EMPLOYMENT TRIBUNALS

Claimant: **Mr Andrew Sell**

Respondent: **Victoria Park Motor Company Limited**

Heard at: **Cardiff** **On: 24 July 2018**

Before: **Regional Employment Judge B J Clarke**
Members **Mr W Davies**
Mrs M Farley

Representation:
Claimant: In person
Respondent: Mr Michael Standing (counsel)

RESERVED JUDGMENT

The unanimous reserved judgment of the tribunal is that the claimant's complaints of unfair dismissal contrary to Sections 98 and 103A of the Employment Rights Act 1996 and victimisation contrary to Section 39(4)(c) of the Equality Act 2010 fail and are all dismissed. He was fairly dismissed.

REASONS

The parties

1. The respondent, Victoria Park Motor Company Limited, is a car dealership in Cardiff, which buys and sells new and used Mazda cars. It trades under the name "Victoria Park Mazda". It was formed in 1982 as a family business by Tony Marshall and his wife Dianne. They retired in 2007 in the context of a management buy-out, but Tony Marshall remains a director and he continues to be heavily involved in the business. The principal of the dealership, and managing director, is Gareth Jones. Its financial director was, until recently, Allan Nicoll. Tony and Dianne Marshall's son, Peter Marshall, is its marketing director. Andrew Gardner is a sales manager. They all feature in this case.

2. The claimant, Mr Andrew Sell, worked for the respondent as a valet; his role was to clean cars. He initially did this on a freelance basis, but he became an employee on 1 March 2012. Separately (and not as part of his employment), he would do occasional work at Mr and Mrs Marshall's home, tending their garden and the like. He was dismissed with a payment in lieu of notice, with effect from 8 November 2017, for the stated reason of misconduct (said to be cleaning and repair work done on a personal car without authorisation and in breach of company rules). At the time, he was the subject of a final written warning for previous misconduct (said to be driving a car on the company's site while using a hand-held mobile phone and, when challenged, acting abusively). This case is about the lawfulness of his dismissal.

The tribunal proceedings

3. Following a period of unsuccessful Acas early conciliation (which lasted from 14 December 2017 to 8 January 2018), the claimant presented an ET1 claim form to the tribunal on 30 January 2018. His grounds of complaint were expressed in brief terms:

> **Unfair dismissal based on the fact that other members of staff have been treated differently.**
>
> **I believe that as I have made allegations regarding sexual harassment/inappropriate behaviour in relation to the owner's son I have been discriminated against.**
>
> **In addition, sanctions imposed on me were by a committee which included the owner of the company and not by the relevant disciplinary manager, and I believe this has led to unfair decisions/sanctions relating to my continued employment.**

The reference in this short narrative to the owner is a reference to Tony Marshall. The reference to the owner's son is to Peter Marshall.

4. The claimant asked for the remedy of reinstatement. When identifying the legal complaint that he was bringing, he only ticked the box at section 8.1 of the ET1 form marked "I was unfairly dismissed". However, he also ticked the box at section 10.1 of the ET1 form, which indicated that his claim included reference to a protected disclosure.

5. Regrettably, the tribunal failed to serve the ET1 claim form on the respondent swiftly. The respondent was only sent the claim form on 4 April 2018.

6. In its ET3 response form, the respondent contended that the claimant had been fairly dismissed. It denied that the dismissal involved any disparity of treatment; it denied that the dismissal related in any way to allegations the

claimant had made about Peter Marshall (in which regard the respondent accused him of homophobia), and it denied that the decision-making process was tainted by unfairness. The letter dismissing the claimant's appeal against dismissal was attached as an annex, which addressed in more detail the claimant's contention that he had been subjected to victimisation arising from his complaints about Peter Marshall.

7. Having read the claim form as part of his initial consideration under Rule 26 of the tribunal's Rules of Procedure, Employment Judge Cadney instructed a clerk to contact the claimant to ask if he intended to pursue any claim of discrimination. He was emailed on 25 May 2018 and again on 9 June 2018, but did not reply. As the tribunal was treating this as a complaint of "ordinary" unfair dismissal for the purposes of Sections 94 and 98 of the Employment Rights Act 1996 (ERA), it had not arranged any case management discussion with the parties to clarify the issues in dispute. Consequently, when the parties arrived at tribunal for the hearing on 24 July 2018, there was uncertainty over what the tribunal was being asked to decide.

The scope of the claim

8. The case was listed before Regional Employment Judge (REJ) Clarke, sitting initially without non-legal members. The claimant represented himself. He said that he was unfamiliar with the law and "not good with documents". The respondent was represented by Mr Standing, a barrister, who had helpfully provided a list of issues for the tribunal to decide but which were limited to the complaint of "ordinary" unfair dismissal.

9. REJ Clarke raised with the parties, at the outset of the hearing, whether the claimant's ET1 form disclosed something more than a complaint of "ordinary" unfair dismissal, bearing in mind his status as a litigant in person. Did it disclose a complaint that the dismissal was an act of unlawful victimisation for the purposes of Sections 27(1) and 39(4)(c) of the Equality Act 2010 (EqA) (by reference to an alleged protected act of the previous complaint of sexual harassment involving Peter Marshall)? Did it also disclose a complaint that the dismissal was "automatically" unfair for the purposes of Section 103A ERA (by reference to the same alleged protected act but, this time, expressed as a protected disclosure)? The first of these complaints would mean that the tribunal was not properly constituted; an employment judge must sit with non-legal members for a case brought under the EqA.

