, but there we are, it features as an allegation.

80 The next allegation related to a request for glasses and concerns Mrs Terry, there were a series of emails around this, starting at [234]- incident 20 on the claimant's list, also said to be victimisation. On 10 June 2015 the Claimant sent an email to Mrs Terry saying he had damaged his glasses, and needed new ones; he said that he was told that the Respondent could help him, and that he needed glasses only for reading, which meant that he put them in the pockets of his overall, often causing damage. Mrs Terry replied at 235 to ask whether the glasses were safety glasses or normal glasses, and whether Claimant needed an eye test, and also asking for his prescription.

81 We should point out at this stage that Mrs Terry's evidence to us was that the Respondent will only pay for safety glasses, not normal glasses. The Claimant, as we understand it from the documents that he handed in later, [C3] seeks to argue that because normal glasses were referred to in her email, this must mean the Respondent does in fact pay for normal glasses, we think that is not the case. Specifically, we do not accept that the respondent would pay for normal spectacles because we know that employers in general terms would not pay for normal spectacles for their employees, but they would be responsible for providing safety equipment. There is a difference between the provision of spectacles and the provision of eye tests, where of course employers do have to pay for eye tests for those who use VDU's, again for Health and Safety reasons.

82 In any event, at 236 (which was again sent on the 10 June) the Claimant replied saying that he used normal glasses and didn't know what the difference was between safety glasses and normal glasses. He then sent his prescription on the 15 June 2015 and Mrs Terry responded asking for confirmation that the Claimant wouldn't require varifocal or bifocal glasses or tints on the lens and went on to say, "sorry for asking so many questions, I just want to make sure you get the right thing". At this point, the Claimant did not respond, and instead went on to purchase his own glasses.

83 On the 23-24 June, the Claimant was on annual leave. During that time, a Purchaser role was advertised internally on a notice board, the closing date for that was the 29 June (incident 16 on the claimant's list, also alleged to be victimisation). The Claimant did not apply for the job, he did say in evidence that he hadn't seen it on the noticeboard but had been aware that there could be a job, but hadn't asked about it because no one had suggested to him that he might wish to apply for it and he said "he was too shy to ask", he also complained that he had not received an email about it, but Mrs Terry explained that such emails would be sent out relating to external vacancies in case family or friends or existing members of staff wanted to apply, but that that was not so with internal vacancies.

84 On the 01 September 2015, the Claimant was sent his third Staff Status Letter, this is a complaint about Mr Faughey because the Claimant said he should have received it sooner (issue 17 on the claimant's list, also said to be victimisation). The situation is that Mr Faughey explained that he wouldn't be responsible for producing such letters, they would be generated by HR, but he may or may not be responsible for dishing them out, handing them out as and when he received them. It was also explained to us that it would make no difference whether he had received the letter or not, the point was that if you have three years attendance without any sickness, your entitlement would increase automatically despite the date on which you were notified by the Staff Status Letter.

85 On the 02 September 2015, Mrs Terry went on maternity leave.

86 On the 04 November 2015, Mr Faughey had a meeting with the Claimant and a colleague called Mr Blue, this was documented at [269]- incident 18 on C's list, also said to be victimisation. In terms of what was documented, Mr Faughey wrote that he had called the meeting because Mr Blue had made an informal complaint about the Claimant and the Claimant had subsequently made a complaint about Mr Blue. It was decided to have a "clear the air meeting" to give everybody the opportunity to speak about their issues. He recorded that Mr Blue had raised certain issues about the Claimant's behaviour and attitude towards him but that the Claimant felt Mr Blue was the one at fault. He said notes were not taken because the conversation was quite fractured.

87 Mel Snape recorded that Andrew Blue felt (after the meeting) that it may not have been as beneficial as he'd first imagined, because he didn't feel the Claimant had taken his concerns on board and instead had raised his own, but went on to say that towards the end the atmosphere had improved and both parties were able to work together amicably, and that Mr Blue had moved Departments shortly afterwards. The Claimant told us that he was happy with the way that Mel Snape had dealt with this situation: Mel Snape was effectively the HR person because Mrs Terry was on maternity leave by this point. Although the Claimant said he didn't accept that the note was an accurate summary, or that there had not been notes because he thought Mrs Snape had been taking notes throughout, he made no complaint at the time because he said he was happy with the way she had handled the situation.

88 The final allegation for 2015 relates to the Christmas Raffle, the allegation (which features as incident 19 on the claimant's list, also said to be victimisation) was that Mr Warmington was unhappy that the Claimant had won several prizes in the raffle on the 24 December. By way of brief explanation, this was a raffle which the Respondent's Directors used to put prizes into, things like gifts from customers and suppliers, and which all the staff would take part in. The Claimant's account was that Mrs Terry had been present at the time, and that she had looked at him when Mr Warmington had taken out what we think was probably a fourth winning ticket for the claimant before throwing it on the floor. The Claimant also said that glances had been exchanged with Mr Newman and himself. The fact is that Mrs Terry says that she wasn't there because she was

on maternity leave, Mr Newman says she wasn't there and so does Mr Warmington. Also, it appears that by this point the Claimant had won three prizes anyway, which as Mr Warmington pointed out was very lucky; we do not accept on the balance of probabilities that Mr Warmington threw a ticket on the floor, still less it was the Claimant's ticket.

89. The first allegation relating to 2016 (incident 21) is that on the 28 June, the Claimant had a conversation with Mr Warmington about the Brexit result and that he thought that Mr Warmington's attitude and behaviour towards him was not encouraging and was off-putting. To be more specific about this allegation, the Claimant said that "Mr Warmington had burst at him" in other words had an outburst after Brexit. The Claimant said he wanted to approach Mr Warmington and it appears that this was mostly because he wanted to raise a complaint about Mr Samuels with Mr Warmington, the Claimant being of the belief that Mr Warmington would immediately sort the situation out. This was about the claimant's complaint relating to Mr Samuels that went back in time to 15 October 2014; at this point, in 2016, the Claimant was looking to raise this matter with Mr Warmington.

90. There is another allegation about this which is incident 22 on the claimant's list, which was also relating to a conversation with Mr Warmington; the claimant says that he wanted to explain that the information Mr Warmington had been given about the Chris Samuels incident was wrong.

91. The Claimant said that Mr Warmington had been giving out the pay-slips and there had been a discussion to the effect "what do you think about Brexit?" and Mr Warmington had "burst out at him". The Claimant said to us that he was sure it was because Mr Warmington "knew what Mr Coleman and Mr Samuels had said about me" and the Claimant also went on to refer to another incident where Mr Warmington had said "shouting happens at work" and had also supposedly said "that he knew how to treat immigrants because he had got employees in India" There is an uncertainty about whether "immigrants" is in fact the word that was allegedly used.

92. In relation to this conversation, Mr Warmington was frank in saying he was unhappy about the Brexit result because he didn't think it would be good for the Respondent's business, and that he thought it would increase red-tape and so forth, but he denied that he had "burst out" at the Claimant or anyone else in relation to his feelings on Brexit. In relation to the Claimant attempting to talk to him about Mr Samuels, Mr Warmington explained that although he is happy to talk to employees about the jobs that they are undertaking, and about families and things like that, he never discusses Human Resources issues with anyone. He gave two reasons: firstly, because he said that if he were to express a view, this would then be quoted, so if there was an ongoing investigation, it would be said "well Mr Warmington said X about this" and the second reason was that, in any event, he might have to become involved in a related process at a later point, for instance to deal with an Appeal Hearing or suchlike.

93. On the 19 July 2016, there was an incident involving the Claimant and a driver. The allegation relating to this was that the Claimant was abused and that

his team leader Mr Faughey left him and first spoke with the driver (issue 23, also said to be victimisation). It is in fact common ground that this was exactly what had happened. The account Mr Samuels gave was that he had heard the driver raise his voice to the Claimant and that the driver had appeared to be standing over the Claimant when the incident first happened. He was clearly quite angry, the incident had then “gone outside” and Mr Faughey had intervened. Both Mr Faughey and Mr Samuels say that the Claimant had come up behind them because they were dealing with the driver and had, as they described it, “smirked at the driver”, which appeared to make the driver more angry.

94. The Claimant denies having smirked at the driver, but it is common ground that the driver did become increasingly angry. Mr Samuels explained that since Mr Faughey was dealing with the matter, he stood by as a witness rather than conversing with the driver. Mr Faughey told the Claimant to go back inside to “goods-inward”, and took the driver to one side to speak to him in order to defuse the situation - that also is not in dispute. Mr Samuels’ account is that the driver had become very angry and had called the Claimant a “racist” a couple of times (he was a Jamaican van driver); he had then used some very insulting language in Jamaican Patois to describe his view of the Claimant, and had also threatened to “stab the Claimant up” and to then board a plane at the airport and fly back to Jamaica. This was clearly a very serious and threatening incident, the result of which was that Mr Faughey had told the driver to leave the site (and consequently the driver was banned from the site).

95. The records of the situation were, firstly, a statement taken on the 19 July 2016 (after the event) by Mr Faughey and Mrs Terry from the Claimant, in which Mr Borak said that “he was not a racist, that he needed protection, that he couldn’t sign for things if he didn’t know whether they had been delivered properly”. He said that he needed to “check them”, that he was doing his job, “the drivers are enemies, I have to fight them, I’d expect a thank you, but they just want a signature”. From this it appears that the dispute had originally been because the Claimant was refusing to sign for a delivery until he was sure that it was complete (which would, of course, be entirely the correct thing to do). The driver had apparently told Mr Faughey he’d been on site “a dozen times” and “always got attitude” from the Claimant. The Claimant was clear in saying that he wasn’t a racist, but did not want anyone to be rude to him. Mr Faughey explained that the driver was going to be banned from the site, and that if the Claimant ever felt uncomfortable, he should ask for help.

96. This was followed up in an email from Mr Faughey of the 20 July 2016 which was sent to the Stores, generally explaining that a driver had been banned from the site. It recounted that during the confrontation and afterwards the driver had made threatening remarks towards the Claimant which was not acceptable, and that the driver’s employers had been told he was not welcome on site. He said that staff safety was the number one priority, and that threatening behaviour from delivery drivers would not be tolerated. Courier drivers can be under a lot of pressure to deliver and collect consignments, they must abide by the site rules and would not be unloaded until the Respondent’s staff were ready and the area was safe. It concluded by saying “please ensure that any unacceptable

behaviour is reported to me so that we can record it, as there has been some confrontation with this driver in the past I was unaware of.”

97. The Claimant explained that he took the last sentence of that email to be a criticism of him, but we don't read it in that way at all, we simply read it that Mr Faughey hadn't known that there had been problems with this driver before, it certainly doesn't suggest the problems may have been limited to the Claimant, so we don't read it in that way.