10. The parties responded as follows:

    10.1 The claimant was clear that the case he had wanted to bring all along was that the tide had turned against him from the moment he brought this grievance. The alleged sexual harassment had occurred earlier in his employment and had been the subject of a grievance brought by

him on 2 April 2014; and, by his own account, the treatment he was complaining about stopped thereafter. He did not want to bring before the tribunal a freestanding complaint of sexual harassment about what had happened prior to 2014 (recognising that such a claim would be considerably out of time), but he did want to argue that his dismissal was motivated by a desire to "get rid" of him once he had complained about Peter Marshall. His ET1 claim form referred to harassment and discrimination and he had ticked the "protected disclosure" box. He did not reply to the tribunal's correspondence because he thought that the trade union officials who had assisted him during the disciplinary and appeal hearings had replied on his behalf.

10.2 For the respondent, Mr Standing contended that an application to amend was required to bring these further complaints, to which the respondent would object. He said that an expansion of the ambit of the claim would cause the respondent prejudice. That said, he noted that the respondent's existing witnesses present at the hearing could deal with the additional matters raised and that no postponement of the hearing would be needed.

11. After consulting the tribunal's administration and learning that two non-legal members were available later that day, REJ Clarke permitted the claimant to pursue the additional two complaints mentioned above. Full reasons were given orally at the time and are not set out in this document; they can be provided in a supplementary document if either party requests them.

The issues for determination

12. The issues for determination were therefore as follows.

12.1 Why did the respondent dismiss the claimant? Specifically:

(a) Can the respondent show that it dismissed the claimant because of a genuine belief that he had committed an act of misconduct?

(b) If so, the respondent will be taken to have shown that it had a potentially fair reason for dismissal for the purposes of Sections 98(1)(a) and 98(2)(b) ERA. The tribunal's enquiry will then shift to fairness in all the circumstances for the purposes of Section 98(4) ERA (see paragraph 12.4 below).

(c) If the respondent cannot show that it dismissed the claimant because of a genuine belief that he had committed an act of misconduct, and with the respondent offering no other reason for dismissal, the dismissal will be unfair.

12.2 Was the claimant's grievance concerning Peter Marshall a protected act for the purposes of Section 27(2) EqA? Did the respondent dismiss the claimant because of that protected act? If so, the dismissal will be an act of unlawful victimisation for the purposes of Sections 27(1) and 39(4)(c) EqA.

12.3 Further or alternatively, was that grievance a protected disclosure for the purposes of Section 43A ERA? Did the respondent dismiss the claimant because of that protected disclosure? If so, the dismissal will be automatically unfair for the purposes of Section 103A ERA.

12.4 Assuming the respondent had a potentially fair reason for dismissing the claimant, was that dismissal fair or unfair for the purposes of Section 98(4) ERA? Specifically:

(a) Was the respondent entitled to rely on a live final written warning issued to the claimant in respect of his conduct? In turn, was the warning issued in good faith; were there prima facie grounds for imposing it; was it "manifestly inappropriate"?

(b) Did the respondent have reasonable grounds on which to sustain its genuine belief in the claimant's misconduct?

(c) At the stage at which it had that belief, had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

(d) Did the respondent treat the claimant more harshly than it had treated other employees for similar offences?

(e) Did the respondent allocate a suitably independent person to hear his appeal against dismissal?

(f) Finally, did the sanction of dismissal with a payment in lieu of notice fall within the band of responses open to a reasonable employer?

The hearing

13. The non-legal members, Mr Davies and Mrs Farley, arrived later that day. The tribunal of three then read the parties' witness statements and relevant documents from a bundle comprising 151 pages. The hearing itself was able to resume at 1.40pm. Mr Nicoll gave evidence from 1.50pm to 2.10pm. Mr Marshall gave evidence from 2.10pm to 2.40pm. Mr Standing was permitted to ask supplementary questions, so that the witnesses could address the whistleblowing and victimisation allegations. The claimant also asked them

questions. With the consent of both parties, the judge asked questions of the respondent's witnesses to ensure that the claimant's case was put properly. The claimant then gave evidence from 2.50pm to 4pm, and most of this time was spent answering Mr Standing's questions. The claimant had no other witnesses.

14. After a break, Mr Standing set out the respondent's submissions on the case. The claimant's submissions were short and to the point: that he was a hard worker and that the respondent had never had a problem with him until he complained about Peter Marshall. The hearing finished at 4.40pm. Because of the lateness of the hour, the tribunal reserved judgment and released the parties.

15. References to page numbers are to pages in the bundle of documents.

Findings of fact

Company rules

16. The respondent's handbook, issued in November 2010, contains its company rules and its disciplinary procedure. Paragraph 3.1 of the handbook (page 55) deals with the consequences of a final written warning in these terms:

> **Final written warning – letter advising you that further breaches of these rules will render you liable to dismissal addressed to yourself, copy and warning record sheet in your file. This copy will be retained on the file indefinitely but disregarded for disciplinary purposes after a period of eighteen months. A final written warning may be issued in respect of serious offences which however do not justify dismissal, or where an employee commits another office within twelve months of the first written warning …**
>
> **If, despite the above actions, the … conduct continues to be unsatisfactory or if another office is committed within eighteen months of the final written warning, then the employee will be dismissed.**

17. Paragraph 3.2 of the handbook (pages 55-56) sets out examples of gross misconduct that "will render employees liable to summary dismissal". Insofar as relevant to this case, they include:

> **Gross insubordination or the use of aggressive behaviour or excessive bad language on company … premises;**
>
> **A serious or wilful breach of safety rules and/or actions, which seriously endanger the health or safety of yourself or another person whilst at work;**

> **Unlawful breach of the Race Relations Act, Disability Discrimination Act or the Sex Discrimination Act, including harassment.**

18. Paragraph 4.1 of the handbook (page 59) sets out company standards in respect of conduct. Among the rules set out is the statement that "mischievous behaviour and horseplay is not permitted".

19. Paragraph 6.2 of the handbook (page 72) provides that "employees will not at any time use … tools or equipment provided by the company to … undertake work for their own personal gain (unless express permission has been given)".

20. Paragraph 10.2 of the handbook (page 85) sets out the equal opportunities policy. It states: "Discriminatory harassment of any kind will not be tolerated".

21. The version of the handbook in the bundle contained no confirmation that the claimant had received and accepted its terms; the page intended to bear his signature was blank (page 87). However, it was no part of his case during the disciplinary and appeal process, or before us, that he was unfamiliar with these company rules. Furthermore, his written statement of terms and conditions referred to the company rules, including the disciplinary procedure, and he did countersign that document (pages 90-93). We therefore proceed on the assumption that the company rules were known to him.

The claimant's grievance

22. On 2 April 2014, the claimant sent a grievance to the dealership principal and managing director, Gareth Jones (page 94). It was expressed in these terms:

> **I am writing this letter to raise a grievance against two people within work and events that** *[need]* **resolving. Firstly the behaviour of Peter Marshall. I find the chasing, touching and grabbing very offensive and the tone of conversation when speaking to myself very disgusting. I would also like to bring up the indirect bullying from Andrew Gardner since his return. As your aware** [*sic*] **as I have spoken informally to yourself he is constantly commenting about my earnings and critiscising** [*sic*] **my work. It really is now at the point of getting me really low and causing me a lot of stress both in and out of work.**

23. Peter Marshall is a gay man; this is known to all who work at the dealership. It was clear from the evidence we heard that the touching, grabbing and comments mentioned above were considered by the respondent's managers to be "banter" or "horseplay" (their words, not ours) rather than in any way flirtatious. For his part, the claimant was equally clear that he considered them sexual in nature, predatory and "disgusting". (His repeated description

in his evidence to the tribunal was that the behaviour he criticised was "like something out of Benny Hill".) In its ET3 form, the respondent described the claimant's attitudes towards Peter Marshall as "homophobic" (page 21).

24. The claimant met Gareth Jones and Alan Nicoll to discuss his grievance. Although we have not seen any notes of that meeting (it appears none were taken), it is clear that, as a proposed resolution, they said that Peter Marshall and Andrew Gardner would have nothing to do with him. He would instead report directly to Mr Jones. The claimant appealed that (unwritten) outcome and this led to an appeal meeting with Tony Marshall on 7 April 2014. Tony Marshall's notes of the meeting record that the claimant also wanted "cash" and record his own view that the proposals made by Mr Jones and Mr Nicoll were "a reasonable way forward" (page 95).

25. Tony Marshall wrote to the claimant on 10 April 2014, which purported to set out his decision on the appeal (pages 97-98). The letter gives the striking impression of a manager who was disappointed to have received such a grievance. This is demonstrated by some of the sentences used:

> **… all the employees have been treated as Friends and Family and over the 32 years in Business we have never received such a grievance …**
>
> **… the majority of our staff have been with us for over 20 years – so we cannot be that bad!**
>
> **It is therefore hurtful to receive such allegations which, as we have said, we take very seriously.**
>
> **... we are well aware you dislike** *[Andrew Gardner]* **… any question of "indirect bullying" is nonsense – Andrew he is half your size!**

26. Pausing there, that sense of disappointment was also apparent from Tony Marshall's oral evidence to the tribunal. He commented on a few occasions that he was the one who decided to employ the claimant in the first place, that he had always tried to help him individually and that he and his wife had been kind to him. Tony Marshall concluded his letter as follows:

> **… there is obviously too much "Horseplay" in the Dealership which probably comes from the relaxed atmosphere which people like and you must remember that Peter has grown up with most of the staff …** *[and he and another colleague]* **used to "fool around".**
>
> **We have had meetings with Peter and he will not make any physical contact with you in future, although why you should bring this up now after working with him and the other staff for the last 10 years or so we do not understand; all members of staff will be told that no "Horseplay" or physical contact will be allowed.**

> **… we think you have had a problem with the difference in being Self Employed (your own boss) and working as an employee and having people tell you what to do and we would urge you to see the other point of view and forget these "hidden agendas" and carry on doing your work to the best of your abilities.**
>
> **As per the Employee Handbook the grievance procedure is now exhausted and we trust everyone will now resume working normally and you will agree that the Company has acted reasonably in this matter.**

27. There followed an exchange of correspondence between Tony Marshall and the claimant's trade union representative. They disagreed about such matters as the applicability of the Acas Code of Practice and the right of the claimant to be accompanied to the grievance meetings. There is no need for us to address these matters.