98. On the 25 August 2016, Kim Shevket was alleged to have shouted at Mr Borak without any reason and the Claimant (in his schedule of allegations) said he'd spoken about it with his supervisor, Mr Samuels, and his team leader Mr Cox (issue 24). It's right to say that it appears that Mrs. Shevket had also complained about the Claimant to Mr Cox. On Mr Cox's account he'd asked her to put it in writing in order to document the occasion, but had taken matters no further. She did document it, [at 276] and in that document, she explained that there had been an issue between them in terms of delivery notes and CSV's and that it got, as she described it, "very vocal from both sides". She went on to say that her frustration was that Mr Borak would not let her speak and explain anything properly, and that she'd walked away and said she'd sort the problem out. It's also right to say that Mr Borak had accused her of blaming him, and that he had said that she should stop it or he would report her; she had said to him that he should go ahead. She also recorded that she was very angry as a result of the incident and had rung Mr Faughey about it, not realising that he'd heard about it already, but that he said "that although he'd heard about it, it appeared to him the situation was in hand". So that was the account of that and no action was taken against either party concerned. It's certainly clear to us from what the Claimant and other witnesses have told us, that there was no love lost between him and Mrs Shevket.

99. Issue 25 was withdrawn: it concerned the fact that on the 28 September 2016 [278] the Claimant sent an email, apparently to someone in the IT Department, complaining that his password for an internal system was the same as that of a Mr Singh; although this appeared in the claimant's Schedule of Allegations it has since been withdrawn, but only during the course of the Hearing.

100. There is an allegation (issue 26) that in September 2016, the Claimant was told (not for the first time) that "he was not allowed to learn to drive chassis". It is described as "lorries" in the schedule of allegations, but in fact it appears to be training for chassis driving as we've been told. Nothing turns on the distinction for these purposes. Mr Faughey's evidence was that his understanding was that the Claimant didn't wish to receive that training. The allegation is one against Mrs Terry, but we were told (and accept) that Human Resources were not responsible for decisions about who would and would not be trained in relation to things like chassis driving, they were simply responsible for arranging the training once a manager had said that it should happen. Mr Mason gave some evidence about this where he said he recalled speaking to the Claimant asking about chassis training, in other words asking the Claimant if he had received any, and that the

Claimant had said it was better not, "it looks like somebody blocked my name". Mr Mason said he would expect everyone to undertake the training and it was his understanding that the Claimant did not want to do it, but if he had asked to do it, he would have arranged it.

101. At some point in October 2016 (Issue 27 –solely an issue of victimisation) the Claimant was using a forklift truck to move some very long tubes and in this process, was being assisted by Mr Cox. The description was that the tubes were not secured to the forklift and that the forklift truck was being driven backwards, but that the Claimant was doing so safely and that the operation with the tubes was completed successfully. The allegation is that Mr Warmington had criticised the way that the Claimant had carried out the job. It appears from the evidence of Mr Cox that Mr Warmington had indeed spotted the operation whilst it was in progress and had said to Mr Cox afterwards that it would be better in future to ensure that these tubes had been actually secured to the forklift truck in some way. Mr Cox had relayed that information to Mr Borak.

102. Mr Warmington accepted that he may well have said that, and explained that he has overall responsibility for Health and Safety on site and that he frequently would raise issues that appeared to him to be a hazard (or appeared to him to be to be something which could be completed in a safer way) if he spotted something while walking around. He also explained that (more recently) the Respondent has been told that they should more stringent over Health and Safety than simply saying to somebody after the event, "that could have been done in a safer manner" - so had it occurred now, Mr Warmington said that he would have stopped the operation and insisted that the tubes were secured to the forklift before it continued. At that point, however, he felt that having a word about what should happen in the future was sufficient. Mr Warmington also explained that he would have done this no matter who was driving the forklift truck at the time. It's also right to say that Mr Warmington and Mr Cox did not take this to be a criticism of the Claimant, simply advice for the future as to how the task could be more safely completed.

103. On the 03 November 2017 (issue 29, said to amount to discrimination, harassment and victimisation) there was an incident involving a colleague called Mr Singh who was working with the Claimant in goods-inwards and carrying out the same sort of role as Mr Coleman and others. Mr Singh was a new member of staff who had not been working there long, and who was being trained by the Claimant. The incident resulted in the Claimant being suspended from work. It's fair to say that the suspension originally related to that one incident, but during the course of investigating it, some other matters came up; specifically, Mr Singh suggested that for a period of about two weeks, the Claimant's behaviour to him had made him feel worried and unhappy at work. There are a number of accounts of what occurred, which we will come to, but the situation at the time appears to be that Mr Singh and Mrs Shevket had gone to make a complaint, and that this had resulted in the Claimant being suspended on the day.

104. The decision to suspend was taken by Mr Mason who is Production Manager, and he was the person who gave the Claimant the letter of suspension which is at p285. There was some disagreement between the Claimant and Mr

Mason about whether a conversation had occurred before this letter was given to the Claimant. The Claimant says that there had been no conversation. The situation is that the letter itself which is [285] dated 03 November 2016 says “Further to our conversation, on the 03 November 2016, this letter is a formal notification of your suspension from work duties on full pay”. Mr Mason was asked by the Claimant under cross-examination “what further to our conversation” meant, at which point he said there had been a conversation outside goods-inwards during which the Claimant had tried to discuss the incident with Mr Singh with him, and that he had said he knew nothing about it. He had then gone away to look into it and had then found out that Mr Singh had been sent home because he was upset about the incident, and had then taken a decision to suspend the Claimant. It is also right to say that, at this point, the Claimant’s account of the incident had not been taken. But the point was that from what Mr Singh had said at the time, a view had been formed that the Claimant had been physically threatening to him, which was why the claimant was suspended, on the basis that, under the disciplinary procedure, this could amount to gross misconduct (which is what is confirmed in the suspension letter).

105. Mr Singh’s account at an investigation meeting [page 286] was that the Claimant was putting some steel out and had asked him the question about where it was going to go and that because he’d been looking at paperwork, he wasn’t paying attention and had asked the Claimant to repeat himself. At this point the Claimant had waved his hands and said “I’m not telling you again” and that when he asked why the Claimant had “to be so rude” the claimant had said “you’re rude” and then started to take what is described here as “his belt off” on the forklift truck and kept saying “don’t go there, don’t go there”. It’s fair to say that the subsequent investigation concluded that there was insufficient evidence to pursue the suggestion there was some physical threat involving a belt, which is why a decision was later taken that this was not potential gross misconduct.

106. Also, however during the course of that meeting, Mr Singh said that Mr Borak had been rude to him for the last few weeks and that he had initially been happy to come to work, but for the last couple of weeks had not wanted to come in because how the Claimant was behaving towards him. He then described an incident involving a pallet where the Claimant was alleged to have called him “a liar” (we think it’s a pallet, see issue 28, although Mr Singh describes it as a “box”). Mr Singh said that the Claimant’s attitude had changed towards him after that and he was generally rude, wouldn’t answer questions or would just stare at him, and that at some stage Kim Shevket had told Mr Singh that he shouldn’t put up with being spoken to in that way. Mr Singh had got to the point where he didn’t feel he could ask Mr Borak anything. This was why the investigation expanded from looking at the one incident to considering several weeks prior to that incident (this relates to issue 30, allegations of discrimination, victimisation and harassment).

107. Mr Cox was also interviewed by Mr Faughey [288] and he said he had witnessed the occasion when the term “liar” was allegedly used; he said that there was a pump that had come in the previous Thursday and hadn’t been put away. He said that Mr Singh had disputed the Claimant’s assertion that this was the case, and the Claimant had then started calling him a “liar” and that Mr Singh had

responded by saying “I am not a liar, I am a 34-year-old man”, and had walked off. Mr Faughey said he thought Mr Singh had handled it very well; he reiterated that the Claimant had just kept saying “you’re a liar”. He went on to say that there was also an incident where there had been a problem with Kim Shevket which we have referred to previously, which had got to the point of a note being put on record. Mr Faughey also said that he got on well with Mr Borak “and I am probably one of the only few that do”.

108. There was also a meeting with Mr Samuels to discuss issues around the Claimant and Mr Singh, during which Mr Samuels said that the Claimant, as he described it “can’t click with anyone” and “it looks like he’s upsetting people”. He went on to say that the Claimant had said that “Mr Sharpe had upset him, Kegan Coleman had upset him, Andrew Blue was alright at first, James Bond upset him”, and then the claimant had said he thinks that Mager Singh “in other words” is stupid, as he doesn’t get it the first time; the claimant had said “am I stupid or him?” and that when Mr Samuels said “well he is new so he will ask questions”, that the Claimant had said he thought Mr Singh was “a liar”. Mr Samuels said that Kim (Shevket) had told him that “Mager had had to go home because the Claimant had been rude and threatening to him and went to take his belt off” - and that there was some confusion about whether this was the trouser belt or the forklift truck belt. Mr Samuels also described an occasion where the Claimant had joked that Mr Singh was “stupid”.

109. There was another investigation meeting about this issue with Mr Faughey chairing and Ms. Snape as notetaker. Kim Shevket was interviewed and she described an incident where the Claimant had shouted at Mr Singh “aggressively and quite arrogantly” and she had said that he shouldn’t have to put up with being spoken to like that. On another occasion, the Claimant had said “you don’t know your ABC”. After the latest incident, Mr Singh had told her he felt intimidated and that she thought he looked “broken” and that’s why she asked him to report it to HR. She said that Mager told him he used to love coming into work, but the last couple of weeks he doesn’t want to come in. She expressed the view that the Claimant could be a “bully” and she also mentioned the incident involving herself and the Claimant. She also had said that the Claimant had spoken to Mr Coleman “like crap”. She said that she couldn’t discuss anything with Mr Borak because he would talk over her and “go off on a tangent and twist what was said and throw it back at you”, so she would tend to walk away.

110. There was then a investigation meeting with the Claimant, notes of which are at [293-297]. An annotated version follows at [299] which has the Claimant’s comments on it. It’s material to note that when Mr Faughey asked the claimant if they could start with the incident on Thursday and move on the past two weeks, and could the Claimant give his version of events, the Claimant gave a very lengthy explanation of what he said had taken place, this was recorded in the notes at [293 and 294]- it is over a page long. He described Mr Singh as being rude and frequently not listening when he was trying to train him to do things, and having no respect for him. He then went on to describe the incident which had led to the suspension. The claimant said that when he’d said something, Mr Singh had not taken any notice because of reading paperwork, and when asked to repeat it, the Claimant said he said “why should I” and Mr Singh said “I was

reading when you told me". The Claimant had said, "you were rude" and Mr Singh had said "no you are rude" and it had carried on in that fashion. The Claimant didn't say anything about the "belt" part of the issue, but his bottom line was that it was Mr Singh who had been rude and who had upset him.

111. He said that he had been talking to Mr Samuels when he saw Mrs Shevket walking with Mr Singh (we assume towards HR) and that he had said to Mr Samuels "watch what will go on" - we take that to mean that the Claimant realised that there could be a problem. The Claimant by this point had come to the view that Mrs Shevket was orchestrating complaints against him. He went on to say, "he upset me, it is rude, if I'm teaching him and I don't listen I'm calm inside, but everybody reacts negatively, I will not tolerate something like that" and went on to say, "he didn't know what was going on" when he was suspended, that he was complaining or upset, but was made to feel like the aggressor. So, he gave quite a long account, and there were also discussions around the definition of rudeness; there was also questioning over the pallet issue (issue 28), during which the Claimant said that he had said to Mr Singh "don't lie to me", this being "don't lie to me that the pallet has come in since Thursday" because it was the claimant's case that he knew that the pallet had come in on Thursday. The dispute in terms of the pallet incident is whether the words "you are a liar" were used, or whether the Claimant, as he himself accepts, said "don't lie to me".