28. The tribunal has heard no evidence from Peter Marshall. We bear in mind, given the limited scope of the claim, that we are not required to adjudicate on whether his actions were unlawful. We should resist the temptation to offer comments in passing. While it was common ground that some touching took place, we are in no position to assess objectively the claimant's assertion that such behaviour was of a sexual nature or the respondent's contrary assertion that the claimant's overt distaste about it was rooted in a homophobic outlook. However, we can make these points:

    28.1 Tony Marshall's response did not properly engage with the claimant's grievance. He neither upheld it nor rejected it, although he endorsed the decision to separate the claimant from both Peter Marshall and Andrew Gardner;

    28.2 He was personally aggrieved by the allegations that the claimant had made;

    28.3 There was plainly *some* "horseplay" (to use his expression) going on that resulted in the need to send a message about appropriate behaviour in the workplace. Indeed, Mr Nicoll accepted in his oral evidence that he had "occasionally" needed to tell Peter Marshall to stop chasing people around the premises;

    28.4 No formal disciplinary action was taken against Peter Marshall, despite the 2010 Handbook already stating that "horseplay" was not permitted; and

28.5 Tony Marshall did not understand that the claimant's *perception* of his son's behaviour as being sexual in nature was relevant to his assessment of whether unlawful sexual harassment had taken place.

29. It is common ground that, after April 2014, there was no repeat of the alleged harassment. However, the episode soured the relationship between the claimant and Tony Marshall. It emerged in oral evidence that, from that point on, the claimant was never again asked to perform gardening work at Mr and Mrs Marshall's house. This upset him; in his questions to Mr Marshall, he described it as the "cold shoulder". In re-examination, Mr Marshall accepted that he stopped inviting the claimant to his house for extra work. When asked why, he said it was because his wife was upset with the claimant about the allegations made about their son and he "didn't want to embarrass" him.

Notification regarding private work

30. On 21 April 2017, Mr Jones issued new written instructions for staff, to take immediate effect. The notification said, among other matters, that: "no private cars will be allowed in the compound or workshop without a manager's authorisation". It was publicised by being included with all pay slips.

31. In his witness statement, the claimant disputed receiving these instructions and he alleged that the document was a fabrication that had been backdated to bolster the respondent's case. The respondent's witnesses denied this. We reject the claimant's assertion. This is for four reasons. Firstly, as we shall shortly see, he would later apologise for acting contrary to the instructions, implying that he was aware of them. Secondly, the claimant did not make this assertion at the later disciplinary hearings or appeal hearings, when it was part of the paperwork being considered. It appeared for the first time in his witness statement. In our judgment, if the claimant genuinely considered the document to have been fabricated, he would have placed this point at the front and centre of his disciplinary hearing and subsequent appeal. The fact that it appeared in the tribunal proceedings for the first time makes it look like an afterthought. Thirdly, if the respondent had been minded to fabricate such a document to bolster its case, it is unlikely it would have embellished it by adding the additional rules it contained (on selling cars to staff, web surfing and the use of mobile phones in the showroom, workshop and valeting bay). Fourthly and finally, there was no evidence before us of any fabrication such as inconsistent metadata.

The final written warning

32. Tony Marshall told the tribunal that, on 25 July 2017, he saw the claimant, while driving his personal vehicle, pass the dealership's vehicle stock, customers and staff holding his mobile phone against his ear. He wrote a short statement about it on 10 August 2017 (page 104), where he said:

> **I waived *[sic]* to him to stop but he carried on waiving back to me and left the site still holding the vehicle. We consider this to be a very dangerous action as he was not in control of his vehicle and could have caused serious damage and injury to our staff and customers.**

33. A meeting then took place on 7 August 2017 between Tony Marshall, Gareth Jones and the claimant. It does not appear that this was a formal disciplinary hearing, but it had the appearance of an investigation meeting. Tony Marshall informed the claimant that he had seen him driving a vehicle while using his mobile phone, which he considered an offence. His notes of the meeting record the claimant's response (page 105): "he admitted this was so but said it was none of the company's f***ing business what he did in his own vehicle – if he was given 6 points that was his business". Tony Marshall told him it was a serious issue and could lead to a final warning, after which the claimant "became very abusive and made remarks that other staff used mobile phones on the premises (in breach of company rules)". Tony Marshall replied: "not while driving". The note concludes: "He then made several sexist remarks regarding staff who were not present" and "as the meeting had deteriorated into abuse against directors of the company it was closed at 12.00". It was clarified in evidence that these were references to Peter Marshall. The meeting had descended into an argument between Tony Marshall and the claimant about the latter's alleged homophobia.

34. It was clear from the evidence to the tribunal that the claimant did not dispute what happened at the meeting on 7 August 2017; we therefore find that Tony Marshall's notes are an accurate record of what happened. Tony Marshall and the claimant disagreed in their evidence to the tribunal over whether the claimant had admitted to using his mobile phone; we return to that point shortly. We suspect that, if the claimant had not responded as he did, the matter might have ended there. Instead, the deterioration of the meeting prompted Tony Marshall to record a written statement of what he had seen (page 104) and prompted Mr Nicoll to write to the claimant on 14 August 2017 (pages 106-107), inviting him to a disciplinary hearing on 17 August 2017.

35. In this letter, Mr Nicoll set out two charges against the claimant: (1) driving his car while using a hand-held mobile phone and therefore endangering staff and customers; and (2) abusive behaviour towards directors (Tony Marshall and Peter Marshall) in breach of company rules. He was sent a copy of Tony Marshall's notes.

36. Mr Nicoll conducted the disciplinary hearing. Tony Marshall was not involved. There are no notes of the meeting as such; instead, a record of the meeting is set out in Mr Nicoll's subsequent letter to the claimant dated 21 August 2017 (pages 109-110). From that letter we can see that the claimant told Mr Nicoll he was speaking to his sister on his mobile phone, which was not hand-

held but connected remotely to his car's speaker system via Bluetooth. He told him (as he told the tribunal) that he could not steer a car, change gears and wave to Tony Marshall at the same time. His response to the allegations of abusive behaviour merely rehearsed the dispute about Peter Marshall: the claimant said that Tony Marshall described him as "nothing but a homophobic *[sic]*", to which the claimant had replied, "put it in the written warning".