112. At [296], the Claimant was saying that Kim Shevket was the main person behind Mr Coleman and Mr Singh (we infer she was behind their complaints about him) and this is why he told Mr Samuels to "watch what she would do". So that was the Claimant's account that was taken at the time, and as we say it is quite a long account. One of the reasons that we mention this is that it was suggested in the Hearing before us that the first time the Claimant's account was ever taken on board was when he handed in a document at the Appeal stage - that's clearly not the case, because the account had been taken right at the start of the investigative process as indicated above.

113. The following day, which was the 08 November, the Claimant was signed off sick and also at the same time had handed in two letters, one to Mr Newman and one to Mr Warmington described as "Private and Confidential" during which he was essentially bringing complaints which they chose, quite rightly in our view, to treat as a grievance. What he said was that "yesterday" he'd had the investigation meeting and had discovered new facts about his case involving Chris Samuels. He said "I found that behind Kegan Coleman and Mager Singh is the same person, Kim Shevket", that what Mr Singh had written was not true, and that similarly two years before, in relation to the incident with Chris Samuels, what Kegan Coleman had said was not true. The claimant said that the result of the complaint that Chris Samuels had made, the opinion of the owners had changed towards him, and that he felt that the situation was very wrong.

114. He went on to say "yesterday when I realised it was Kim Shevket, I felt a big relief because all the time I was sure somebody suggested to Kegan to write it in that way. I thought about a few different people but never about Kim, I am very proud I found this plot" and went on to say, "his goal had not been to punish Mr Samuels but to make him apologise in front of others and stop treating him

[the claimant] in that way, and that's why he had gone straight to the owners", although as we know, Mr Warmington had not been willing to discuss that case with him.

115. As noted above, Mr Warmington and Mr Newman decided this should be treated as a grievance and investigated as such, and they asked Mr Faughey to do so. In our view, that was the proper thing to do. Issue 31 is a complaint that the claimant's two private and confidential letters (to Mr Newman and Mr Warmington) were shown to others. Mr Faughey of course saw the letters as investigator; Mr Faughey's account (which we accept) is that the people to whom he spoke in the course of his investigation were not shown the letter and we also accept that; however the consequence of the grievance being made on the 08 November was that the investigation into the incident involving Mr Singh (which had led to the Claimant's suspension) had to be put on hold until the grievance had been dealt with. This inevitably caused delays in dealing with the disciplinary issues which may have arisen as a result of the incident on the 03 November. The other significant issue which now arose was that because the Claimant was by now off sick, there were issues about whether he would be fit enough to participate in meetings, and this led to the Respondent making a series of referrals to Occupational Health.

116. In relation to the Occupational Health referrals, we can hopefully deal with this relatively briefly; the situation is that there is a complaint in the Scott Schedule (issue 36, allegations of discrimination, victimisation and harassment) that, as the Claimant had provided permission for Occupational Health to contact his GP early on in the process, it was not right that he was asked to do so again at a later stage when the Respondent was seeking to ascertain whether he was fit to return to work, fit to participate in meetings involving disciplinary issues and so forth. During the course of the Hearing, the claimant has accepted (quite fairly) that it would be a standard procedure to ask for permission again at a later stage in order to get up-to-date medical information - so to that extent, we think that Mr Borak has accepted that there is an explanation as to why he was asked for a second time for that access (although obviously, at the time the Scott Schedule was produced he was unaware that that was the situation).

117. In short, though, Occupational Health having said a further GP Report would be required, it was incumbent on the Respondent to obtain one and consequently, that's why it did so, but there were five Occupational Health Referrals in total.

118. On the 23 January, Mrs Terry emailed the Claimant [page 338] to say that the respondent's Occupational Health physician had received the Claimant's GP Report and had said it was "okay" to carry on with the grievance, and consequently setting up a grievance meeting for the 26 January 2017. There were in fact two grievance meetings, there was what is described in the notes as a "preliminary meeting" on the 26 January between the Claimant and Mr Faughey with Ms. Baker taking notes, and during the course of that, the Claimant was asked whether he was not satisfied with the outcome of the Chris Samuels' grievance investigation; he replied that he expected senior management to stop the situation immediately when they knew what was going on and said he couldn't

stop thinking about it. His view was that there was evidence to show that Mr Samuels had behaved badly to him and he couldn't understand why instead, as he described it, he was treated as if he had done something very bad.

119. He was asked if he had any new information, not raised in the original discussion and said "no the information was already so strong the Judgment can be only one". Mr Faughey explained they'd have to decide whether to look into that matter again - it had of course already been investigated once. There was an explanation that the suspension would not have gone on so long, but for the fact that they'd been waiting for the Doctor's notes.

120. The Claimant then went on to mention problems with Kim Shevket, and also raised the issue of Mr Sharpe saying "I think that Paul Sharpe did a horrible job, he is the main architect, he shows people how to treat me" (making reference to Steven Trapp and Chris Samuels). He said he had a grievance about Kegan Coleman having lied in relation to the grievance about Chris Samuels, and also said he wanted to make a grievance against Mr Houghton and Paul Harris in relation to the "burping" issue (which is why, when we dealt with this earlier we said this was not in fact investigated until much later). So, there were a number of matters that were raised, some of which dated back a considerable way and involved complaints about a number of people.

121. This led to further investigations which we will briefly summarise: we have dealt with pages 346 and 347, which were interviews with Mr Houghton and Mr Harris, [348] which was Mr Sharpe's interview, where he said, in relation to the early part of the Claimant's employment, "Everyone who knows me knows I can be really sarcastic [or] flippant but most people know it and understand it. When he started, I said something, I can't even remember what it was and he took it the wrong way. He came to me afterwards and told me it was wrong/racist. I apologised. I said if I was a racist, I wouldn't have hired him ... I kept apologising, several times, and treated him with kid gloves to make sure it won't happen again. When you know someone has different values, or a different outlook on something, you change how you behave with them. Other than that, there were no problems." So that was his account, four years down the line.

122. In addition, there was a meeting with Mr Singh simply around the grievances that had been raised by the Claimant - this wasn't, therefore, in relation to the disciplinary issue (which had been "parked"). In general, Mr Singh confirmed that no one had told him how he should treat the Claimant and in terms of being encouraged to complain, he said that everyone had told him to go and see HR in relation to the incident, and that the reason he had was because the Claimant had been (as he described it) rude, arrogant and aggressive, and wouldn't teach him when he wanted to learn [p349].

123. Also, [at p350] there was a meeting with Mr Blue who had said that he had not been "egged on" to complain. He had previously mentioned problems with the claimant "being impossible" to Mr Samuels, who told him to see how it goes, but if it got no better, it would have to be taken further. As we know, there was a meeting eventually between the Claimant, Mr Blue and Mr Faughey around issues between them. Mr Blue was asked (in the interview on 27 January 2017) why he'd moved to a different role and he said it was for development reasons.

It wasn't to do with the Claimant but "that was a bonus" because he had got to move away from him.

He concluded that, in the end, he had been getting on with the claimant anyway.

124. At [351] Mr Harper was interviewed; he described Mrs Shevket as being "quite negative" and not "approachable", and also said that he had got on fine with the Claimant but that he would do too much rather than ask the Claimant for help because they had such a workload. He said that the Claimant had nothing to do with him having left that Department for another role. He also said "on a personal note, I think Mr Borak has probably got to a point where he is getting short with people because a number of people who are going through. They get training, and he's got fed up giving all that training and so many have gone through. It's right they get the training, but it must be hard on [the claimant]."

125. Mr Elms when interviewed [p353, 27 January 2017] had said he would have spent another year of two in goods-inwards but "It was starting to drive me cuckoo, just WB" ie: the Claimant, and he said the Claimant wouldn't respond when he said good morning or good night and so on, so he'd given up. He also describes a row had taken place when he was looking for paperwork, and the claimant thought Mr Elms had gone through his personal papers.

126. There was an interview with Kim Shevket [354] who said she hadn't got a particular issue with the Claimant, only the one that she'd written the email about, but that the claimant was, in which she described him "an odd character to get on with" and that there were little clashes from time to time.

127. At page 355, Mr Coleman (interviewed on 30 January 2017) said he had not been encouraged to complain about the Claimant and said "He's just not the best person to get on with. He is very possessive about his role and won't show you anything. The first two weeks were ok, but when I picked things up he started ignoring me. I was only there 3 weeks, and he's started threatening me, saying he was going to tell Lisa Terry and Scot Faughey that I was no good and another thing he would say is that he's up here and I'm down there." He said he was happy when he moved as he didn't have to deal with the Claimant anymore because he'd reached the point where he didn't want to come in to work.

128. So, there was quite a bit of investigation that went on as can be seen from the summary above. Then there was a reconvened grievance hearing after those investigations had been undertaken [this is at 358, 2 February 2017] during which it was explained to the Claimant that there was really no evidence in support of his complaints as a result of what had been said during the investigation, and consequently the grievance could not be upheld. The Claimant said, "I thought it would be a warm welcome today, I expected what I got, you did what you did". It's not entirely clear what was meant by that, although we infer that what the Claimant meant was that he hadn't expected them to uphold the grievance, or at least he was unsurprised that they had not upheld the grievance.

129. On the 02 February 2017 [p362], the Claimant was notified by letter of the grievance outcome. In short, Mr Faughey said that the Claimant had not raised any new information about the Chris Samuels' case so it wouldn't be

reopened, that they had investigated the allegation that Kim Shevket had been orchestrating complaints against him and found no evidence that she was, and also that their investigation about Mr Harris and Mr Houghton (regarding the “burping” issue) had found no evidence to support the Claimant’s case on that.

130. That being so, the disciplinary process was again reactivated because the grievance had been dealt with. Also on the 02 February 2017, the Claimant was invited to attend a disciplinary investigation meeting [363].

131. The meeting took place on the 06 February 2017 and was quite short, as the respondent had already taken statements from everyone before having to “park” the process. During it, Mr Faughey asked the Claimant whether, looking back on the incident with Mr Singh, he accepted why Mr Singh felt threatened and unable to come back into work? The claimant replied, “I didn’t threaten him, I told you everything already”. He was asked if he recalled how many times he’d shown Mr Singh how to do each job and said he’d need to check his file, but that Mr Singh could have called him. It was put to him that possibly Mr Singh had not done so because the claimant had been rude to him, but the claimant said that it was Mr Singh who was being rude by ignoring his instructions and explanations about how to do things. Eventually the claimant said he wasn’t feeling very well today, so they should do “whatever they thought was right, what they had been told to do” – p365.

132. This resulted in an Investigation Report [at 366] in which Mr Faughey summarised the fact that Mager Singh had said he felt threatened on the day concerned and had needed to go home, and it had then come to light during the investigation that it wasn’t an isolated incident, so they had started to look at the two week period prior to that. The Report went on to say that there was evidence that the Claimant’s behaviour could be perceived as aggressive and patronising, but there was no evidence in relation to threatening behaviour (this being the physical threat we have referred to before). Consequently, Mr Faughey was recommending the suspension should be revoked with immediate effect, but that there should be a Disciplinary Hearing in relation to misconduct rather than gross misconduct - attached to that report were the various interview notes that had been taken.

133. On the 08 February, Mr Faughey emailed the Claimant, amongst other things saying, “within these [the papers that he was sending], you will see my investigation report which confirms as we discussed on Monday that you are no longer on suspension but as you are currently signed off sick until the 16 February, we do not expect you to attend work”. So, he was confirming that the Claimant was no longer on suspension; he explained that this was because he had discussed his recommendation and been authorised to tell the Claimant that the suspension was lifted. It’s fair to say that it’s very clear from that document that the suspension had been lifted, but the Claimant didn’t seem to accept that, and queried it on a number of occasions; we think this is possibly because he thought Mr Faughey didn’t have the requisite authority to be able to do so. Nevertheless, the document is very clear.

134. The papers relating to the Disciplinary Hearing [368] arrived with the Claimant late and the consequence was that the Hearing was postponed so that he would have proper time to prepare for it- so, for instance at [375], the Claimant was saying that he'd received the paperwork the day before, the 09 February, so the Disciplinary Hearing eventually took place on the 14 February.

135. The notes of the Disciplinary Hearing start at p379; it was chaired by Mr Newman and Mrs Terry was the note-taker. Issue 32 on the claimant's list refers to this hearing but wrongly states the date is 14 March 2017 rather than 14 February. The allegation is that the hearing involved discrimination and victimisation. There was an initial discussion about the fact that the severity of the alleged misconduct had been downgraded. Consequently, the Claimant's suspension had been lifted because it was no longer classed as gross misconduct. There was a discussion where Mr Newman was asking the Claimant if he recognised that he could be aggressive or rude and the Claimant said, "not at all". He was also asked if it was better working on his own or in a team. It was obvious Mr Newman, at this stage, was looking at some job where the Claimant might work more on his own so that there would be less potential friction. The Claimant reiterated that he had been upset, and he was particularly upset to realise that Mr Singh had not been suspended as well as him. The Claimant then went on to say that Mr Coleman had exaggerated in relation to the case involving Chris Samuels. It was pointed out that there were a number of different accounts of what had happened, but that the Claimant's recollection wasn't in accordance with what others were saying. He was asked if he would be prepared to apologise to Mr Singh - the Claimant said "regarding what" and Mr Newman said "because he felt threatened" and the Claimant kept querying what the "threat" was. Mr Newman also said that unless the Claimant changed the way he interacted with people, he was worried that it might happen again. The eventual result was that the Claimant was given a final written warning for twelve months.

136. The Tribunal were mindful that the reason that the first claim was brought was because of the final written warning, and we were keen to explore with Mr Newman why he thought a final written warning was in fact the right sanction in the circumstances. His explanation was that he felt that the Claimant needed a stern warning to force a change in his behaviour, because there had been other incidents involving Mr Singh and because the Claimant had shown no acknowledgment that he may have been at fault, no remorse and was not prepared to apologise.

137. Mr Newman said that if the Claimant had instead been prepared to acknowledge that he may have been at fault (or at the very least that there may have been a misunderstanding meriting an apology) then the situation would have been different. The final written warning was notified to the Claimant both verbally and by letter of the 14 February 2017. The letter said: "the nature of your unsatisfactory conduct was that you used threatening behaviour to another member of staff over a two week period culminating an incident on the 02 November 2016, I'd like to stress again, it's about how the individual perceives the behaviour and not whether you feel it was appropriate or not" and it did point out that if there was an unsatisfactory improvement or further conduct issues

within the next 12 months, more serious disciplinary action could be taken and a dismissal without notice could be a consequence.

138. It's right to say that the phrase about "it's about how the individual perceives the behaviour, not whether you feel it appropriate or not" was relied on heavily by the Claimant in the Hearing before us in relation to a matter that we will come to shortly, but the point is that the Claimant's understanding of that sentence appeared to be that, whether or not he was in the right, as long as somebody felt threatened, that was sufficient; that is not actually what it says - it's not saying that the behaviour didn't occur, it's saying that how the claimant felt about (whatever the behaviour was) is not the issue.

139. The Claimant lodged an appeal [page 407], it was dated the 28 February 2017 and the claimant complained that his version of events had not been before Mr Newman in the Disciplinary Hearing (which is not correct, because he had the investigation notes as we've already pointed out), that the claimant had no chance to comment on the statements during the disciplinary hearing and also that, even if the Claimant had done something wrong, the punishment was too harsh.

140. Mr Anderson conducted the Appeal meeting on 8 March 2017 [page 409 – 416] – allegation 33 on the claimant's list, said to involve discrimination and victimisation. During that meeting, it was clarified that although the Claimant had suggested in his Appeal letter he might submit further evidence he had not done so. There was another discussion about whether the Claimant had understood the fact that the suspension had been lifted, and an offer for translation services (which the Claimant did not take up). Mr Anderson asked what evidence the Claimant had got to back up his version of events, as it was totally at odds with those of others, such as Matthew Cox and Kim Shevket. Mr Borak said that if Mr Singh had apologised to him, he would have been ok, so he couldn't understand why he as saying he felt threatened. Mr Anderson said that Mr Borak was coming across as threatening at this point in terms of his mannerisms and the way that he was speaking.

141. It was explained that the allegation of misconduct had been reduced from gross misconduct, as there was no evidence of physical violence. Mr Borak responded by saying he'd been treated unfairly and that there had been an opportunity to revoke the suspension immediately. Mr Anderson pointed out that they couldn't do that without first investigating and Mr Borak queried why Mr Samuels had not been investigated in relation to the incident back in 2014. It was explained that this was a different case. Effectively, most of the discussions centred around the fact that Mr Borak's account of what took place was at odds with what other people were saying. Mr Borak's view of that was that Mr Anderson would find out that he was right, and not others.

142. Mr Anderson did not uphold the appeal, but prior to making that decision, he in fact carried out further investigations - one involved a meeting with Mr Cox [426] another with Mr Newman [427] and then the outcome was notified on the 22 March 2017.

143. There were then a series of emails from Mr Borak to Mr Anderson in relation to the appeal outcome, effectively challenging the content of the witness statements of the various people who had given information relating to the allegations around Mager Singh. Mr Anderson had been clear in pointing out that once the appeal had been dealt with, there was no further right of appeal, but what he was prepared to offer at some stage was a meeting, effectively to discuss a way forward rather than reopening the appeal, it's not entirely clear to us that Mr Borak understood that it wasn't possible to challenge the appeal outcome, but if he did, he certainly sought to do so in any event.

144. On the 18 April 2017 an Occupational Health Report was obtained, [page 502-503] in which, amongst other things, a meeting with managers and mediation was recommended in order to push things forward. Occupational Health were then saying a return to work would be dependent on a successful outcome from the mediation.

145. There was then a meeting between the Claimant and Mr Anderson to discuss a way forward rather than reopen the appeal [515 onwards]. It took place on the 10 May and the short point is that the Claimant was offered mediation – he said he would think about it, and subsequently (on the 31 May 2017) there was in fact a mediation. We don't need to go into the ins and outs of what happened at the mediation, but simply to say that at this point it is clear that the Respondent was seeking to get the Claimant back to work and was hoping to achieve this via a mediation process. At 34 on the claimant's list of issues this mediation is mentioned, but in the boxes for "perpetrators" and type of discrimination the claimant has simply written "no comments".

146. There was a further Occupational Health appointment on the 20 June (listed at 35 on the claimant's Scott schedule, although he now accepts that it is not a complaint in itself). The report is at [533] and, it is material to note that the Occupational Health physician said it would be advantageous to ask the Claimant's GP to obtain a detailed report; the Claimant had previously had a stent fitted, and had experienced chest pains in the recent past, resulting in him being taken to hospital. The physician was looking to see whether it was safe for the Claimant to continue to drive forklift trucks and suchlike at work, so this was what resulted in the second request for permission for a GP report, which I have referred to previously (issue 36, said to be discrimination, victimisation and harassment by Lisa Terry).

147. On the 19 July 2017 the Claimant sent an email to Mrs Terry [551] partially picking up on issues around the Occupational Health matters, but then going on to say "I hope one of those "up to ten people" who receives my email is P Sharp, if not, please do me a favour and forward it to him, I attach a link from a Sky News website". The background to that comment is that Mr Borak had been sending emails relating to the Occupational Health communications (and indeed, to some degree challenging what others had said in their witness statements in the disciplinary process) to a Whale Mail address which was accessible by, we are told, up to ten staff. This particular email of the 19 July attached a link to a very distressing article about a 16-year-old Polish girl who had hanged herself because she had been bullied for being Polish. There is a

reference to this email at issue 37 on the claimant's list, but he clarified that he is not making any claim about it. 148. The point here is that at the time that document [551] was sent, the Claimant was aware that more than one person would see the Whale Mail emails - it's fair to say he had not at that stage been told not to send emails there, but he had been warned that it was not a private address. In reply, (this was at [553] on the 20 July 2017) Ms Terry sent an email saying, "with regards to the Whale Mail address, I still do not feel it's appropriate for you to email that address, but it's your decision if you continue to do so."

149. On the 20 July 2017, the Claimant sent a reply to Mrs Terry querying issues around his heart condition, and then saying "could you please confirm you did me a favour and forwarded my last email with a link to Sky News to P Sharp", that's at [554].

150. Mrs Terry then responded on the 20 July at [555] saying it would be inappropriate to forward the email to Paul Sharpe, and "it is also not appropriate for you to send any correspondence concerning other employees to the Whale Mail address. If you do this again, it will be a conduct issue and dealt with accordingly." This email is referred to at issue 38 on the claimant's list, where he refers to Ms Terry's sending of it as "discrimination, victimisation and harassment" and says that she is "threatening him" to stop sending emails to the main Whale Tankers address.

151. In the Hearing before us, it was suggested that the Claimant was unclear that Mrs Terry had told him he should not use the Whale Mail address. We accept that, prior to the email we've just quoted (that was sent on the 20 July) Mrs Terry had explained she thought it was not advisable to use that address because it was a public address, but if the Claimant chose to do so relating to his personal information, that was his matter (i.e. she did not prohibit its use at that point). It's quite clear that the email sent at [555] specifically prohibited it, however, and in fact warned of the fact that there may be consequences in the way of misconduct investigations, were the Claimant so to do.

152. On the 20 July 2017, Mr Borak responded, "Dear Lisa, are you threatening me now? Could you please explain to me why it's inappropriate to send this link to Paul Sharpe and to send my emails to other Whale's accounts. The link should be sent not only to Paul Sharpe, but others from the group". In the email the claimant went on to say "what's wrong with the link from Sky News, it's a public website, your lack of reaction is also reaction, which shows how you've dealt with my case, that story should be a warning for Paul Sharpe and others, what this behaviour can cost other people" and the link was again attached. There was a reiteration of "I'm sending this email also to Paul Sharpe"- and indeed it was copied specifically to him- "because I feel it's my duty to warn him".