37. On 30 August 2017, Mr Nicoll wrote to the claimant with his decision, which was to issue him with a final written warning. He said that he did not find his explanations acceptable. He confirmed in his oral evidence to the tribunal that, by this, he meant that he had preferred Tony Marshall's version of events to the claimant's version of events. Given the claimant's initial comment that what he did in his car was his own business, which he did not deny, Mr Nicoll's decision was understandable. He explained that the warning would remain live for a period of 12 months (although the company handbook refers to a period of 18 months).

38. Mr Nicoll also wrote:

> **If within that time period there is further cause for dissatisfaction in respect of any misconduct (whether similar to or different to that described above) more serious disciplinary action may be taken against you which may result in your dismissal from employment. It is hoped that this warning will lead to a sufficient immediate improvement in your conduct so that such action will not be necessary.**

39. The claimant appealed the sanction of a final written warning by letter dated 1 September 2017 (page 113), identifying his grounds of appeal as "unfair disciplinary process, overly harsh sanction and new evidence". Mr Jones wrote to the claimant to say that he would deal with the appeal and to ask for details of the new evidence (page 114).

40. The appeal hearing took place on 22 September 2017 (notes at pages 115-117). The claimant was represented by a trade union official, who questioned why there had been no CCTV footage of the incident and said that "it goes back to when he made a complaint against Peter Marshall". The claimant said that Tony Marshall "just wants to get rid of him and can now do it with any other incident". In the event, the claimant presented no new evidence.

41. Mr Jones wrote to the claimant on 28 September 2017 to reject his appeal (pages 118-119). He was satisfied that the claimant had used his mobile phone on site and that he had behaved abusively. The final written warning therefore remained in place. He added:

> **I was very concerned regarding your union official's comment that as we are relying on one witness we could repeat the exercise to**

> **terminate your employment. You know full well Victoria Park are not a 'hire and fire' organisation in fact the number of staff dismissed over the last 35 years is in single figures ... a large number of staff have been with us over 20 years so we must be doing something right.**

Dismissal

42. Although Peter Marshall did not give evidence to the tribunal, it was his concerns that gave rise to the claimant's dismissal. It came to his attention that, contrary to the instruction dated 21 April 2017 sent to all staff, the claimant had some personal work done on his car. Peter Marshall had been reviewing the respondent's CCTV footage and he made a note of what he saw (page 120): the claimant had put a personal vehicle in the workshop between 7.57am and 8.42am on 19 October 2017; he took it to be washed by a colleague between 8.45am and 8.59am on the same day; he then kept it in the compound until the following day; and, on 20 October 2017, it was worked on in the workshop for a further 35 minutes after 10.25am. It seems that he then brought the matter to the attention of Mr Jones.

43. Mr Jones spoke to the claimant on the same day and made a note where he recorded what the claimant told him (page 121) – which was much the same as what the claimant told the tribunal: that he had bought the car the day before, he felt that the driver's seat was unsafe and had asked a colleague to have a look at it and "give him a price". Mr Jones note went on to say that he referred him to the instruction dated 21 April 2017 "expressly forbidding this", and that the claimant had said that he realised what he had done was wrong and then apologised. Mr Jones' account was corroborated by a note a colleague, who said that the claimant had apologised and said he hoped he had not got him into trouble. The claimant also told us twice in his oral evidence that he had apologised to Mr Jones and we find as a fact accordingly; it also supports our earlier conclusion that he was fully aware of the contents of the document dated 21 April 2017.

44. Mr Nicoll wrote to the claimant on 25 October 2017, inviting him to a disciplinary hearing (pages 126-127). The two charges were expressed as follows: (1) entering the compound with a private vehicle, despite instructions to the contrary, and instructing cleaning without authorisation, which amounted to unauthorised use of company facilities; and (2) entering the workshop without authorisation from the usual method of reception, therefore avoiding a job card/invoice being raised. On 6 November 2017, following correspondence with the claimant's trade union representative, Mr Nicoll sent relevant material to him including Peter Marshall's note, a further copy of the instruction dated 21 April 2017, a copy of Mr Jones' notes from his discussion with the claimant and a copy of the CCTV footage.

45. The disciplinary hearing took place on 8 November 2015. It was a brief meeting, lasting only 25 minutes (notes at page 132). The claimant had provided a short statement in advance (page 130), in which he said that, once it became clear that the car was faulty, the work on it would have covered by a warranty claim and he then booked it in (the implication being that the respondent would have lost no money). He also said that other colleagues (and he named them) regularly had their cars washed without difficulty. At the hearing, he asked whether it was Peter Marshall's job to review CCTV footage (to which Mr Nicoll said it was, and he would do so twice a week). As noted above, he made no reference to the position he subsequently adopted before the tribunal: that he was unaware of the instruction dated 21 April 2017 and that the document had been fabricated. If that had genuinely been his view at the time, we think that an experienced trade union representative would have pursued it forcefully and asked for metadata for the document.

46. On 8 November 2017, Mr Nicoll wrote to the claimant to confirm that he would be dismissed with immediate effect on grounds of misconduct but would be paid in lieu of notice and his accrued holiday. (The ET1 and ET3 both record a termination date of 30 November 2017, but nothing turns on the difference.) He said that the other employees named by the claimant had sought, and obtained, permission to bring in their cars to be washed or repaired. He specifically said that he was dismissing the claimant because he was the subject of a live final written warning.

47. On 9 November 2017, the claimant appealed the decision to dismiss him (page 137). He listed several complaints about the decision but, as confirmed at the tribunal hearing, the main ones of concern were (1) a belief that Tony Marshall had steered the process from behind the scenes and predetermined the outcome, (2) a contention that the respondent had ignored custom and practice of employees having work done on their personal vehicles and (3) victimisation for his 2014 grievance about sexual harassment.

48. Tony Marshall conducted the appeal hearing on 29 November 2017. He was aware that the claimant viewed him with suspicion, but he told the tribunal that he was the most senior person left in the business available to deal with the appeal and confirmed that he had not been involved at any previous stage concerning the latest incident. In his evidence to the tribunal, Tony Marshall described the appeal hearing as "without doubt the worst meeting I have attended in over 50 years in business". He said that the claimant quickly became abusive. The notes of the meeting (page 138) record the claimant stating that "it was all a conspiracy" and that the main aim was to replace him with cheap labour from Romania. Tony Marshall's account of the meeting is consistent with the way that the claimant had behaved at earlier meetings, which is why we accept his evidence that, at one point, the claimant's union representative took him outside to calm him down and, upon his return, to ask the respondent to consider giving the claimant his job back.

49. By letter dated 7 December 2017, Tony Marshall rejected the claimant's appeal against dismissal (pages 139-142). He appeared to acknowledge that the offence was not at the serious end but wrote that, in the light of the final written warning, "dismissal was justified under the totting up procedure".

50. Tony Marshall dismissed the claimant's references to his son as homophobic and described his comments about cheap labour as racist. Tony Marshall said that the claimant's loss of temper at the meeting turned it into a "shambles" and reinforced his view that he had shown no desire to change which might have mitigated against dismissal. Tony Marshall told the tribunal that he had been prepared in principle to overturn the decision to dismiss (which testifies to his impartiality) but that he saw no way to exercise leniency when the claimant appeared to reverse his previous remorse and instead became abusive during the appeal hearing.

The relevant law: "ordinary" unfair dismissal

51. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct; see Section 98(1) ERA. If the respondent fails to persuade us that it had a genuine belief in the claimant's misconduct and that it dismissed him for that reason, the dismissal will be unfair. If the respondent does persuade us that it held that genuine belief and that it did dismiss the claimant for that reason, the dismissal is only *potentially* fair. To complete our enquiry, we must then go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

52. Section 98(4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether, in the circumstances (including the respondent's size and administrative resources), the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissal. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral. The respondent's size has some bearing in this case: it has only 24 employees.

53. In considering the question of reasonableness, we have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; *Beedell v. West Ferry Printers Ltd* [2000] IRLR 650 EAT and [2001] ICR 962 CA; the joined appeals of *Foley v. Post Office* and *Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short, when considering Section 98(4) ERA, we should focus our enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of its investigation. However, we should not put ourselves in

the position of the respondent and test the reasonableness of its actions by reference to what we would have done in the same or similar circumstances.

54. In particular, it is not for us to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before us at the hearing but not before the respondent at the time) and substitute our own conclusion as if we were conducting the process afresh. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that band. The band of reasonable responses applies not only to the decision to dismiss but also the procedure by which that decision was reached.

The relevant law: the final written warning

55. We have already noted that the claimant was on a live final written warning at the time of his dismissal. It has a long-recognised feature of industrial relations, as well as the Acas Code of Practice on Disciplinary and Grievance Procedures (2015), that further misconduct within a set timescale of a live warning can result in escalating sanctions leading eventually to possible dismissal; see paragraph 21 of the Code.

56. The claimant wanted us to go behind the final written warning and preclude the respondent from relying on it. In *Davies v. Sandwell*, the Court of Appeal followed earlier authorities (such as *Stein v. Associated Dairies Ltd* [1982] IRLR 447 and *Tower Hamlets Health Authority v. Anthony* [1989] IRLR 394) and restated that it is legitimate for an employer to rely on a live warning when dismissing an employee so long as the warning was issued in good faith, there were prima facie grounds for imposing it and it was not "manifestly inappropriate" to have done so. It is only in exceptional circumstances that a tribunal could go behind an earlier disciplinary process and re-open it.

57. We have been mindful of *Simmonds v. Milford Club* (EAT/0232/12); in that case, the EAT noted that a tribunal ought to hear evidence on whether a warning was manifestly inappropriate before safely deciding that it was not.

58. At paragraph 37 of *Wincanton Group plc v. Stone & Gregory* [2013] IRLR 178, the EAT gave guidance on how tribunals should approach cases where, contrary to an assertion of manifest inappropriateness, the tribunal decides that a previous warning was valid. In summary:

    58.1 The tribunal should take account of the fact of the warning;

58.2 It should take account of any proceedings that may affect the validity of the warning, such as an extant internal appeal, giving as much weight as seems appropriate;

58.3 It will be going behind a warning, which is not permissible, to hold that the warning should not have been issued or to hold that some lesser category of warning should have been imposed;

58.4 It does not go behind a warning to take account of the factual circumstances giving rise to it. Just as a degree of similarity may, in some instances, subsequently favour a more severe penalty, so a degree of dissimilarity may point the other way. There may be some feature related to the conduct of the individual that places the earlier warning in context. An employer, and therefore tribunals, should give proper weight to all those matters;

58.5 It is not wrong for a tribunal to take account of an employer's treatment of similar matters relating to other employees; and

58.6 A final written warning always implies that further misconduct of whatever nature will be met with dismissal, unless the terms of the contract provide otherwise, or the circumstances are exceptional.