153. A number of things need to be said about that email: firstly, as a result of the interpreter clarifying things, it appears that the Claimant was not using the word "warn" in the sense of threaten, what he was intending was to use the word "warn" in the sense of "to alert" someone to something, however the point is that

the word “warn” was used. The recipients did not necessarily think that Mr Borak meant that he was raising an issue or alerting people - what we know now is not what they knew then. The second point that is that it was quite clear to us that the Claimant knew that he wasn't to send further emails to Whale mail, because he used the phrase “are you threatening me now?” - so he clearly knew that there would be, or could be, adverse consequences if he continued to use Whale mail. The other reason that we accept that the Claimant knew this is because he said that if it had been sent by one of the owners, rather than Mrs Terry, then he wouldn't have done it.

154. On the 21 July 2017 [at 557] the Claimant sent a further email (again to Whale Mail, human resources and a copy to Mr Faughey) saying “Dear Lisa, with reference to your last emails, what you did is called threatening, definitely gross misconduct” - so at this point, the Claimant is saying that Mrs Terry is threatening him by telling him that sending further emails to Whale Mail would or could be treated as a conduct issue. Mr Newman attempted to reply to that, [p559] and at that point, was saying there shouldn't be any further correspondence between the Claimant and Mrs Terry, but that's neither here nor there because we know that the Claimant didn't see that email.

155. On the 21 July 2017 [559] there was meeting between Mr Warmington and Mr Sharpe (note taker Mrs Baker) at which point Mr Sharpe was raising concerns about the Claimant attempting to contact him directly, either in person or by phone, or more worryingly at his home. It was recorded that Mr Sharpe was concerned for his own safety and that of his family, and was advised that he should “walk away” if he bumped into the Claimant and not get into a conversation or a discussion. If the Claimant was to come to his house, he should secure the doors and contact the police. So clearly, Mr Sharpe did feel alarmed and threatened at this point by the emails which had been sent.

156. The Claimant on the 24 July 2017 raised a complaint about Mrs Terry “threatening” him that if he didn't stop sending his emails to the general Whale Mail account it would be a “conduct” issue. He went on to say he believed that the dignity at work policy would be used in his favour, because the email made him feel “threatened”.

157. At [562] Mrs Terry gave her account in relation to what had gone on around the Whale Mail and specifically said “although the “link” is in the public domain” (in other words the article), “by forwarding it and the language used, it was threatening Paul which is not appropriate.” She said that if the claimant had a complaint it should have been raised in the appropriate manner with evidence of incidents, which had not been received. We bear in mind that everything complained of relating to Mr Sharpe goes back to 2013, and we are now in 2017.

158. Mr Newman then wrote on the 25 July [563] making it clear that the conduct that Mrs Terry had engaged in, in other words instructing the Claimant not to use the Whale Mail account, would not amount to bullying under the dignity at work policy because (and he quoted from the policy), “bullying does not include appropriate constructive criticism of an employee's behaviour or job performance by management” and went on to say that he would reiterate that sending correspondence of a confidential nature to the Whale Mail email address is not a

suitable method of communicating a complaint. “This email is monitored by numerous people and has been set up as a means for our external customers to get in touch with us. Matters of this kind should be dealt with confidentially for both yourself and the individuals you have complained about. Therefore all further correspondence should be sent directly to myself in my position as Director”.

159. We find that there is a clear distinction between a management instruction and threatening behaviour towards a colleague, and we think Mr Newman was quite clear in explaining what that distinction was.

160. Mr Anderson interviewed Mr Faughey relating to the complaint about Mrs Terry. Mr Faughey said he did not see her email as threatening, but that he thought Mrs Terry was right about the Claimant’s email on the Sky News link because she was here to look out for Whale’s staffs welfare; it would be reasonable to ask for such an email to be sent to someone specific. He went on to say he thought that Mrs Terry had said something pretty straightforward, and he didn’t know why Mr Borak had taken it the wrong way.

161. At [page 570] by letter 3 August 2017 the Claimant was notified that his grievance about Mrs Terry was not successful, essentially because she had issued a management instruction after he’d already been advised not to send messages to the address, and that the management instruction explained the repercussions should he continue to do so, but unfortunately, the Claimant had continued use it.

162. On the 10 August 2017 the Claimant sent an appeal against the finding about Mrs Terry, essentially saying that Mr Newman had said “it was about how the individual perceived the behaviour, not whether you feel it was appropriate or not”. Consequently therefore he thought it was very clear that Lisa Terry had threatened him contrary to the Dignity at Work Policy; as we have already noted, the Claimant didn’t appear to accept that sending a reasonable management instruction is not inappropriate behaviour and consequently would not be covered by that policy.

163. At [577] on 11 August 2017 the Claimant sent a further email copied to Whale Mail notwithstanding Mr Newman’s instructions to send everything directly to him. This email, amongst other things, was critical of Mrs Terry because it was aimed at Ms. Baker and it said “I think it’s inappropriate to put you in this situation, you have to talk with me about your boss’s failures, I’m very sorry about that, you must feel uncomfortable That’s why (I’m not stubborn), I think sending emails to the general whales account is the only proper way- the right person will deal with it asap.” So despite having been instructed by one of the Owners, Mr Borak continued to send emails to “whale mail”.

164. There was an Occupational Health Report dated the 14 August 2017. At paragraph 9 the Occupational Health Physician confirmed the Claimant was fit to attend meetings in relation to the disciplinary investigations and subsequent potential grievance investigations, in other words the Claimant was fit to attend Hearings.

165. The Grievance Appeal Meeting was dealt with by Mr Warmington on the 05 September [593]. During the course of that the Claimant explained that for him, “it was a very easy case, no doubt Lisa Terry is threatening me, I have no doubt how I should be treated”. He referred to Mr Newman’s quotation from the Disciplinary Meeting (which we have already covered) and then the claimant said, “it’s how the individual is feeling, it was horrible to check my email. I was scared...Definitely she threatened me. It’s gross misconduct”. Mr Warmington tried to explain that Mrs Terry had issued a management instruction. Mr Borak simply replied that he was talking about “being threatened” and thus the conversation continued.

166. This resulted in further investigations which we won’t cover in depth. Mr Warmington spoke to Mrs Terry [596], to Mr Newman [599] - during which Mr Newman thought the wording of Mrs Terry’s email was firm but appropriate – to Mr Anderson [601] who said that it seemed a very clear instruction to him, not threatening or bullying, and to Mr Faughey [604] who also said he thought Mrs Terry was right to handle the situation the way that she had.

167. The grievance outcome letter of 15 September 2017 (page [605]) essentially, confirmed that the appeal was not upheld because bullying did not include appropriately constructive criticism of employee’s behaviour or job performance. It reiterated that it was a reasonable management instruction and the wording and actions could not fit the definition of bullying.

168. The Claimant was invited to a Disciplinary Investigation because the disciplinary in relation to the Whale Mail had been put on hold pending the grievance investigation into Mrs Terry. This was by letter dated 18 September (page [610]) and the allegation was that the Claimant had wilfully disregarded a direct Management instruction not to use the Whale Mail account, and had acted inappropriately by sending emails to Mr Sharpe that could be perceived as threatening.

169. There was a Disciplinary Investigation Meeting chaired by Mr McFarlane on 20 September 2017, during which the Claimant was asked what he hoped to achieve by sending the link to Mr Sharpe. He replied “to warn him” and went on to say that Mr Sharpe was the “main architect”/“main inventor” [618]. He also suggested the reason he’d sent it to the Whale Mail address was in case Mrs Terry was not in the office. When it was suggested that it should have been confidential, he said “sometimes you need to say very loudly” [618]. We will touch on this slightly later on. The Claimant was said to us (and indeed said during the Disciplinary Hearing) that actually he would have sent the email again, because he thought it was his “moral duty” to do so. There was some suggestion by the Claimant during the Hearing that he meant he would have only sent it to Mr Newman; that isn’t what he said to us, nor what he said at the time.

170. There was a further investigation carried out by Mr McFarlane who spoke with Mrs Terry. She confirmed why she thought the email should not have been sent to the general account, and why she issued the email she had. She also said she had checked it with Mr Newman to ensure her reaction was appropriate,

and then went on to say that they tried to make sure Mr Sharpe had not seen the Sky News link, but in the end the Claimant had sent it directly to him. Mr McFarlane [265] also spoke to Mr Newman, who said he was surprised the Claimant had used whale mail again and disappointed he had sent it directly to Mr Sharpe. He said he had subsequently explained how a reasonable management instruction wouldn't constitute bullying under the Dignity at Work Policy, and explained that Mr Sharpe had been concerned about his safety and that of his family.

171. Mr McFarlane did a report in which he concluded [627-628 - dated 22 September 2017] that those who had read the emails felt they were (at the very least) inappropriate - and in the case of Mr Sharpe, threatening - and went on to say that the instruction on the 20 July 2017 from Mrs Terry was entirely reasonable. He went on to say that it was possible that if an earlier instruction had been issued, it may have avoided an escalation of this matter -but in fact, in the Disciplinary Hearing and in the Hearing before us, as we've already said, Mr Borak confirmed quite clearly that he would have continued to use the Whale Mail account. We find that, whenever the instruction had been sent, it would have been disregarded by the claimant.

172. On the 4 October, the Claimant was invited to the Disciplinary Hearing. The letter said there was a case to answer regarding wilfully disregarding a direct management instruction re: The Whale Mail account and acting inappropriately by sending emails that could be perceived as threatening to Mr Sharpe. It was pointed out that one outcome could be dismissal on the grounds of misconduct, because the Claimant already had a live final written warning.

173. On the 9 October 2017, there was a Disciplinary Hearing between the Claimant and Mr Warmington. This was an extremely lengthy Hearing; we only refer to certain aspects of it in the interests of brevity. Firstly, the Claimant confirmed that his Doctor had said he was fit to go ahead with the Hearing; secondly, the Claimant said his "dream" was to have five minutes with Mr Warmington in order that everything could just be sorted out. Thirdly, when asked about the management instructions, he said it was Mrs Terry's opinion only; the claimant continued to say it was an opinion or a threat, not a management instruction, and he continued to say it was his duty to send the email and link. There was a discussion around the fact that Mr Sharpe had felt threatened; and the Claimant explained he had not intended to threaten Mr Sharpe.

174. There were further investigations that Mr Warmington undertook; he specifically spoke to Mrs Terry [651] on the 9 October, Mr Newman [652], Mr McFarlane [653], Mr Faughey [654] all on the same day. In addition, the Claimant had sent quite a bit of correspondence [655-659] in relation to amongst other things the meeting with Mr McFarlane. He also raised other issues around Mr Samuels, Mr Sharpe, Mrs Shevket and Mr Trapp.

175. The meeting reconvened on the 10 October 2017. Again, this was a very long meeting and we refer only to certain relevant extracts from it, but it runs from pages 661-677. Firstly, Mr Warmington said to the Claimant that the latter had said in the earlier meeting that if Mr Newman told him to stop using whale mail,

he would have done so; the Claimant said “yes I stopped” but then Mr Warmington pointed out that wasn’t the case, because there was a further mail sent on the 26 of July and another on the 11 August. Then Mr Warmington said that another email had been sent after the instruction to stop using whale mail, to Mr Sharpe and Mr Faughey; the Claimant replied “yes definitely and I will do it again”. This is the quote we were referring to earlier and which was repeated in the Hearing before us ; it is not the same at all as saying definitely “I wouldn’t do it again, I would just send it to Mr Newman” or something along those lines.

176. So, at this point, Mr Warmington was being told quite clearly by the Claimant that he would not have stopped sending them, regardless of who had issued the instruction. Also, at [668] in relation to whether he had seen the note of the meeting with Mr Sharpe, the Claimant was recorded as saying “why didn’t Mr McFarlane mention to me about Mr Sharpe having to call the police, it made my day to read this”. There was discussion in the Hearing before us about what the Claimant meant by “made my day”. Originally, it said it made him happy and it made him feel like it was a good day; and later, he said that rather than making him happy, it made him laugh. Either way it’s fair to say that anyone reading it would take it to mean that the Claimant was pleased to think that Mr Sharpe was alarmed enough to think about calling the police. At the end of the meeting the Claimant confirmed that he had been given enough opportunity to explain, and that the correct procedure had been followed.

177. In between the second Disciplinary Hearing and being told the outcome, the Claimant raised a complaint that graffiti had been painted on his house [679-680], a complaint that we see in the Scott Schedule which seemed to suggest that this was Mr Faughey, who was the only person who knew his address. Indeed the Claimant also suggested it could be Mr Faughey’s brother, who worked in the paint shop. A few points to be made about this: firstly, during the Hearing, the Claimant then said he was not complaining that it was Mr Faughey, he was just suggesting it was someone from the Respondent company; the second point being that Mr Faughey had given him lifts but never dropped him off at this house, but of course could have accessed his address from the personnel files (as, indeed, someone else could). Thirdly, the graffiti itself [679-680] was not written in a language that the Claimant or this Tribunal could understand - if anything, appears to be the kind of graffiti that gangs use, which is a process we understand to be called “tagging”. One sees it, for instance, near railway lines and the like. The short point to be made about this graffiti is that the Claimant seems to suggest that, in some way, the Respondent was responsible for it; there is really not a shred of evidence whatsoever that that is the case.

178. On the 25 October 2017, Mr Warmington wrote to the Claimant explaining that he had decided that the Claimant should be dismissed on notice. He encapsulated his thoughts by saying that the Claimant had said that he believed that the instruction was just Mrs Terry’s “opinion” and he had been adamant he would do the same thing again. Mr Warmington was satisfied that Mrs Terry had given a reasonable management instruction and it wasn’t acceptable to disregard such an instruction, even though one might disagree with it. He also said that he was satisfied that the email had been threatening to Mr Sharpe, and had been perceived as such.

179. The Claimant appealed 27 October 2017, firstly on the basis he had not disregarded a reasonable management instruction because, he said, “I have never ever received a clear management instruction from Lisa Terry not to use whale mail anymore”, secondly, that he hadn’t disregarded the management instruction from Mr Newman but had obeyed it. Thirdly, he said he had not sent threats to Mr Sharpe but just a warning about what would happen if the Respondent did not address the discrimination problem.

180. The Appeal meeting took place on the 10 November and it was Mr Turner who dealt with the Appeal - the notes are at [697-701]. During the course of that, similar points were made as the Claimant had made in the Disciplinary Hearing: firstly, that he thought that the email was threatening. Mr Turner said that he thought that it was possible Mr Sharpe could have misinterpreted the Claimant’s message as a threat, but he could see why it could be interpreted that way; the Claimant replied that it could not be seen as a threat. There was also a reference to the graffiti.

181. Mr Turner then prepared a draft response [pages 701a & b], in short dealing with the three points of the Appeal: point one being that there was a clear management instruction which the Claimant had interpreted as a threat; secondly, that Mr Newman’s email had again explained that the claimant was not to use the whale mail address but in fact he had used it again on the 11 August; thirdly, that although in the Claimant’s mind he had not made a threat, but was only trying to get across a message, Mr Sharpe interpreted the actions as threatening. 182. The other points that he made (which were not included in the letter) were his own personal thoughts about the Claimant. In summary he said it was a sad case to hear and that Mr Borak appeared lonely, bitter, frustrated, dogmatic, obsessive and disappointed but dignified, and unable to differentiate between major and minor points (and in some cases, no point at all). But those were his personal thoughts. The other thing he told us when he gave evidence was that he had noted the “it made my day” comment made by the claimant in the context of Mr Sharpe, and the fact that Mr Sharpe might have had to have recourse to calling the police.

183. Mr Turner wrote on the 16 November 2017 [702-703] basically reiterating the points that we’ve already quoted from the draft (in relation to the three points of Appeal). He concluded that the decision to dismiss was correct.

184. Because he was dismissed with notice, the Claimant had an effective date of termination of employment of the 25 December 2017.

RELEVANT LAW

1. Under section 26 of the Equality Act 2010, a person (A) harasses another (B) if:
 - (a) A engages in unwanted conduct related to a relevant protected characteristic [here, race]; and

- (b) the conduct has the purpose or effect of – (i) violating B’s dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

2. Under s 26(4), in deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

- (a) the perception of B;
- (b) the other circumstances of the case;
- (c) whether it is reasonable for the conduct to have that effect.

3. Direct discrimination: under s13 of the Equality Act 2010, a person discriminates against another if, because of a protected characteristic [here, race], that person treats another [here, the claimant] less favourably than s/he treats or would treat others.

4. Victimisation: under s 27 of the Equality Act 2010, a person (A) victimises another if s/he subjects the other to detriment because the other does a protected act, or A believes that the other person has done or may do a protected act.

5. Under section 27(2), each of the following is a protected act –

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

6. The burden of proof: under section 136(2) of the Equality Act 2010, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the court must hold that the contravention occurred. Under section 136(3) however, subsection 2 does not apply if person A shows that A did not contravene the provision.

7. Time limits: section 123 of the 2010 Act provides that proceedings on a complaint... may not be brought after the end of:

- (a) the period of three months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.

8. Section 123(3) provides that for the purposes of this section –

- (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.

9. In the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when s/he does an act inconsistent with doing it, or if s/he does no inconsistent act, on the expiry of the period in which s/he might reasonably have been expected to do it.

10. Unfair dismissal: Under section 98(1) of the Employment Rights Act 1996, so far as relevant, it is for the employer to show a potentially fair reason for dismissal within s98(2) . In this case, the respondent relies on the claimant's conduct as the potentially fair reason justifying his dismissal.

11. Where the employer has fulfilled these requirements, the determination of the question as to whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) 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 (b) shall be determined in accordance with equity and the substantial merits of the case.

12. We have borne in mind the guidance in the case of BHS v Burchell, to the effect that the issue to be considered is whether, at the relevant time, the respondent employer genuinely believed that the claimant had carried out the conduct in question; if so, whether the employer had carried out, by the time at which the dismissal process was complete, an investigation which was within the reasonable range in all circumstances; and if so, whether there was a reasonable basis in the evidence for that belief. If so, the tribunal must go on to consider whether dismissal was within the reasonable range of sanctions for the conduct in question in all circumstances. We must not substitute our own views for those of the employer.

APPLICATION OF LAW TO FACTS

1.General: The findings of fact above (and any below) were all made on the balance of probabilities. If we say that any allegation is "out of time" we have considered whether to exercise our discretion under section 123 and have decided not to exercise it, no good reason for extending time having been shown.

2.Victimisation allegations (allegations 15 -20, 23, 27-33, 36, 38-42 in the claimant's Scott schedule; 35 was not pursued at the hearing before us and the claimant accepted that 37 was not an allegation but a statement about what the claimant had done): The first point to be made is we think Mr Borak has had difficulty in understanding what an allegation of victimisation actually constitutes (and specifically what is meant by "protected acts"); that said, we have asked questions of all of the witnesses regarding the point at which they thought the claimant had done a protected act (in other words, made an allegation of race discrimination) or that the claimant may do such an act. Mr Faughey said the first he knew of any reference to race discrimination was when he was informed of the original Employment Tribunal claim (at some point shortly after the 16 July 2017). Mr Warmington's evidence was the same, as was that of Mr Newman, and specifically he said that when the emails around about page [440] had been sent, he was off sick. We accept their evidence on this.

3. Mrs Terry had seen the document at [183] but told us she did not take that to be an allegation of race discrimination, nor the document at [198]- although, as we said, we thought the latter could potentially have been read that way. Mrs Terry said that the first time she really realised that there was a race discrimination allegation was on receipt of the claim form. One of the people, very confusingly, who is the subject of a victimisation allegation is Mr Singh; he clearly couldn't have known about any of the protected acts as they were not addressed to him or brought to his attention, so any claims against him in that regard fall away.

4. Mr Turner confirmed that at the time of the Appeal Hearing, he did know that there were Employment Tribunal proceedings involving an allegation of race discrimination of some sort, but had no further information and as a matter of the timeline, it's clear that Mr Anderson did not know even of the Employment Tribunal proceedings as at the time he dealt with the Appeal Hearing. We accept their evidence and make those points because the amendment application that we allowed at the beginning of the case allowed the claimant to rely on (firstly) the incident of the 27 January 2014 which resulted in the document at [183], secondly the email of the 23 October 2014 which resulted in the document at [198], thirdly the various letters disputing the content of witness statements (which were at [440] onwards) - to our minds, the only one of the latter which potentially contained a protected act was [466] which was sent on the 02 April 2017. Mrs Terry did not read it that way according to her evidence to us, which we accept. The short point about all of that is that taken at its best, anything that happened before April 2017 cannot constitute a victimisation allegation as none of the alleged perpetrators knew or believed that the claimant had done, or may do, a protected act, and as such those allegations of victimisation (15-20,23,27 to 33) are dismissed.

5. Dealing with the allegations in the Scott schedule (other than those dismissed above or withdrawn): Allegation 1. The allegation was that the claimant was asked to use second hand safety shoes: this was an allegation against Mrs Shevket. We have dealt with this and found that there was no unfavourable treatment here. The Claimant was provided with a pair of shoes within 3 weeks, he was asked to bring any safety shoes that he already had when he started work. He says that he was wearing trainers, but his manager Mr Sharpe and indeed Mr Warmington said that was very unlikely as someone would have noticed this, and we do not accept that he did wear trainers. We accepted that the situation of Mr Bond, four years later, was different and that he must have requested safety shoes and provided his shoe size in advance. The first point to make is that we do not accept that there was any unfavourable treatment. The second point to be made is that we simply cannot understand the basis on which the Claimant says this could be discrimination because he was Polish or related to that fact; he has provided no evidence from which we could conclude that it was. The third point to be made is that that allegation dates back to the 13 August 2012; no good reason has been given for the claimant's failure to claim earlier, the allegation is very substantially out of time. For all of the above reasons that claim fails.

6. Allegation 2: this relates to the mobile phone, again August 2012 and the perpetrator is alleged to be Libby White. We have already explained in our Findings of Fact that we didn't accept (on the balance of probabilities) that the Claimant's mobile phone was any worse than anybody else's, or that he had worse problems than anyone else did in relation to the mobile phones issued. Again, it is totally unclear to us how this allegation, had it been factually based, could constitute less favourable treatment for being Polish or unfavourable treatment related to being Polish. It is fair to say that the Claimant, throughout these proceedings, has very rarely put to witnesses the proposition that they treated him differently because of being Polish and there is no evidence to support any suggestion that this was the case in relation to allegation 2. In any event, the allegation is out of time.

7. Allegation 3: the claimant alleged that Mr Sharpe shouted at him in front of others without any reason; we'll deal with that allegation along with Allegation 9 (about Mr Sharpe shouting and pointing a finger at the claimant in 2013) and also with the Allegation 4 (about Mr Sharpe shouting at the claimant in front of others and telling the claimant what he thought about immigrants). In relation to allegations 3 and 4, we did not accept that Mr Sharpe had shouted or pointed at the claimant, we certainly did not accept he mentioned anything to the claimant regarding his views about immigrants and again, on the facts, those allegations failed. There was no unfavourable (s26) or less favourable (s13) treatment.

8. In relation to Allegation 9, we did accept that there may have been an occasion when Mr Sharpe at least pointed his finger at the claimant, because Mr Samuels appears to recall the Claimant threatening physical harm to Mr Sharpe. In relation to that, whether it occurred or not, (and the same applies to allegations three and four), there is no indication at all as to why this should be anything to do with fact that the Claimant is Polish. Not only that, but there was no complaint made at the time and the allegations dated back to 2013 at the latest; on any analysis, they are completely out of time.

9. Allegation 5: this was against Mr Fletcher for blaming the Claimant (in 2014) for something that wasn't his fault. In the first place, there the Claimant was not blamed and Mr Fletcher was simply investigating how a faulty part had been delivered in relation to the project that he was undertaking; it's quite clear why he chose to copy in the rest of the project team firstly, it was his practice to do so, and secondly, there was a history for the particular supplier of supplying substandard parts. This is the only allegation against Mr Fletcher; Mr Fletcher didn't know until these proceedings that he'd been accused of discrimination. He said that he'd never had a problem with the Claimant. It is quite clear to us that there is no evidence that this had anything to do with the fact that the Claimant is Polish. Furthermore, it is completely out of time and in any event, it fails on the facts.

10. Allegation 6 was that the Claimant in January 2013 had problems getting confirmation that his workplace was in Solihull. As can be seen from

our Findings of Fact, Mrs Terry sorted that out within one working day, so the allegation is factually incorrect. There was no unfavourable or less favourable treatment. There is no evidence to link this to the fact that the Claimant is Polish and furthermore, the allegation is completely out of time.

11. Allegation 7: is that Mr Samuels treated the Claimant “like a slave” in February 2013 due to the dispatching training, that is specifically not letting him go to the toilet or shut his computer down before starting training. We preferred Mr Samuels’s evidence on this point; we do not accept that he treated the claimant as alleged. This allegation fails on the facts, it is totally unclear to us why the Claimant says that this was direct discrimination or harassment because he is Polish and furthermore, the allegation is out of time.

12. Allegation 8: this relates to problems booking holidays and being treated like a tennis ball by Mr Samuels and Mr Sharpe. Again, this failed on the facts, as covered in our Findings of Fact the likelihood is that the claimant attempted to bypass Mr Samuels and was sent back to ask him, perfectly reasonably as it was his responsibility. In any case, it is unclear how this could be an allegation of race discrimination; the claimant provided no evidence of more favourable treatment of the comparators named. Finally, the allegation is out of time because it relates to holidays in 2013, none of which generated complaints at the time.

13. Allegation 9. Has been dealt with.

14. Allegation 10: Whether Mr Samuels shouted at the Claimant suggesting an error in his booking; certainly we accept that Mr Samuels may have raised his voice and he may also have said “pay more attention to detail”, but we accept he would have treated anybody that way in the circumstances, that being so, there is no basis for a discrimination allegation. Furthermore, the allegation is out of time and there is no good reason why it would be just and equitable to extend time, as with the other allegations above.

15. Allegation 11: Incident with Mr Trapp, no reaction from Mr Samuels when I complained, but then after a few days, a different reaction. This is what generated page [183]. It’s absolutely clear that when Mr Samuels became aware that there was complaints by the Claimant against Mr Trapp and by Mr Trapp against the Claimant, he took steps to deal with it and resolve the situation. Everybody signed something to confirm that was the case, and that was the end of that. That occurred on the 27 January 2014, therefore the allegation is out of time. The claimant has given no good reason why it would be just and equitable to extend time. In any event, Mr Trapp and the Claimant were treated in the same way by Mr Samuels so again, we cannot see how there is a viable claim against him on the basis that the Claimant was Polish. Mr Trapp denied treating the claimant differently because he was Polish at the time and the claimant has produced no credible evidence to suggest why any adverse treatment by Mr Trapp was related to the claimant’s Polish ethnicity or nationality.

16. Allegation 12: the claimant alleges that on the 15 October 2014, there was a “big incident with Chris Samuels, he shouted at me, pointed his finger, physically threatened me, followed me to my office” and that it was all in front of two witnesses and CCTV cameras. The first point to be made about Allegation 12 (and we’ve dealt with it in great detail in our Findings of Fact), is that there was an investigation, it was a thorough investigation and the Claimant’s account did not in fact accord with the account of Mr Samuels and Mr Coleman. The Claimant’s case is that this means Mr Coleman is lying. The point is that the difference may mean that Mr Coleman is not lying; the Respondent had to look at the detail around that and decide what had in fact taken place. What appears not to be in dispute is that the Claimant walked off the job, and that Mr Samuels (as supervisor) had to take over and assist Mr Coleman. Mr Coleman’s evidence (which we thought was independent and objective, although we know the Claimant didn’t accept this), was that Mr Samuels was not “out of order” and was simply saying the Claimant was not behaving appropriately. Mr Samuels told us that he felt he had to tackle the Claimant because he was acting that way in front of a new member of staff, and in fact he’d chosen not to tackle the Claimant on many previous occasions when the Claimant had disregarded his instructions or chose to do something else. We accept that. We have already covered the fact that Mr Samuels considers the Claimant was discriminatory to him.

17. We don’t accept that Mr Samuels was discriminatory towards the Claimant, not least because, if Mr Samuels had in fact wished to cause problems for the Claimant, he could have made complaints about the Claimant (as he pointed out when giving his evidence). Consequently we don’t accept that the Claimant was discriminated against directly or that Mr Samuels conduct had anything to do with the claimant’s race. Furthermore we think the matter was properly investigated.

18. Allegation 13. Is the “burping” allegation. That was said to occur 2015 and was not investigated until 2017. As far as we can see, the Claimant had no evidence at all to support the proposition that Mr Houghton or Mr Harris would deliberately burp or fart in his direction; they certainly denied it when asked about it two years down the line. Even if it were right, it’s difficult to see how that constitutes a less favourable treatment for being Polish, rather than for example being rather childish workplace behaviour. The claimant has not produced any evidence to suggest why any such conduct was influenced by or related to his Polish nationality/ethnicity. Consequently, that allegation fails, quite apart from which it is out of time.

19. Allegation 14: This is the allegation that in January 2015, Mr Warmington said the Claimant was causing problems for his colleague Mr Coleman. We have already explained that even the Claimant’s own account doesn’t in fact say Mr Warmington used those words, simply that he asked Mr Coleman if he was “doing ok” or having any problems. We simply don’t accept that was discrimination at all, or that it happened in the way the Claimant describes. We think it more likely that the claimant drew

an unnecessary inference from what Mr Warmington said (if indeed such a comment was made - Mr Warmington cannot recall). But to put it shortly, we cannot see how this could constitute (even if accurate) an allegation of less favourable or unfavourable treatment related to the claimant's ethnicity.

20. Allegation 15: Taking pictures of employees for the "50 Years of Whales Tankers brochure". We have already dealt with that in our Findings of Fact. In fact, the Claimant's picture was taken, and featured in the brochure. The best this allegation got in the Hearing before us was that it was about the Claimant's feelings at the time, and his fear that he may be excluded until he knew his picture was in the brochure. It is, as we said before, a mystery to us why, therefore, in 2018 it features as an allegation before us, even though the Claimant himself knows that the factual basis of it is entirely wrong. So, we don't accept that there was less favourable or unfavourable treatment for being Polish. We don't accept that it was victimisation, we don't accept that it happened even, furthermore, it's out of time.

21. Allegation 16. This was about the "new opportunity to change job" after Mr Way left. We have already dealt with that above; the Claimant had the opportunity to apply before the closing date and did not, he was aware there was a job but didn't discuss it with anyone because he was "too shy" on his own account to do so. That is said to constitute discrimination by Mr Faughey and also victimisation. As to the victimisation, as we've already said, this allegation has no basis anyway, because before 2017 the people accused of victimising the claimant were not aware of the alleged "protected Acts". Similarly, we failed to see how could this be direct discrimination or harassment. The post was advertised internally, the Claimant was aware of it, but he chose not to apply for it. We don't understand why the Claimant says that's direct discrimination or harassment because he was Polish. There was no detriment, less favourable treatment or unfavourable treatment.

22. Allegation 17. Receiving the staff status document, slightly later after three years. Again, an allegation about Mr Faughey, although in fact it was Human Resources who were responsible for doing this. The fact is that not receiving the document made no difference at all to the Claimant's sickness entitlement. There is no detriment or evidence of less favourable treatment or unfavourable treatment, and we cannot understand again how this treatment could be said to be direct discrimination or harassment because the Claimant is Polish. He has provided no evidence from which we could conclude that it was.

23. Allegation 18. This relates to a meeting about working together with Andrew Blue, and being blamed by Mr Faughey for not telling the truth. We accept there was a meeting to try and clear the air and that Mr Faughey thought that he had resolved the situation. On the balance of probabilities we do not accept that the claimant was blamed for not telling the truth. The simple fact is, not only is the allegation out of time (as indeed was Allegation

17) but also, there is no evidential link at all to the claimant's Polish nationality or ethnicity , it's about someone doing their best to try and resolve a problem.

24. Allegation 19. The Christmas Raffle. This allegation relates to the 24 December 2015 and the allegation that Mr Warmington discriminated against the Claimant because he was Polish. We have already explained in our Findings of Fact that we cannot see that the Claimant was less favourably treated; he won, we think, three times on the raffle. Whether Mr Warmington threw a ticket down or not, there is no evidence it was the Claimant's and there is simply no evidence at all that the Claimant was treated less favourably or unfavourably because he was Polish - and the allegation is out of time.

25. Allegation 20: Problems about getting a voucher for glasses damaged at work. This is allegation involving Mrs Terry and relates to June 2015 (not 2016 –see p234) as we understand it. Mrs Terry explained that the respondent would not pay for normal glasses, only Health & Safety glasses, so in that sense there is no less favourable treatment. Furthermore, the Claimant didn't respond to her last email and that's why nothing further happened. Again, we cannot accept this had any connection with the fact the Claimant was Polish. The complaint is also out of time.

26. Allegation 21: The conversation with Mark Warmington about the Brexit result. We did not accept that Mr Warmington "blew up" at the Claimant - we do accept he was unhappy about the results. We accept he was quite happy to share that view with a number of people. Simply put, there is no evidence that Mr Warmington did this because the Claimant was Polish, furthermore, we don't accept it happened as the claimant described and it is also out of time.

27. Allegation 22: The attempts to converse with Mr Warmington about Mr Samuels; we have dealt with this above. Mr Warmington was not prepared to discuss HR issues with any member of staff, for very good reasons. Consequently, he treated the Claimant the same way as anyone else - in fact, his evidence to us was that he was not aware of the details about the incident with Mr Samuels at that point. We think his explanation for not involving himself with HR issues made perfect sense. Again, it is difficult to understand how the Claimant puts forward a case of discrimination for being Polish – there is no evidence to link Mr Warmington's behaviour here to the claimant's nationality/ethnicity.

28. Allegation 23. The incident with the van driver in August 2016 is said to be discrimination by Mr Faughey. In so far as there was an incident, it seems to us that this was handled perfectly sensibly and well. Mr Faughey tried to defuse the situation by telling the Claimant to walk away from it, and then by discussing the matter with the driver and sending him off site. It has now been extended by the claimant to being an allegation that, in some way, Mr Faughey's email was critical of the Claimant when

he asked to be told of such things. This is simply not the case. The allegation fails on the facts – there is no less favourable or unfavourable treatment. In any event, there is no evidence to link this to the claimant being Polish - in fact the Claimant's health and safety was rightly put first by Mr Faughey - and it is out of time.

29. Allegation 24. That Mrs Shevket shouted at the Claimant without any reason. This was the 25 August 2016; we have already dealt with this above. It appears there was an altercation and that both parties complained against each other and that Mrs Shevket's version was put on record and no action was taken against either. We simply don't accept that Mrs Shevket was discriminating against the Claimant because he was Polish, not least because one person who was later interviewed (and who was not Polish) said they, too, found her unapproachable and difficult to deal with. We think there may have been personality clash, but that's not the same thing at all. There is no evidence that Ms Shevket's behaviour had anything to do with the claimant's ethnicity or nationality. Furthermore, the allegation is out of time.

30. Allegation 25: Has been withdrawn, but only at the Hearing. It was a complaint about having the same log in and password as Mr Singh. Quite frankly, it cannot possibly be seen as an allegation of being discriminated against for being Polish/treated unfavourably or less favourably for being Polish and the Claimant was right to withdraw it - but it would have been helpful if it had not been included in the first place.

31. Allegation 26: Is the allegation about the chassis training and it's an allegation about Mrs Terry; as we now know Mrs Terry was not responsible for deciding who did training in any event, so the allegation fails. We also know that Mr Mason was prepared to arrange it, but the Claimant told him not to, and that Mr Faughey thought the Claimant didn't want the training, so again, it fails on the facts as an allegation of being discriminated against because of being Polish. The reasons are as set out above, rather than having any connection with the claimant's national or ethnic origins. Furthermore, it is out of time.

32. Allegation 27: Is the allegation about the forklift truck tubes and it's an allegation about Mr Warmington. In short, we thought Mr Warmington behaved appropriately, he'd spotted a health and safety risk and he suggested improvements for the future. That simply couldn't be discrimination for being Polish. According to the claimant it is only put as an allegation of victimisation in which case, it doesn't work, because (as explained above) Mr Warmington was not aware of any protected act at the relevant time. Not only does it fail on the facts, but again, it's out of time.

33. Allegations 28 and 29 – We will deal with together, the first is an allegation about calling Mr Singh a liar and is an allegation about Mr Singh. The second is relating to the major incident with Mr Singh which had led to the suspension, that's also put as an allegation against Mr Singh. In the first instance, we can't see that Mr Singh is said to have done anything in

relation to Allegation 28, the allegation is that the Claimant called him a liar. The Claimant says and that it may well be true that he said, “why are you lying to me” rather than “you are a liar”, but certainly there was a reference by the claimant to Mr Singh lying. In relation to both allegations there was a thorough investigation, the Claimant’s version of events (contrary to what he says now) was noted at the investigation stage.

34. In short, other accounts of the event did not accord with the Claimant’s, and that is as far as it goes. We cannot understand how any of this relates to harassment on grounds of being Polish or being direct discrimination on grounds of being Polish. The Respondent took action because they thought the Claimant threatened Mr Singh, and was right to do so. Mr Singh is named in the allegation but it’s difficult to see why. There is no evidence that any of this was related to the claimant being Polish. So the allegations fail, and again are out of time in any case.

35. Allegation 30 Is an allegation about the investigation process and seems to be an allegation that Mr Faughey deliberately delayed it. That simply fails on the facts: the reason it was delayed was initially because the Claimant put in a grievance (in the form of the “private and confidential” letters) which Mr Faughey then had to investigate. This meant that the disciplinary didn’t go ahead until after that had been sorted out. Secondly, there was a delay over the need to seek medical clearance, so that it fails on the facts – there is no evidence of unfavourable treatment or that the claimant’s treatment was influenced by his being Polish. The Claimant has not made any case as to why any such delays, if they had been caused by Mr Faughey (which they weren’t) were discrimination or harassment because he was Polish.

36. Allegation 31: Is an allegation that the claimant’s confidential letters, (09 November 2016) were shown to other people. These were the letters that led to Mr Faughey’s investigation and he was the only person who saw them. It was perfectly appropriate for the Respondent to investigate them. If the Respondent had not investigated them, we have no doubt that we would have a complaint about that instead. Furthermore, there is no evidence to suggest the Respondent chose to investigate these complaints because the Claimant was Polish and would not have treated somebody else in the same way: if you put in a grievance you expect someone to do something about it. That’s what happened here. In addition the allegation is out of time.

37. Allegation 32: Is simply put that, on the 14 March 2017, there was a disciplinary meeting with Mr Newman. That much is true. We take it that the suggestion is that Mr Newman treated the Claimant in a discriminatory manner during that meeting. We do not accept there was any evidence to suggest that he did. He looked at what happened in the investigation and asked the Claimant appropriate questions about it. The one thing that gave us some concern about the disciplinary meeting was whether a final written warning was the right outcome. We were satisfied (and it was the panel who asked the questions about this) that Mr Newman’s reasoning was

entirely logical in the circumstances. The Claimant had demonstrated no remorse, no intention of behaving any differently and, as Mr Newman put it, he wanted to give a strong message that this had “got to stop”. We think in those circumstances that the sanction was justifiable as well, and that also goes to the question of unfair dismissal. We certainly do not accept that there was any discrimination because the Claimant was Polish and there was no evidence of any connection between the way the hearing was dealt with (or the outcome) was influenced in any way by the claimant’s ethnicity or nationality.

38. Allegation 33: Relates to the Appeal Hearing with Mr Anderson. Again, very little detail is provided by the claimant and essentially, we could repeat the same comments as we have above for Mr Newman. This was not discrimination because the Claimant was Polish, it cannot be victimisation because Mr Anderson knew nothing of any earlier complaints by the Claimant around race discrimination and the claim form had not been lodged at this time.

39. Allegation 34. Relating to the Mediation Meeting, and Allegation 35, being a complaint about the Occupational Health Doctor have been withdrawn. Regarding Allegation 35, we understand that the Claimant has reported the Occupational Health Physician to the General Medical Council - that is of course a matter for the Claimant and the GMC and not us.

40. Allegation 36: Is an allegation against Mrs Terry forcing the Claimant to give access to his GP records, having already done so once. As I’ve already said, Mrs Terry had to do that because they needed an up-to-date report and Occupational Health had asked for further information from the GP. The Claimant did appear to accept this, in any event it’s a wholly unexceptional course of action and what we would have expected to happen, certainly doesn’t constitute discrimination for being Polish or indeed victimisation on the basis of a Tribunal claim. It was an attempt to find out whether the Claimant was fit to attend meetings and/or go back to work.

41. Allegation 37: Was withdrawn on the basis that it was simply a preamble to Allegations 38 onwards which relate to the Whale Mail.

42. In short Allegation 38 was that Mrs Terry threatened the Claimant by telling him to stop sending the emails on the 20 July 2017. She didn’t threaten him, it was a reasonable management instruction. The Claimant was well aware that if he carried on doing it, the consequences could be adverse because it could be regarded as a conduct issue. He chose to continue doing so. Not only that, but he said in the Disciplinary Hearing (and before us) that he would do the same thing again. The suggestion that he didn’t understand that it was an instruction rather than an “opinion” is simply not the case in our view, because the Claimant immediately responded by treating it as a “threat”. There is no evidence that Mrs Terry would have treated anyone who was not Polish any differently or that her treatment of the claimant was related in any way to his ethnicity or

nationality. We find that Mrs Terry genuinely did not think that the claimant had made any allegation of race discrimination (nor did she think he may make such an allegation) at this stage, so the complaint of victimisation fails also.

43. Allegation 39: Was that there was an investigation after the claimant continued to use Whale Mail. Clearly, that was almost inevitable because the Claimant had done exactly that which he was instructed not to do. Not only that, he said he would do it again. We accept that consequently, had anyone would have been exactly the same. This wasn't discrimination because the Claimant was Polish nor was it victimisation, the simple fact is there wouldn't have been an investigation if the Claimant has followed the instruction. He didn't follow the instruction and it led to an investigation. He had been told that that would happen and it did, so it cannot come as great surprise to him.

44. Allegation 40. The second disciplinary meeting "blaming me for something I didn't do", which is an allegation of victimisation against Mr Warmington. Put simply, the Claimant was not blamed for something he didn't do, he was blamed for something he did do. We have covered this already by saying "if anybody had disregarded that instruction and carried on in the way that the Claimant did, it would have resulted in some action". We simply don't accept that this was victimisation by Mr Warmington. Mr Warmington could see a clear instruction and could see the Claimant had not obeyed it, and could also see that the Claimant would have done the same thing again.

This was the reason for Mr Warmington's action, not any protected act by the claimant (or belief by Mr Warmington that he may do a protected act).

45. The same comments effectively apply to the complaint about the Appeal Hearing which is Allegation 42. This was not because of a protected act by the claimant or suspicion that he may do a protected act. Mr Turner was not aware that a race discrimination claim was included in the claim to the tribunal at this stage. It was the result of an action of the Claimant. If the Claimant had taken notice of Mrs Terry's email, none of this would have happened.

46. Allegation 41: In relation to the Graffiti, this complaint simply has no factual basis whatsoever. There is no evidence that anyone connected with the respondent was responsible for the graffiti, or that it had anything to do with the claimant being Polish.

47. Turning to the unfair dismissal, firstly the Claimant was clearly dismissed for a fair reason, which was conduct. The dismissing and appeals officers clearly genuinely believed in the misconduct, on the basis of reasonable evidence. Clearly there were fair investigations, if not extremely thorough investigations throughout. Indeed, on both occasions they were delayed somewhat by a grievance process (which also resulted in very thorough investigations).

48. We have already said that the one thing we questioned ourselves about was whether the final written warning, in relation to the first disciplinary which was administered by Mr Newman, was appropriate or not; we decided that in all the circumstances, it was. Mr Newman took the view that anything less would not give the Claimant pause for thought. He hoped that it would bring about a change in behaviour; unfortunately there was then the further incident leading to further disciplinary proceedings. As for the further incident, it is clear that if you are on a final written warning and there's further misconduct, dismissal is likely to be within the band of reasonable responses in respect of the further misconduct, which it was here. The dismissal was fair.

In summary, we have concluded that the Claimant was not discriminated against because he was Polish, he was not victimised for making protected acts or bringing Tribunal claims and the Claimant was fairly dismissed. All of the complaints are dismissed.

Signed under rule 63 in the absence of the Employment Judge by:

Ms W Stewart

Mr R Virdee

21 March 2019