The final point is of obvious relevance to this case.

The relevant law: victimisation

59. By Section 27(1)(a) EqA, an employer discriminates against an employee by way of victimisation if it subjects him to a detriment because he has done a "protected act". Section 27(2)(d) EqA defines "protected act" to include making an allegation (whether or not express) that a person has contravened the EqA. There is no need for a comparator. Victimisation can relate to the issuing of a final written warning (Section 39(4)(d) EqA) but the focus of this case is on the claimant's dismissal (Section 39(4)(c) EqA).

60. It is not enough that the alleged detriment simply follows the protected act. Consciously or subconsciously, it must have been by reason of it and, for this purpose, it is sufficient if the protected act had a "significant influence" on the way a claimant was treated (see *Nagarajan v. London Regional Transport* [1999] IRLR 572 HL).

61. The provisions on the two-stage burden of proof set out at Section 136 EqA apply equally in victimisation cases. In short: once a claimant establishes a prima facie case of victimisation, the burden of proof shifts to the respondent to show that the contravention did not occur. To discharge the burden of

proof, there must be cogent evidence that the impugned treatment was in "no sense whatsoever" because of the protected act.

The relevant law: "automatic" unfair dismissal

62. Section 103A ERA provides that an employee is regarded as unfairly dismissed if the principal reason for the dismissal is that he has made a protected disclosure.

63. Section 43A ERA defines a protected disclosure as a "qualifying disclosure". Insofar as relevant to this case, Section 43B(1) ERA defines a qualifying disclosure as "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show … (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".

64. In *Kilraine v. London Borough of Wandsworth* [2018] EWCA Civ 1436, the Court of Appeal held that the wording of the legislation should not be glossed to introduce a rigid dichotomy between "information" on the one hand and "allegations" on the other. Sometimes a statement that can be characterised as an allegation would also constitute information and amount to a qualifying disclosure. However, not every statement involving an allegation would do so; it depends on whether it had sufficient factual content and was sufficiently specific.

65. In *Chesterton Global Ltd (t/a Chestertons) v. Nurmohamed* [2017] EWCA Civ 979, the Court of Appeal gave guidance on what meets the public interest. In a case where the disclosure relates to a breach of the worker's own contract of employment or some other matter in which the worker has a personal interest, there may be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Four factors offer a useful tool: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the alleged wrongdoing disclosed; and the identity of the alleged wrongdoer.

Analysis and conclusions

66. We shall set out our analysis and conclusions by reference to the issues for determination, but we will take them in a slightly different order.

67. We start by concluding, without hesitation, that the claimant's grievance dated 2 April 2014 was a protected act for the purposes of Section 27(2)(d) EqA. Read in context of the points he pursued at the subsequent meetings, it was obvious that he was complaining that Peter Marshall had sexually harassed him. We have already noted that we cannot objectively assess on

the evidence before us the respondent's view that Peter Marshall's actions were innocent in their intent or its view that the claimant's allegations were driven by homophobia; in any event, the claimant was not challenged on this point during his evidence and there was no submission that his allegations were made in bad faith. For completeness, however, we say this: the fact his allegations led to a future injunction against "horseplay" and an agreement to separate him from Peter Marshall strongly suggests that his allegations were *not* made in bad faith.

68. We are more hesitant about whether his grievance amounted to a protected disclosure for the purposes of Section 43A ERA. While we can readily accept that a fact-based allegation of sexual harassment meets the requirement of Section 43B(1)(b) ERA that "a person has failed to fail to comply with any legal obligation to which he is subject", we are less sure that the claimant had a reasonable belief that his disclosure was made "in the public interest". It was no part of his case that he made his disclosure to alert the respondent's customers to an issue of concern and it was no part of his case that he did so to protect other employees from similar treatment. We do not wish to make this judgment any longer than it needs to be; in the interests of proportionality, then, we will proceed on the assumption – and without making any specific finding to this effect – that his grievance *did* constitute a protected disclosure.

69. We deal next with the status of the final written warning to which the claimant was subject. In our judgment, the warning was issued in good faith, there were prima facie grounds for imposing it and the warning was not "manifestly inappropriate". It was reasonable for Mr Nicoll to conclude that the claimant's initial response (that it was "none of the company's f***ing business what he did in his own vehicle") pointed to his guilt. Given that his actions in driving while using a mobile phone posed a danger to company stock and its staff and customers, it was also reasonable for Mr Nicoll to decide to issue a disciplinary sanction in consequence.

70. We have carefully considered the claimant's suggestion that Mr Nicoll acted as he did in retaliation for the claimant's 2014 grievance (and at the bidding of Tony Marshall). We have noted that Tony Marshall was upset by the claimant's allegations and stopped asking him to do work at his home as a result – which, although not part of this claim, was a form of retaliation. We have noted that Tony Marshall's handling of the original grievance was odd, in that he accepted that there had been inappropriate behaviour but neither upheld nor rejected the grievance. We have also noted that Tony Marshall was the person who reported the claimant for the mobile phone incident.

71. Ultimately, however, we have concluded that the claimant's suggestion lacks plausibility. This is for three reasons. Firstly, over three years had passed since the conclusion of the claimant's grievance and, as the claimant had accepted, he had very little to do with Peter Marshall since. Secondly, if the

respondent was determined to be rid of the claimant, it seems implausible that it would decline to do so when presented with this obvious opportunity; in view of the claimant's conduct, lack of remorse and abusive behaviour at the disciplinary hearing on 17 August 2017, a final written warning struck us as a rather lenient sanction. Thirdly, the claimant has displayed a tendency to resort to allegations of conspiracy or fabrication with little or no evidence (as we saw with the document dated 21 April 2017), rather than accept responsibility for his actions. It has meant that we have treated his assertions with caution.

72. We therefore reject the claimant's wish that we should "go behind" the final written warning and interpret it as part of a slow-burn strategy to dismiss him. This leaves us with the final point of the EAT's guidance in *Wincanton Group plc v. Stone & Gregory*: a final written warning always implies that further misconduct of whatever nature will be met with dismissal, save in exceptional circumstances.

73. We now turn to the reason for the claimant's dismissal. In our judgment, the respondent dismissed the claimant simply because he committed a further act of misconduct, by acting contrary to the instruction in the document dated 21 April 2017 at a time when he was the subject of a live and legitimate final written warning for previous misconduct. It is notable that whatever "custom and practice" (as the claimant described it) about private work may have operated prior to 21 April 2017 was contrary to the paragraph 6.2 of the company handbook. The respondent was entitled to make clear that, from a certain date, private work would only be allowed with express permission.

74. We have closely scrutinised the claimant's concerns. We accept that it is odd that the respondent failed to examine CCTV evidence for the mobile phone incident but did so for the work on the private vehicle that led to dismissal; but, as we noted above, we have declined to "go behind" the final written warning. There is also the fact that Peter Marshall was the one who observed the transgression on the CCTV footage but there was nothing to gainsay the respondent's evidence that it was his job to review this footage periodically. However, these points aside, the claimant's contention that the dismissal was the end-game in a plan that had existed since his 2014 grievance is one that lacks plausibility. We return to the point we made above: if the respondent had been determined to dismiss him, the mobile phone incident on 25 July 2017 and his abusive behaviour at the meeting on 7 August 2017 would have presented the perfect opportunity to do so; and the respondent's failure to grasp that opportunity strongly supports its case that it was not looking for a reason to terminate his employment.

75. There is no need for an in-depth examination of the burden of proof provisions that apply in respect of Sections 98(1) ERA, Section 103 ERA and Section 136 EqA. Whichever way we look at it, the respondent has persuaded us that

it dismissed the claimant because of a genuine belief that he had committed an act of further misconduct while the subject of a final written warning. In our judgment, the claimant's dismissal was in no sense whatsoever in retaliation for a protected act or a protected disclosure.

76. We turn finally to an analysis of the general fairness of the dismissal under Section 98(4) ERA. There are several points to examine:

    76.1 In our judgment, the respondent had reasonable grounds on which to sustain its genuine belief in the claimant's misconduct: it had CCTV footage; it had his own initial acceptance that he had acted wrongly; and it had noted his later intemperate response.

    76.2 At the stage at which the respondent held that belief, it had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. There was no need for the respondent to investigate the claimant's allegation that the document dated 21 April 2017 was a fabrication because that allegation was made for the first time to the tribunal.

    76.3 The respondent did not treat the claimant more harshly than it had treated other employees for similar offences. There was nothing to gainsay the respondent's evidence that other employees had received permission for their vehicles to be cleaned or repaired, which was consistent with the instructions in the document dated 21 April 2017. By contrast, the claimant had received no such permission. The fact that the remedial work ended up being covered by warranty was irrelevant, since that fact was not apparent when the car was inspected initially on 19 October 2017, and in any case, it did not license the cleaning of his car. The situations are not comparable, and they do not demonstrate any unfairness.

    76.4 The claimant's concern that the respondent did not allocate a suitably independent person to deal with his appeal against dismissal is an understandable one. Tony Marshall had already rejected his appeal against the rejection of his grievance in April 2014; he was the person who reported the mobile phone incident that led to the claimant's final written warning (although playing no part in that disciplinary process); and he was considered by the claimant to be the person steering the respondent's organisational animus towards him, a contention that the claimant put at the front and centre of his appeal. But the fact remains that Tony Marshall had not previously been involved in *this* incident. He was the most senior person remaining in the business who could deal with an appeal and we must bear in mind that this was a small employer with limited administrative resources and no dedicated HR function.

76.5 Finally, in our judgment, the sanction of dismissal fell within the band of responses open to a reasonable employer. Taken in isolation, an employer might reasonably have treated an employee leniently for failing to recognise a recent change in approach to employees having their own vehicles cleaned or repaired. The existence of a live final written warning changes matters; both Mr Nicoll and Tony Marshall were clear that it made the difference between dismissal and a lesser sanction. There are no exceptional circumstances present of the sort envisaged by the EAT in the *Wincanton Group* case.

77. We noted earlier that, when giving his submissions at the end of the hearing, the claimant wished to emphasise that he was a hard worker and very good at his job. He put this point to Mr Nicoll and Tony Marshall when questioning them. They both agreed with that assessment without hesitation. We are happy to adopt it; he was clearly a good performer. Ultimately, however, this case is not about the quality of the claimant's work but whether his behaviour justified his dismissal when he already had a final written warning on his record. Regrettably for him, it did justify his dismissal. It was a fair dismissal not tainted by any victimisation. His claims therefore fail.

Regional Employment Judge B J Clarke
Dated: 13 August 2018

JUDGMENT SENT TO THE PARTIES ON

20 August 2018

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS