EMPLOYMENT TRIBUNALS

Claimant: Mr Z Saleh

Respondents: 1. Viking Consultancy UK Limited
2. Mr D Hobson

Heard at: Manchester **On:** 2-4 April 2019
13 May 2019
(in Chambers)
28 May 2019
(in Chambers)

Before: Employment Judge Sharkett
Mr J Ostrowski
Mr T A Henry

REPRESENTATION:

Claimant: Mrs A Tyson, Solicitor
Respondents: Mr J Middleton, Solicitor

JUDGMENT

The judgment of the Tribunal is:

1. The claimant's claims of automatic unfair dismissal under s103 and s104 Employment Rights Act 1996 are not well founded and are dismissed.

2. The first and second respondents discriminated against the claimant contrary to sections 26 and 13 of the Equality Act 2010.

3. The claimant's claims of harassment under s26 Equality Act 2010 succeeds in respect of one allegation. The remaining allegations are not well founded and are dismissed

4. The claimant's claims of direct discrimination under s13 of the Equality Act 2010 succeeds in respect of one allegation. The remaining allegations are not well founded and are dismissed.

5. The claimant's claim of breach of contract (notice pay) is well founded and succeeds.

6. The respondent concedes that there are outstanding monies owing to the claimant in the form of wages and that this will be settled at a future remedy hearing if agreement has not been reached before that time. The remedy hearing is now listed for **12 September 2019** at **Manchester Employment Tribunal, Alexandra House, 14-22 The Parsonage, Manchester, M3 2JA** commencing at **10.00am**.

REASONS

Introduction

1. By an ET1 submitted on 25 January 2018 the claimant brings claims of unlawful discrimination on the grounds of race and religious discrimination. He brings further claims of automatic unfair dismissal on the basis of his assertion of a statutory right to be paid the National Minimum Wage and the right to paternity leave. He brings a further claim of automatic unfair dismissal on the basis that he had made a protected disclosure by informing the respondent that he was not being paid the National Minimum Wage and that he not been paid for paternity leave. The claimant brings a further claim of breach of contract (notice pay).

2. Following the determination at the preliminary hearing that the claimant is an employee, the first respondent accepts that the claimant is owed wages outstanding at the end of the claimant's employment with the first respondent but save for this concession the remainder of the claims are denied in their entirety.

3. At the beginning of the hearing Mrs Tyson on behalf of the claimant withdrew the claim of unlawful discrimination on the protected characteristic of religious belief, and the same was dismissed upon withdrawal.

4. The parties agreed that the third respondent should be dismissed from these proceedings i.e. Consort Consultancy Services Limited.

5. The following claims, in addition to those of automatically unfair dismissal, were identified as being for determination by this Tribunal:

(1) Unlawful discrimination under section 26 of the Equality Act 2010: The claimant relies on the alleged assault of 31 August/1 September 2017 i.e. the verbal assault including when he was called a thief; the physical assault when he was hit on his hip with his helmet and pushed out of the door and the dismissal.

(2) Unlawful discrimination under s13 of the Equality Act 2010. The claimant relies on the physical and verbal assaults as stated above and the dismissal as act of less favourable treatment and in doing so relies upon a hypothetical comparator.

(3) In respect of the unlawful deduction of wages claim the first respondent confirms that once agreement can be reached on the amount owed and the relevant HMRC form completed by the claimant, payment will be made to the claimant. In the event that agreement cannot be reached the amount will be determined by the employment tribunal at a remedy hearing.

6. It was agreed between the parties that the date upon which the alleged assault has taken place started on 31 August and carries over to 1 September 2017.

Evidence

7. The Tribunal was provided with a bundle of documents consisting of some 204 pages to which further documents were added during the course of the hearing. The claimant also produced a bundle of further documents which was labelled C1. All references to page numbers in this Judgment are references to page numbers in the bundles unless otherwise stated.

8. The claimant gave evidence in support of his claim and Mr Middleton on behalf of the respondent called the following witnesses to give evidence:

(1) Mr D Hobson, Senior Supervisor of the respondent; and

(2) Mr D Wilson, Administrative Consultant to the respondent.

9. All parties produced their evidence in chief by way of written witness statements which had been exchanged between the parties and were taken as read by the Tribunal

Findings of Fact

Initial background

10. The first respondent is in the business or providing security services to client companies. The services offered include supplying security guards, such as the claimant, to work shifts at the premises of their clients to ensure the premises remain secure over a 24 hour period. The second respondent (Mr Hobson) is employed by the first respondent as a Senior Shift Coordinator. The respondent has three permanent employees; the Managing Director Jens Bollerod, who is also the shareholder of the company; the Operations Coordinator, Mr Hobson, and an Office Administrator, Nathan Lowe.

11. The claimant first contacted the respondent to seek work by text of 17 July 2017. When he did not immediately receive a response to his text he sent another one on the same day asking for a response. An offer of work was made and the first day on which the claimant worked for the respondent was 29 July 2017. Whilst these dates are not disputed the Tribunal note that the claimant's written evidence that he called the respondent to ask for work and then got a call back soon after is inconsistent with the documentary evidence that the contact was by text and then the claimant was asked by text to call. Whilst it is not a significant inconsistency it is the first of many that have arisen in the claimant's evidence during the course of this hearing (p182 & C1-1).

12. The claimant, received instruction about the days he was to work each week and where by text which was usually sent by Mr Hobson but signed off as 'Viking' (p170). His first place of work was the Garston site where the respondent provided security cover for its client 'Murphys' who were carrying our repair work on a bridge belonging to Network Rail. The area was divided into two areas; the working area where the work was being carried out and the compound where the security guards

and other workers would be based. Only authorised workers had access to the working area which was protected by fencing. Guards were not authorised to access the working area and would patrol the compound and observe the working area through the perimeter fencing. The working area was monitored by an outside monitoring company PID Systems Limited (PID), who operated mobile CCTV units , referred to as daleks, to detect any unauthorised activity within the working area. The claimant's hours varied between days and nights but on average 1 his shifts were 12 hours mostly at the Garston site but on occasion he would be required to work elsewhere. His work followed a similar routine wherever he was based in that he was required to carry out hourly patrols and complete a daily occurrence sheet during each shift. The daily occurrence sheet recorded when the guard had carried out a patrol of the site and also such matters as the times upon which staff arrived or left site or the registration numbers of vehicles on site. In addition this would be where the security guards would record anything unusual or any problems occurring on site. For example on 7 August there is an entry that records the company phone as faulty (p68). The supervisors of the respondent would also record their visits to site on the daily occurrence sheet. It is the claimant's case that the supervisors did not always record when they had visited a site but this is not borne out by the documentary evidence produced to the Tribunal which demonstrates regular recording of supervisor visits during the time the claimant worked there.

13. It is the claimant's case that he commenced work with the respondent on the understanding that he was an employee and had been offered a two-year fixed-term contract. Prior to a Preliminary Hearing of 9 January 2019, where Employment Judge Robinson determined that the claimant was an employee the respondent had been of the view that the claimant, along with all the other security guards who carried out work for it, was self-employed. The respondent accepts the finding of Employment Judge Robinson, but maintains that it held a genuine, albeit incorrect understanding of the claimant's employment status at the time in question. Employment Judge Robinson delivered an extempore judgment and written reasons were not subsequently requested. Consequently, save for the finding that the claimant was an employee there are no other findings of fact from that Tribunal that this one is able to rely on.

14. There is no documentary evidence to support the fact that the claimant was employed on a fixed term contract for two years, nor has it been suggested that the respondent would only have work to offer for that period. The claimant despite being adamant that there was never any suggestion that he was anything other than an employee, accepted in oral evidence that Mr Hobson had told him he was self-employed but the claimant had refused to accept this and insisted that he was not. On the balance of probabilities, if, as is the respondent's case, Mr Hobson had been under the impression that the claimant was self-employed, which I find that he was under that impression, he would not have told the claimant he was employed under a fixed term contract for two years. The Tribunal makes the finding that Mr Hobson was under the impression that the claimant was self-employed because the claimant accepts that there was a conversation within which Mr Hobson told the claimant he was self-employed and there is evidence that the respondent paid all the security guards including the claimant, through the medium of another company (Consort Consultancy Limited) which invoiced the guards for their work. Whilst the true state of affairs was that the claimant was found to be an employee, there was a clear intention on the part of the respondent to give the impression that the guards were

self-employed. In addition having considered the evidence of the claimant, the Tribunal exercising its judgment as an industrial jury with knowledge of the manner in which the security industry commonly operates, finds that it would be extraordinary to find that a respondent had agreed to employ a security guard under a two-year fixed term contract; the Tribunal find this would be especially so in the north west of England where this respondent is based. Consequently, in the absence of any documentary evidence to support the claimant's claim, which we would have expected to see if such an agreement was in place, it finds on the balance of probabilities that whilst the claimant was an employee of the respondent he was not employed on a fixed term contract of two years or any other fixed term duration.

15. The Tribunal further notes that in the claimant's witness statement he claims that when he first met with Mr Hobson he was told that he would get 28 days holiday, be paid double time for working bank holidays and would be entitled to and be paid for two weeks paternity leave. On the balance of probabilities the Tribunal find that it is not likely that Mr Hobson told the claimant this because in addition to the finding that Mr Hobson was under the impression that the claimant was self-employed, if he had told the claimant this , there would have been no reason for the claimant to send Mr Hobson the undated text to Mr Hobson which reads:

Hi Dave,

1) *Monday 28 August is a Bank Holiday and by law is paid double.*

2) *is the Wednesday 30/08/2017 including the pay date or not?*

3) *Normally by law father allowed to get paternity leave for two weeks isn't it? I only took one week. Will you pay me for two weeks or only one week?".*

4) *I got my new SIA badge (followed by a smiling emoji)*

5) *I got my driving licence as well (followed by another smiling emoji)*

Thank you so much

Best regards

Zeid Saleh

In addition to finding that the need to send this text would not have arisen if the claimant had already been given this information by Mr Hobson, the Tribunal finds that if the claimant had been told this it would have expected the text to be written in terms of what Mr Hobson had promised him as opposed to stating his rights, which is what he did. For these reasons the Tribunal finds, on the balance of probabilities that the claimant was not told that he was entitled to 28 days holiday or more, or that he was entitled to two weeks paid paternity leave.

16. When the claimant first started work he did tell Mr Hobson that his wife was expecting their first baby and that he wanted to take paternity leave when the baby was born. Mr Hobson agreed that he could take a week's leave and that he would arrange for cover of the claimant's shifts while he was off. The claimant notified Mr Hobson by text of 12 August that his son had been born and he then took paternity leave as agreed returning to work on 18 August 2017 (C1-5). The daily occurrence

sheet for his shift on that day records that the site manager had given the claimant the wi-fi password and that Sayed one of the supervisors visited the site (p71)

17. Following his return from paternity leave the claimant worked a number of shifts over the following days and save for the visit from Sayed on 18 August 2017 there is no record of a supervisor visiting during one of the claimant's shifts until 29 August 2019 when Sayed visited again (p83A). On this occasion Sayed took the work mobile phone with him as it was faulty. The Tribunal note that the entry on the daily occurrence sheet recoding that the phone has been removed is made in the box where supervisors would normally record their visit, but on this occasion the entry has been made by the claimant. The claimant explained in oral evidence that Sayed had forgotten to record it when he recorded his visit and that is why he made the entry. It is clear from the daily occurrence sheets before the Tribunal that the claimant was conscientious in his duty to record matters on these sheets as is evidenced from this entry and also others where he has for example recorded that neighbours had been complaining about noise from the site (p72), and on another that an Inspector from Network Rail had been on site (p78). On the balance of probabilities, I find that following the claimant's return from paternity leave if a supervisor had visited the site during one of the claimant's shifts and not recorded his visit, it is likely that the claimant would have completed the form himself to reflect that the visit had taken place.

Claims arising from the claimant's right to be paid the National Minimum Wage and Paternity Leave

18. It is the claimant's case that he was dismissed because he asserted a statutory right to the national minimum wage and a right to paternity leave. In addition he claims that his complaint to Mr Hobson that he was not being paid the national minimum wage was a protected disclosure which also contributed to his dismissal.

19. It is clear from the evidence before the Tribunal that unless there was face to face contact with a supervisor on site, communication between the claimant and Mr Hobson was on the whole carried out via text messages. The Tribunal accepts that there was a conversation at some stage about pay because with effect from 7th August, the claimant's hourly rate increased from £6 to £6.50 In oral evidence Mr Hobson explained that when the claimant had started work he had told him that he would be paid the same rate of pay as one of the claimant's colleagues. The claimant had subsequently learned that this colleague was being paid £6.50 per hour and that is why Mr Hobson obtained permission to raise the claimant's hourly rate to the same level. The claimant disputes this and whilst he accepts there was an increase in his pay he is unable to explain how or why the change in rate occurred.

20. On the basis that the respondent was treating the claimant as a self-employed person the Tribunal find Mr Hobson's explanation plausible, It also notes that in the claimant's text to Mr Hobson of 23 August 2017 enquiring about when he will be paid, he makes no mention of the rate at which he would be paid or any complaint that the increase in his hourly rate is still not enough to meet the national minimum wage. The Tribunal also has regard to the content of the undated text message from the claimant to Mr Hobson referred to above (para 15), which again makes no reference to his rate of pay. Whilst this text is undated it is clear that it was sent after the claimant's return from paternity leave because of the reference to this that he

makes i.e. *Normally by law father allowed to get two weeks paternity leave, "Paternity leave for two weeks isn't it? I only took one week. Will you pay me for two weeks or only one week?".* This text was after he had received his July payment when he asserts that he first raised the issue with Mr Hobson of not being paid the national minimum wage. For the same reason it is also clear that it is sent before he received his August wage because he is enquiring about how much paternity pay he can expect to receive in his pay. The Tribunal note that the reference in this email is the only reference to paternity leave and/or pay that is made in any of the claimant's communications.

21. Following his return from paternity leave the claimant had been told that his pay would arrive in his bank account 'straight after midnight on the 28th'. When it had not arrived by 12.27 on the 29th he emailed Mr Hobson to ask 'what is going on' (C1-16). He was told that because the 28th was a Bank holiday his pay would be processed on the 29th and be in his bank account on the Thursday. The Tribunal note that this would have been on 31 August 2017.

22. It is the claimant's case that on 28th August 2017 he challenged Mr Hobson about his rate of pay and was told that if he kept asking these questions he would be sacked. He further maintains that Mr Hobson said *"You are dangerous. There are suspicions on you that you could be working for the government. Why are you asking these questions. You work and go home. Next time if you open your mouth and ask these questions I'm going to sack you"* (para16&17 C's witness statement).

23. The claimant has changed the date upon which he said that this conversation took place stating both the 28th and the 29th August on different occasions in his witness statements whilst quoting the 29th as the date in his claim form. In oral evidence the claimant was adamant that it was the 28th August that the conversation took place but he was unable to explain why there was an inconsistency in the dates or why he was now sure that was the date upon which it took place. The Tribunal note that rotas disclosed by the respondent record that Mr Hobson did not work on either the 28th or 29th August 2017. The claimant has suggested that the rota has been fabricated for the purpose of these proceedings, but is unable to base his claim on anything other than his bare assertion. The Tribunal further notes that the daily occurrence sheet disclosed by the respondent for the purposes of these proceedings records that Mr Sayed was the supervisor who visited the claimant's site on 29th August. The Tribunal find that there can be no doubt therefore that if there was a conversation with Mr Hobson it was not on the 29th August because Mr Sayed was the supervisor on duty during the claimant's shift.

24. The Tribunal find that the claimant's account of this encounter with Mr Hobson is inconsistent and unreliable. In addition to the inconsistency in the date on which the claimant alleges the conversation took place, which he is unable to explain, the Tribunal also find it difficult to understand the circumstances in which Mr Hobson or anyone else in the respondent would have suspicions that the claimant was working for the government. The claimant was unable to explain the reference and Mr Hobson denies it was ever said maintaining that the conversation never took place. In addition there is further inconsistency between the claimant's witness statement win which he claims he told Mr Hobson that he was entitled to £7.50 per hour and his oral evidence where having initially claimed that he had told Mr Hobson he should be paid £7.50 per hour he confirmed that he had not mentioned a figure but had just told him he was entitled to be paid the national minimum wage.

25. It is Mr Hobson's evidence that queries about pay were often raised by the guards and that he would always refer them to the office as he had nothing to do with pay. The Tribunal find that this is a plausible explanation which is borne out by the fact that the claimant would have received his pay immediately after midnight on Thursday 31st August and thereafter emailed the respondent at 05.17 hours as follows:

> *"Dear Viking*
> *My name is Zseid Saleh, I'm a security consultant working for your company. I am mainly working in the Garston site. Can you please tell me how many hours I have worked for the month of August 2017. I believe it up to the 27 August. Please correct me if I'm wrong. Note I have worked as well on 30 July 2017*
> *Best regard".*

The Tribunal note that the email does not contain a subject heading.

26. When asked in cross examination why in the email of 31st August he had not mentioned the conversation with Mr Hobson, or raised the fact that he had been underpaid, the claimant's response was that at the time he sent the email he was just asking how many hours he had worked so that he could work out how much he was being paid because he thought there may have been a mistake (para 20 C's witness statement). The Tribunal note that on 28 August when the claimant is alleged to have challenged Mr Hobson about his rate of pay he had not yet actually received his August pay and would therefore not be aware of how much he had been paid. In addition it is inconsistent that he would have had the alleged conversation with Mr Hobson on 28th August if as he now says in oral evidence that his email of 31 July was merely to establish how many hours he had worked because he thought there might have been a mistake. Having considered the inconsistencies in the claimant's evidence and the absence of any reference to previous conversations or complaints made to Mr Hobson is his email correspondence, along with the documentary evidence which supports the fact that Mr Hobson did not work on 28th August, the Tribunal find on the balance of probabilities that the alleged conversation of 28th August did not take place. For the avoidance of doubt the Tribunal also find for the reasons given above, that if we are wrong and Mr Hobson did work on 28th August 2017, he did not attend the site on which the claimant worked that night because if he had done he would have made an entry on the daily occurrence sheet to that effect, or if he had forgotten it would have been likely that the claimant would have completed it or alternatively Mr Hobson would have filled it in when he visited the site on the 30th August. The Tribunal further find there is no doubt that the alleged conversation did not take place on 29 August because Mr Sayeed was the supervisor on duty for that shift.

27. It is clear to the Tribunal that the claimant sent the first email while he was on the shift covering 30-31st August 2017 and when he returned to work the following night 31August/1st September, he sent another email when he had not received a response to the first. It is dated 00.09 1st September 2017. The subject of the email is "Wage unpaid properly" and reads:

Dear Viking,

I have emailed today regarding my hour worked with Viking. Until now you did not reply to my email. However I just advise you to pay me the difference ASAP of £442.88. The payment I am disputing is from the period 31 July 2017-27 August 2017. I'm not happy about what has happened and I'm looking to take action if it is not sorted. Moreover I have been underpaid of £55 for the two days worked in July 2017. This underpayment didn't occur accidentally and I will consider it as a misconduct and theft it you don't pay me by tomorrow I will not longer continue working with you and I will escalate this matter to whom it may concern. [sic]

There is dispute about the timing of this email, given it was sent around the time of the alleged acts of unlawful discrimination and dismissal. However irrespective of the time it was drafted the content of the same was not communicated to the respondent until after the time of the alleged acts of unlawful discrimination and dismissal. Whilst it is clear that the claimant is complaining about an underpayment, there is no reference to what the underpayment relates to and no reference to paternity pay or leave.

28. Mr Wilson, a consultant engaged by the respondent to provide administrative support duties, picked up the email when he arrived at work the following morning. He responded at 08.06hrs and asked the claimant to supply a list of the hours he had worked so that he could check this issue out (p173). The claimant did not respond to this email and despite indicating he had attached the information requested in his subsequent email of 4 September 2017 discussed below, the information was not provided.

Claims of unlawful discrimination and dismissal.

29. The alleged acts of unlawful discrimination and dismissal are said to have occurred on the shift worked by the claimant which commenced 31st August 2017. This is the date that is agreed by both parties as being the relevant date. The Tribunal note that on 29th August it is recorded on the daily occurrence sheet that the supervisor Syed had visited the site and took the works mobile away with him because it was faulty. The following night, 30th August, Mr Hobson had attended the site at 21.58 because there had been a been a call from PID, the external company that monitored the working area of the client site by means of mobile CCTV units or Daleks. It had been reported that children had been seen on site and that one of the Daleks had been knocked over. After Mr Hobson had left the site the claimant sent a text to him at 23.20 notifying him that the electricity, which had gone off, had been restored with the help of one of the workers. There is nothing else of note recorded on the daily occurrence sheet and the Tribunal note that the claimant continued to carry out hourly patrols for the duration of his shift.

30. On 31st August 2017 the claimant attended for work as usual. It is his evidence that he was already feeling unwell before he went to work and that he worsened as the night went on. It is not disputed that at approximately 18.00 Mr Hobson had contacted the claimant and asked him to go and look at the work area of the site because there had been a further call from PID about intruders being on the site and one of the Dalek cameras had been knocked over. The claimant accepts that the account at paragraphs 20, 23 and 29 of his witness statement is incorrect as he concedes that he was not expected to enter the working area to inspect the site; he does not however offer any explanation for the inaccuracy in his statement or his claim form (paras 16&19).

31. It is the claimant's oral evidence that having taken a photograph of the overturned camera (p204), he then returned to the compound to continue the shift. He was suffering from diarrhoea and vomiting and was starting to feel worse as the shift went on. At around 10.15pm one of Murphy's supervisors (Freddie) arrived on site having let himself in. The remaining staff were due on site at 23.00 and it was the claimant's job to open the gate to let them in and then close it to secure the compound. It is the claimant's evidence that when Freddie arrived he was praying in the kitchen. Freddie enquired about his wellbeing and the claimant went to get hot water to clean his stomach because he had vomited. Before Freddie had arrived the claimant says he had been drafting an email to the respondent about his pay because he had not received a response to the one he had sent earlier that morning (p172). He attempted to send the email at that time but it did not go through (para 23-27 C's W/S).

32. Having made a cup of coffee Freddie left the portacabin and it is not disputed that Mr Hobson arrived sometime thereafter**.** When Mr Hobson arrived at the site he found the gates to the compound open with no security guard in attendance. In oral evidence Mr Hobson accepts that he was annoyed by this but denies that he openly displayed his anger. The claimant's evidence about the gates being open is inconsistent. In his witness statement the claimant says that he is meant to open the gates for staff to come in before 11pm but that on that night Freddie told him he had already done this. This is inconsistent with the claimant's oral evidence that he did not know that Freddie had left the gate unlocked.

33. It is Mr Hobson's written evidence that following a call from PID the previous evening (30 August 2017) Mr Bollerod the respondent MD had given an instruction that guards on duty at the Garston site should increase their patrols to every 30 minutes instead of the usual hourly patrols. Mr Hobson says he subsequently spoke to the claimant and told him to go and look at the working area and report back to him. He also told the claimant to call 101 to advise the police that children had been on site because it was dangerous. It is clear that there were two consecutive days when there was an issue with intruders in the working area.

34. On the night of the alleged incident it is not disputed that Mr Hobson arrived on site and found the compound gate open and unattended. Mr Hobson's evidence is that he then made his way to the canteen and discovered the claimant lying back with his feet on a bench in a position which could give the impression he had been sleeping. In oral evidence Mr Hobson explained that Mr Wilson's subsequent statement that Mr Hobson had said he had found him asleep is incorrect and assumes Mr Wilson wrote this statement from Mr Hobson's shift report submitted later that day. The Tribunal note that the shift report submitted by Mr Hobson referred to in more detail below does not imply that the claimant was sleeping when he arrived. Mr Hobson confirmed in oral evidence that what he had found was the claimant in a position that could give the impression he had been sleeping.

35. Mr Hobson says that when he entered the canteen the claimant sat up told him that he was not feeling well. Mr Hobson asked the claimant why the gate was unlocked and instructed him to go and lock it. Mr Hobson then went outside to speak to someone who was sitting in a Murphy's van in the compound. He assumed that the claimant would do as he instructed and having established that the person in the van was authorised to be there he went back into the canteen. As he was returning he saw the claimant leave the canteen and enter the toilet.

36. Whilst waiting for the claimant to return from the toilet Mr Hobson checked the daily occurrence sheet and noticed that the claimant had not been carrying out the patrols every 30 minutes as instructed but had continued with hourly patrols. In addition there was no indication on the sheet that the claimant had called the police on 101 as he had been instructed to do. Mr Hobson accepted in oral evidence that even though the claimant had not called 101, he did not do so either when he discovered that the call had not been made. He did not offer any explanation as to why he did not.

37. Mr Hobson further says that when the claimant returned to the canteen a short while later, he saw him spit a brown substance onto the floor. Mr Hobson was surprised by his behaviour as it was a small amount of fluid and did not look as though it was vomit. In oral evidence Mr Hobson explained that he thought that the substance was spittle and that the claimant was clearing his mouth from having previously being sick. The Tribunal find this is a plausible explanation given that the claimant's evidence is that he had told Freddie he was going to get hot water to clear his stomach.

38. Mr Hobson found the claimant to be bent slightly forward with one hand on his knee and the other held up towards Mr Hobson indicating he should stay away. He asked the claimant if he was ok and told him he wanted to speak about what had been happening that evening. The claimant did not respond to this or Mr Hobson's subsequent question about whether he had locked the gate. When he asked the claimant to wipe the brown substance up off the floor the claimant told him he wanted to take a photograph of it first "for proof". At this stage Mr Hobson told him to go home and call Viking the following day. It is Mr Hobson's evidence that he did not think that the claimant was well enough to do his work and that his behaviour did not make sense. It is Mr Hobson's evidence that the claimant was insistent that he got a photograph of the substance on the floor before going home. He was also insistent that he needed the keys to the site manager's office although he would not say why, and this led Mr Hobson to suspect that the claimant had been accessing the site manager's office and possibly using the computer without permission which was not allowed. Mr Hobson says he ultimately had to tell the claimant that he would call the police to escort him off the premises if he did not go. It is his written evidence that the claimant then left the canteen and he cleaned the substance off the floor before starting to look for a replacement guard. Mr Hobson denies that there was any physical contact at all between him and the claimant but does accept in oral evidence that contrary to his written evidence that the claimant simply left the canteen, he did, as was originally pleaded in the grounds of resistance, escorted him 'professionally' off the premises

39. Mr Hobson accepts that the claimant subsequently returned to the site, (by his evidence approximately ten minutes later), accompanied by staff from Murphy's who informed him that the claimant had been making allegations and "Zac" required statements. Mr Hobson told the man, whose name he was not given, that he had sent the claimant home because he was unwell. In oral evidence he explained that he was informed that allegations had been made but he did not know what they were about. He explained that he was more concerned with operational matters and from a time management point of view he needed to get on with his job. It is Mr Hobson's oral evidence that he did not give a written statement to anyone and that the reference in his witness statement to Zac explaining the procedure to him prior to

giving a statement is incorrect. In oral evidence he explained that he has never spoken to Zac and does not know why he put that in his witness statement. In oral evidence Mr Hobson confirmed that the only information he gave about the incident was that contained in the shift report he submitted at 05.13 on 1st September which was part of standard procedure and is set out in full below.

> *Jens,*
>
> *As you are aware PID reported an unauthorised entry on the working area around 18.00 Thursday 1/9/17* [this dates was incorrect as it was 31st August] *While you was present I spoke with the guard on duty (Zeid Saleh) and asked him to carry out the following actions.*
>
> *Assess the situation and report the issues to the police*
>
> *Zeid called back and informed that the two PID units had been pushed over.*
>
> *I asked Zeid to call 101 and inform the police that 'this is the second time in two nights'*
>
> *I arrived on site at 23.00. The gate was unlocked and unattended.*
>
> *I found Zeid sitting in the canteen, I asked him why the gate was unlocked? He told me 'he let Murphys staff in and pointed to the compound.*
>
> *I instructed Zeid to lock the gate*
>
> *I found a member of Murphy's staff sitting a van, He told me they would be working Woolton bridge tonight.*
>
> *When I walked back I saw Zeid entering the toilets, a few seconds later he came back into the canteen and spat out of his mouth a light brown liquid onto the canteen floor.*
>
> *I asked if he was OK? He replied 'yes' so I asked him to clean the liquid on the floor?*
>
> *I looked at the occurrence book and noticed very little of the incident had been logged. He had logged that he had patrolled every hour (not every half hour as agreed after the incident the night before). He had not logged the staff on site and I could find no police log number.*
>
> *After a while I went to find Zeid, he was standing outside, once again I asked him to clean the mess of the floor? He told me that he wanted to take a photo first. I asked if I could speak with him about tonight incident? He didn't reply. I asked if he had locked the gate? Again he didn't reply.*
>
> *At this stage I was concern about Zeid and tried to establish if he was OK. Zeid was only interested in taking a photo of the floor.*
>
> *Action*
>
> *I asked Zeid to leave the site and go home*

Because Zeid started shouting I informed him that if he refused to leave I would call the police. He agreed to leave but wanted to get something from the managers office. Zeid went to a draw and took some keys. I told him to put the keys back because we have no need to ever go to manager's office.

I then escorted him off site and arranged a replacement guard. I cleaned the canteen floor and carried out our duties while waiting for the replacement.

Shortly after I saw Zeid walking onto the site with a member of staff. I was told Zeid had made allegations and they need statements from both of us.

The person who requested the statements was called Zac.

After Zac explained the procedure I gave a statement, inducted the replacement guard and Carried on with my duties

Dave Hobson

It is clear to the Tribunal that the reason there is a reference in Mr Hobson's witness statement to Zac explaining the procedure and the claimant giving a statement is because that is what he wrote in his shift report to Mr Bollerod only a few hours after the alleged incident. The Tribunal find, given the evidence before it that on the balance of probabilities, Mr Hobson's oral evidence before the Tribunal that he never spoke to Zac or gave a statement is not a reliable recollection of events and that the account given in the shift report set out above shows, on the balance of probabilities. that he did.

40. Mr Hobson confirmed that he left the site approximately an hour and a half later when the replacement guard arrived. On the daily occurrence sheet he made an entry at 23.21 to say that he had arrived on site and sent the guard home. He records the presence of one Murphy and 3 Rhino staff on site. At midnight he handed over to the replacement guard and records that he left the site at 12.45am.

41. The Tribunal note that according to the entries on the daily occurrence sheet the replacement guard did not carry out patrols every 30 minutes, which according to Mr Hobson had been the instruction of the respondent MD, and that he did in fact carry out patrols with less frequency than the claimant (p84) The Tribunal accept that Mr Hobson did instruct the claimant to inform the police that children had been seen on the working site of the compound, because the claimant records on the daily occurrence sheet that he had not been able to do this because there was no mobile phone on site (p84B). The Tribunal does not accept that the claimant was instructed to carry our 30 minute patrols because on the previous night the claimant had carried out hourly patrols and Mr Hobson had not addressed this with him on that occasion and the guard who replaced the claimant in the early hours of the morning on 1st September did not carry out 30 minute patrols, which it is likely he would have done had Mr Hobson been following the instruction of Mr Bollerod as referenced above.

42. The claimant gives a different account of what happened when Mr Hobson arrived at the site that night. It is his written evidence that Mr Hobson arrived not long after Freddie and wanted to know what had happened in relation to the PID call. His written evidence is that Mr Hobson was angry that he had not patrolled the working area (para 29) which he now accepts was not the case because he would never

have had the key to enter the working area or have been expected to patrol it from inside. His evidence is consistent in that he did tell Mr Hobson he was not well and he did leave to go to the toilet to vomit. It is also consistent that Mr Hobson left the portacabin but the sequence of events is different. It is the claimant's written evidence that once Mr Hobson left the portacabin the claimant returned to the canteen and unexpectedly vomited on the floor. He claims it was when Mr Hobson returned to the canteen that he started to shout at him and called him a *"fucking liar"* and said *"you clear your shit up from the floor".* He claims that he told Mr Hobson it was vomit and it is not disputed that the claimant then attempted to take a photograph of the substance as proof. The claimant claims that this was when Mr Hobson lunged at him and tried to grab his phone, when he could not he started to shout at the claimant and said amongst other things. *'You fucking shit. You little rat. You fucking paki. Clean your shit. You're fucking dangerous. You're fucking suspicious you did that on purpose'* It is the claimant's evidence that when he asked Mr Hobson to stop shouting at him and accused him of being racist he told the claimant that he was dismissed. It is the claimant's written evidence that he was very upset by the manner in which Mr Hobson treated him and as he noticed that Freddy was in his van outside he packed up his belongings and went to leave. He had forgotten that his safety helmet was still on and Mr Hobson snatched this off his head and hit him with it on the hip. This scared the claimant and he left. When he had got about a metre away he realised that he had left his boots behind, he knew that Freddie was watching from his van so he went back to the portacabin to get them but Mr Hobson would not let him in; when he tried to get in Mr Hobson pushed him back with two hands and he fell over landing on one knee against the railings. Mr Hobson ordered him off site and told him to use the side gate because this is the gate commonly used at this time of night as the front gate was not open. Mr Hobson followed the claimant to the gate and told him that if he contacted Viking again he would call the police. He accused the claimant of using Murhpy's internet and told him that he would also contact the SIA to report him. The claimant told him he could contact who he wanted and left the site.

43. The claimant gives a different version of events in his second witness statement dated 21 March 2019. His evidence in that is that when he was waiting at the bus stop Freddie came to the main gate to ask if the claimant was ok. He told the claimant he would go to get his boots and reassured the claimant that he should not worry about Mr Hobson. Freddie returned with the boots unlocking the main gate to hand them to him. Having waited for the bus for some time the claimant eventually decided to go to the main bus station and it was while he was there that he says he received a call from an unknown number. The person calling was the man named Zac who told the claimant that he was with Freddie. Zac asked the claimant to return to the site to give a statement and advised the claimant that he need not worry about Mr Hobson. Zac and Freddie met the claimant at the main gate and Freddie took a statement from him in the manager's portacabin. It was agreed that Freddie would send the statement to Murphy's head office and he would also ask Mr Hobson to provide a statement. He gave the claimant his phone number, and asked him to call him. Zac then arranged for the claimant to be given a lift home by one of the worker's arriving there about 1.45am.

44. The claimant's account in the March 2019 statement of how he came to give a statement to Freddie is inconsistent with the account given in his first written statement dated 20 December 2018. In that statement he claims that after Mr

Hobson had pushed him out of the door and told him that he would call the police if he emailed or contacted Viking again, he noted that Freddie was still outside. He approached Freddie and asked him to take a statement from him (para 21). Having given Freddie his statement the claimant then got a lift home with another colleague.

45. It is not disputed that the claimant did return to the site after the alleged incident and that he returned in order to put into writing the allegations he had raise with Freddie.

46. In oral evidence the claimant confirmed that he did not contact the respondent the day after the alleged incident because he was taking legal advice. He also confirmed that when he left the site on the morning of 1st September 2017 having given a statement to Freddie he did not speak to either Freddie or Zac again. The claimant confirmed in both oral and written evidence that he did not receive a copy of his statement and despite calling Freddie many times he did not answer any of the claimant's calls or text messages. In oral evidence the claimant explained that Zac had also given him his phone number but again the claimant was subsequently unable to make contact following that night. In oral evidence the claimant explained that he had gone to Murphy's to ask for copies of the statements but it had not occurred to him that he should contact them by email or letter.

47. The claimant went to see his GP on 4 September 2017. The GP records that the claimant told him that he had been verbally and physically assaulted at work and explained the circumstances in which this happened stating that he had been racially verbally insulted. He reports that he had been hit with his helmet and pushed through the door. On examination he records that the claimant feels pain from his leg injury was limping and unable to bend his knee and hips due to assault injury. The GP records that the claimant was also very emotionally traumatised, has tenderness in the area of the assault and that there was evidence of resolving bruising. The Tribunal do not find that it is unusual that the claimant did not seek medical attention until the following Monday because his injuries were not of a type that he would have needed to be seen at a hospital accident and emergency department and it is common knowledge that it is not always possible to get a GP appointment on the same day of requesting one. The following Monday would therefore have been the next available time after the Friday given that GP practices are not usually open at the weekend.

48. Having been to see his GP and obtained a sick note for two months, the claimant contacted the respondent by email of 4 September. This was the first contact the claimant had with the respondent following the incident of 31 August and in it he complained that he had been physically assaulted by Mr Hobson and that this had been witnessed by others. He told the respondent that Mr Hobson had dismissed him because he had told him:

a. *he underpaid me and was playing with the hour rate (I will contact the HMRC)*

b. *he refused to pay me the bank holiday and paternity leaves (I should get paid by law)*

c. *he didn't give me a copy of my two years contract*

d. *I was not feeling well and vomiting and he through me away without any sign or respect for my dignity*

e. *he felt that I was dangerous for him because I know my right (he told me that)*

f. *I was disputing my right and he told me to shut my mouth and accept what you have been given. I told him that we are in the UK and there are rules and policies.*

He advised the respondent that he had written a statement and that Mr Hobson was currently under investigation by Murphys. He also confirmed that he would be "*taking all legal steps for the matter to be solved by law".*

49. Mr Wilson again picked up this email on behalf of the respondent. It is Mr Wilson's evidence that he was surprised at the claimant's allegations against Mr Hobson and decided to carry out an investigation. Having completed his investigation he wrote to the claimant by email of 13 September (p174). In respect of the complaint against Mr Hobson Mr Wilson wrote

"Firstly, you state that you have been attacked by Dave Hobson at Murphy's in Garston and you have witnesses and evidence to this effect. However you have not supplied any of this to me and therefore I can only say that Dave Hobson denies this. If however you have a crime reference number because you have reported it to the police please let me have all of the information and then I can inform our company solicitors of this"……..

"Sixthly, I understand from Dave Hobson that he was attending site in his capacity as supervisor. When he got to site the gate was open and you could not be found. He eventually found you asleep in the canteen and when approach [sic] you refused to speak and rushed to the toilets were[sic] apparently you were sick. Dave Hobson asked after your health and you refused to speak with him. Murphy staff have also complained that you have been found asleep on that occasion and that the security gate had been left open. This is totally against the role that you undertake. As you refused to speak to Dave you did indeed speak to a Murphy employee who you requested take a statement from yourself and he also took one from Dave Hobson. As you claimed sickness you left site and Dave Hobson continued in your place on shift"

"Seventhly, Dave Hobson also states that you refused to talk to him therefore as he was enquiring after your health and you refused to speak to him you only wished to take a picture of some spittle that you have spat onto the toilet floor I cannot see that any confrontation took place.

Murphy did indeed take a statement from both yourself and Dave Hobson although they now consider the matter to be an internal Viking issue although they have complained about you being asleep in the canteen and the gate being left open. Therefore there is no Murphy investigation.

You say that you are going to take legal steps with all your evidence. I would request that this evidence can be shared with our company solicitors so that we can defend the case as appropriate".

The other content of the email relates to the claimant being self-employed and the fact that he has been paid the correct amounts.

50. Although it is Mr Wilson's written and oral evidence that as part of the investigation he spoke with Mr Hobson, Mr Hobson denies any such conversations ever took place and that any information Mr Wilson relied on can only have come from his shift report submitted on 1st September 2017.

51. In his written statement Mr Wilson refers the Tribunal to the respondent Equal Opportunity and Diversity Policy, (p85-93). The Tribunal had regard to paragraph 10 of the policy which provides:

"In the event that an employee is the subject or perpetrator of, or witness to, discriminatory behaviour please refer to the Company handbook"

Mr Wilson was unable to tell the Tribunal what the Company handbook provides. In response to a question he explained that he did not consider that it might have been necessary to suspend Mr Hobson pending the outcome of his investigation because it was just one person's word against the other. Mr Wilson has suggested that he was prevented from investigating the matter further because it became a police matter. However, the Tribunal find that when Mr Wilson responded to the claimant's complaint on 13 September 2017, the police had not yet notified the respondent that a complaint had been made to them and therefore could not have influenced how Mr Wilson investigated or dealt with the claimant's complaint of 4 September 2017/

52. It is Mr Wilson's evidence that he contacted Murphy's as part of his investigation and that they informed him there were no statements and they were unaware of an incident. He decided that in the absence of the evidence that Mr Saleh said he had but did not provide, there was nothing else he could do. The Tribunal have not been shown any documentary communication between the respondent and Murphy's and are told that all communication was by telephone only. In oral evidence Mr Wilson said that Murphys had refused to provide a witness statement for the purpose of this hearing. The Tribunal have not been taken to any documentary evidence that Murphy's were asked to or refused to give a statement in respect of these proceedings.

53. In oral evidence Mr Wilson said he could not explain Mr Hobson's reference to a Zac in his shift report if Murphy's did not know of such a person. He explained that he tried to help the police in their enquiries but for whatever reason he could not trace them (Zac or Freddie) for the police.

54. It is not disputed that the claimant reported the alleged incident to the police and it was recorded as a race hate incident (p196). In oral evidence Mr Wilson explained that the police contacted the respondent and Mr Hobson voluntarily attended the police station to give a statement. The Tribunal have not been shown a copy of this statement. Mr Wilson also explained that he had contacted Murphy's who confirmed that they did not know of anyone working for them called Zac or Freddie. Murphy's had told Mr Wilson that it was a Mr Brady who was the site manager on duty that night and he did not know anyone of the name of Zac or Freddie.

55. The police also confirmed that they had been unable to locate a Zac or Freddie and informed Mr Hobson by letter of 22 February 2018, that the Crown Prosecution Service had decided that no further action would be taken at that time as there was insufficient evidence to provide a realistic prospect of conviction (p168). The claimant was also advised by email of 3 April 2018 that the police had been unable to find any witnesses to the incident and that the matter had been finalised as Undetected (p202)

56. In oral evidence Mr Wilson confirmed that despite his initial oral evidence and the content of the grounds of complaint which state that the claimant simply walked off site and did not accept further work offered, he now accepts that this is incorrect and the claimant was not offered any further work. His oral evidence was that there had been a conscious decision not to offer him any further work because he was in dispute with the company. This was inconsistent with his later oral evidence that he personally believed that the claimant had simply gone off sick and that because he had not rung in to say that he was fit for work a replacement guard was found to cover his shift the following day.

Submissions

57. Both Mr Middleton for the Respondents and Ms Tyson for the claimant had prepared written submissions for which the Tribunal is grateful.

58. Mr Middleton accepted that if the Tribunal found that the claimant's version of the events of 31 August 2017 took place, then there could be no other finding than that of harassment under s26 Equality Act 2010. He submits however that the claimant's version of events is nothing more than an assertion and the burden does not shift to the respondent. Mr Middleton referred the Tribunal to the documentary evidence before it and in particular the emails from 31 August 2017 (p172 & 173). He accepts that the email of 1 September 2017 is a continuation of a concern about wages. He further submits that if the Tribunal accept the claimant's evidence that he wrote the email on 31st August but that it went to draft when he first tried to send it, he non the less did nothing more to raise the additional issue of the alleged assault until 4 September 2017.

59. Mr Middleton asks the Tribunal to have regard to Mr Hobson's evidence that he had previously had a good relationship with the claimant and that whilst he was not pleased that the gate had been left open he remained calm throughout. In addition he submits that no one including the police had been able to trace Freddie or Zac. He accepts that Mr Hobson did see the claimant come back with two individuals but asks the Tribunal to consider how likely is it that the claimant's version of events occurred. In support of this he also asks the Tribunal to consider the fact that the claimant did not seek medical treatment until 4 September 2017 or report the matter to the police until 5 September 2017.

60. In respect of the claimant's other claims Mr Middleton submits that the conversation offering the claimant a two-year fixed term contract never took place and urges the Tribunal as an industrial jury to consider how likely this is to have been offered in the security industry. In respect of the claimant's assertion that he raised the matter of his pay and leave with Mr Hobson on 28 August, Mr Middleton directs the Tribunal to the documentary evidence which supports the respondent's case that

Mr Hobson was not working on that day, and the inconsistency in the claimant's evidence about the date upon which this is alleged to have occurred.

61. Mr Middleton submits that if the claimant was dismissed, as he asserts, during the events of 31st August 2017, he did not send the he raised nothing further until 4th September 2017 when he submitted a sick note despite reminding the respondent that Mr Hobson has dismissed him. Mr Middleton accepts that the respondent did not contact him but submits that it was the respondent's position that the claimant was not ready and willing to work and as they believed him to be self-employed there was no reason to contact him. In addition Mr Middleton submits that if it is correct that the claimant no longer intended to work for the respondent if he was not paid monies he alleged were owed, it is questionable why he would then submit a sick note.

62. Mr Middleton asks the Tribunal to prefer the respondents' versions of events and submits that all concerned at the respondent have done their best. He submits that the respondent cannot be blamed for not being able to locate the statements – as far as Murphys were concerned there were no statements and there was nothing more the respondent could do.

63. For the claimant Ms Tyson submits that there is clear evidence that there must have been some complaint by the claimant on 31 August because it is accepted that he returned to site with staff from Murphys. She submits that there is nothing unusual or suspicious in the claimant not attending his doctor until 4 September because this was the first appointment he could get. She submits that the report he gave to the GP and the subsequent report to the police, give support to his version of events. She submits that it is not credible that he would have gone to the lengths he did if he had simply made the story up.

64. Ms Tyson asks the Tribunal to consider whether it is credible that Mr Hobson would threaten the claimant with the police and escort him professionally off the site if, he was simply sending him home because he was not well, or that if he did not stop the claimant from taking the photograph of the floor, why there is no photograph. She further asks the Tribunal to consider whether it is credible that Mr Hobson would not have asked to be told what the allegations were that the claimant was raising if as he says he did not know.

65. Ms Tyson also reminded the Tribunal of the numerous inconsistencies in the evidence of Mr Hobson and Mr Wilson and the way in which Mr Wilson carried out the investigation into such serious allegations. She submits that Mr Hobson was protected by the respondent and that there was no intention on its part to take the claimant's complaint seriously. She submits that although the claimant has not been able to produce the statements of Freddie or Zac he has made considerable efforts to do so by texting them and that he is a much more credible witness whose evidence she asks the Tribunal to prefer.

The Law

66. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: In this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): In this Part a "qualifying disclosure" means 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 one or more of the following:**
>
> **(a) that a criminal offence has been committed or is likely to be committed,**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**
>
> **(f) that information tending to show any matter falling within any one of the previous paragraphs has been, or is likely to be deliberately concealed.**

67. A qualifying disclosure is protected if it is made to the employer (section 43C). Where the information is already known to the recipient the reference to the disclosure of information is treated as a reference to bringing information to the attention of the recipient (section 43L(3)).

68. HHJ Eady QC summarised the law as follows in paragraphs 23 – 24 of **Parsons v Airplus International Ltd UKEAT/0111/17,** a decision of 13 October 2017:

> **"23. As to whether or not a disclosure is a protected disclosure, the following points can be made:**
>
> **23.1. This is a matter to be determined objectively; see paragraph 80, Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 CA.**
>
> **23.2. More than one communication might need to be considered together to answer the question whether a protected disclosure has been made; Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT.**
>
> **23.3. The disclosure has to be of information, not simply the making of an accusation or statement of opinion; Cavendish Munro Professional Risks Management Ltd v Geduld [2010] IRLR 38 EAT. That said, an accusation or statement of opinion may include or be made alongside a disclosure of information: the answer will be fact sensitive but the question for the ET is clear: has there been a disclosure of information?; Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT.**
>
> **24. As for the words "*in the public interest*", inserted into section 43B(1) of the ERA by the 2013 Act, this phrase was intended to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109 EAT, in which it was held that a breach of legal obligation owed by an employer to an employee under their own contract could constitute a protected disclosure. The public interest requirement does not mean, however, that a disclosure ceases to qualify for protection simply because it may also be made in the worker's own self-interest; see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837 CA (in which the earlier guidance to this effect by the EAT ([2015] ICR 920) was upheld)."**

69 In **Chesterton Global Ltd and anor v Nurmohamed [2017] IRLR 837** the Court of Appeal approved a suggestion from counsel that the following factors

would normally be relevant to the question of whether there was a reasonable belief that the disclosure was made in the public interest:

(a) the numbers in the group whose interests the disclosure served;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer.

Detriment in Employment

70 If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

71 The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

72 The time limit provision appears in Section 48(3) and is a period of three months beginning with the date of the act or the failure to act, not the detriment, although where the act is part of a series of similar acts or failures, time runs from the last act in the series. Time can also be extended in effect where the Tribunal considers it was not reasonably practicable for the complaint to be presented before the end of the three-month period and it is presented within a further reasonable period.

73 The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work.

74 As for Section 48(2), **NHS Manchester v Fecitt [2012] ICR 372** concerned a case where whistleblowers had been moved due to a dysfunctional working atmosphere. Their claim failed in the Employment Tribunal. The appeal was allowed by the EAT but the Court of Appeal restored the Tribunal decision and in doing so confirmed that the correct test of causation to be applied is the direct discrimination test under s13 of the Equality Act 2010. Consequently the Tribunal can proceed by way of an inference as to the real reason for the decision as per the

guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**. In paragraph 41 of **Fecitt** Elias LJ said this:

> **"Once an employer satisfies the Tribunal that he has acted for a particular reason, here to remedy a dysfunctional situation, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false, whether consciously or unconsciously, or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles."**

Automatically Unfair Dismissal

75 Where the employee has made a protected disclosure dismissal can be automatically unfair under section 103A:

> **"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".**

76 The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

77 Where the claimant contends for a reason which would be automatically unfair but the respondent contends for a fair reason, the proper approach is set out in paragraph 47 of the decision of the EAT in **Kuzel v Roche Products Limited [2007] ICR 945**, approved by the Court of Appeal at **[2008] ICR 799:**

> "(**1) Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent…..was not the true reason? Has [the Claimant] raised some doubt as to that reason by advancing the s103A reason?**
>
> **(2) If so, has the employer proved his reason for dismissal?**
>
> **(3) If not, has the employer disproved the s103A reason advanced by the Claimant?**
>
> **(4) If not, dismissal is for the s103A reason.**
>
> **In answering those questions it follows:**
>
> **(a) that failure by the Respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s103A;**
>
> **(b) however, rejection of the employer's reason, coupled with the Claimant having raised a *prima facie* case that the reason is a s103A reason entitles the Tribunal to infer that the s103A reason is the true reason for dismissal, but**
>
> **(c) it remains open to the Respondent to satisfy the Tribunal that the making of the protected disclosures was not the reason or principal**

reason for dismissal, even if the real reason as found by the Tribunal is not that advanced by the Respondent;

(d) it is not at any stage for the employee (with qualifying service) to prove the s103A reason."

78 HHJ Eady addressed this as follows in **Parsons v Airplus International Ltd UKEAT/0111/17:**

"27. [Section 103A] … requires an enquiry into what facts or beliefs caused the decision-taker to decide to dismiss. This may require the ET to do more than simply consider what was the reason for dismissal by reference to any particular protected disclosure, in isolation; it might be necessary to consider that question against a history of protected disclosures and to ask whether, taken together in that history, the prohibited reason was the reason or principal reason for dismissal; see El-Megrisi v Azad University (IR) In Oxford UKEAT/0448/08.

28. A further issue that may arise when determining what was the reason for dismissal, is sometimes referred to as the question of separability: the ET may need to resolve whether the real reason (or principal reason) for the dismissal was the protected disclosure itself *or* the manner in which that disclosure was made. In addressing this issue in Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500, the EAT gave the following guidance:

"49. First, as a matter of statutory construction, s.47B of ERA does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures. A protected disclosure is 'any disclosure of information' which in the reasonable belief of the employee tends to show the existence of one of the state of affairs specified in s.43B(1) of ERA, eg that a criminal offence has been or is being committed or that a person is failing or is likely to fail to comply with a legal obligation or that a miscarriage of justice has occurred, is occurring or is likely to occur. There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed.

50. Secondly, that distinction accords with the existing case law which recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself. In Bolton School v Evans [2007] IRLR 140, the Court of Appeal recognised a distinction between disclosing information - in that case, that the school's computer system was not secure - and the fact that the employee hacked into the computer system in order to demonstrate that the system was not secure. Disciplining the employee on the ground that he had engaged in unauthorised misconduct by hacking into the computer system did not involve subjecting the employee to a detriment on the grounds that he had made a protected disclosure. The conduct, although related to the disclosure, was separable from it. The Court of Appeal noted, however, that a 'tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than

because of the disclosure itself' (see the comments of Buxton LJ at [2007] IRLR 140 at paragraph 18).

51. The Employment Appeal Tribunal reached a similar conclusion in Martin v Devonshires Solicitors [2011] ICR 352. That case concerned discrimination contrary to s.4 of the Sex Discrimination Act 1975 (essentially victimisation of a person for doing a protected act) rather than the provisions governing protected disclosures under ERA. The principle is, however, similar. The appellant in that case had made allegations of sex discrimination against two partners in the firm of solicitors involved. The statements were in fact untrue. However, the appellant, who had mental health difficulties, did not appreciate that they were untrue. The fact that the appellant had done protected acts, in that case making complaints of sex discrimination, formed part of the facts leading to her dismissal. The reason why the employer dismissed the appellant, however, was not the making of those complaints but rather the fact that the complaints involved false allegations which were serious, that they were repeated, that the appellant refused to accept that they were untrue and that she had a mental condition which was likely to lead to unacceptably disruptive conduct in future. The reason for the dismissal was that the appellant was mentally ill and the management problems to which that gave rise. The Employment Appeal Tribunal accepted that the reason for the dismissal constituted:

'23. … a series of features and/or consequences of the complaint which were properly and genuinely separable from the making of the complaint itself. Again, no doubt in some circumstances such a line of argument may be abused; but employment tribunals can be trusted to distinguish between features which should and should not be treated as properly separable from the making of the complaint.'

52. Those authorities demonstrate that, in certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure itself. The employment tribunal will, however, need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did.

53. That conclusion is not, in my judgment, altered by the decision in Woodhouse v West North West Homes Leeds Ltd [2013] IRLR 773. That case involved alleged victimisation. The appellant had lodged a series of grievances alleging racially discriminatory conduct against himself. The grievances had been investigated and ruled to be unfounded. The appellant, however, remained of the view that he had been subjected to racially discriminatory conduct and the fact that his grievances had been rejected reinforced that conclusion in his mind. The employer decided to dismiss the appellant. The appellant had always done his job properly and there were no doubts about his abilities when performing his job and that was not the reason for the dismissal. Rather, the tribunal found that the reason for the dismissal was that the employer considered that the appellant was convinced that the managers were treating him in a racially discriminatory fashion and so concluded that he, the employee, had lost trust and confidence in the employment relationship. The Employment Appeal Tribunal considered that, on the facts, there were no features which were separable from the fact of making the grievances. The features relied upon by the employer involved a view of the appellant's subjective state of mind and the possibility that he may make further complaints in future. In reality, the Employment Appeal Tribunal considered that, on an analysis of the tribunal's findings the reason for the dismissal, described in terms of a loss of confidence and trust by the employee in the employment relationship, was the fact that the appellant had made complaints of racial discrimination. The factors relied upon were not therefore properly separable on the facts of that case from the doing of the protected acts.

> ***54. The Employment Appeal Tribunal in Woodhouse suggested that, in such cases, it would only be exceptionally that the detriment or dismissal would not be found to be done by reason of the protected act. In my judgment, there is no additional requirement that the case be exceptional. In the context of protected disclosures, the question is whether the factors relied upon by the employer can properly be treated as separable from the making of protected disclosures and if so, whether those factors were, in fact, the reasons why the employer acted as he did. In considering that question a tribunal will bear in mind the importance of ensuring that the factors relied upon are genuinely separable and the observations in paragraph 22 of the decision in Martin v Devonshires Solicitors [2011] ICR 352 that:***
>
> ***'Of course such a line of argument is capable of abuse. Employees who bring complaints often do in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purposes to object to "ordinary" unreasonable behaviour as that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle.' "***
>
> **29. Further, see Beatt at paragraph 94:**
>
> ***"94. … it is all too easy for an employer to allow its view of a whistleblower as a difficult colleague or an awkward personality (as whistleblowers sometimes are) to cloud its judgement about whether the disclosures in question do in fact have a reasonable basis or are made (under the old law) in good faith or (under the new law) in the public interest. Those questions will ultimately be judged by a tribunal, and if the employer proceeds to dismiss it takes the risk that the tribunal will take a different view about them. I appreciate that this state of affairs might be thought to place a heavy burden on employers; but Parliament has quite deliberately, and for understandable policy reasons, conferred a high level of protection on whistleblowers. If there is a moral from this very sad story, which has turned out so badly for the Trust as well as for the appellant, it is that employers should proceed to the dismissal of a whistleblower only where they are as confident as they reasonably can be that the disclosures in question are not protected (or, in a case where Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 is in play, that a distinction can clearly be made between the fact of the disclosures and the manner in which they are made)."***"

79 A dismissal may also be automatically unfair if an employee is dismissed because they asserted a statutory right. The claimant claims that he made assertions both to be paid the national minimum wage and to take paternity leave and that by reasons of making those assertions he was dismissed

80 Section 104 of the Employment Rights Act 1996 provides:

> **"(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee alleged that the employer had infringed a right of his which is a relevant statutory right.**
>
> **(2) It is immaterial for the purposes of subsection (1) –**

> **(a) whether or not the employee has the right; or**
>
> **(b) whether or not the right has been infringed;**
>
> **but for that subsection to apply the claim to the right and that it has been infringed must be made in good faith.**
>
> **(3) It is sufficient for subsection (1) to apply but the employee, without specifying the right, made it reasonably clear to the employer what the right claim to have been infringed was.**

81 The right to be paid the National Minimum Wage and the right to take Paternity Leave are relevant statutory rights for the purposes of this section.

Unlawful Discrimination

83 The complaints of race discrimination were brought under the Equality Act 2010. Section 39(2) prohibits discrimination against an employee by dismissing him or by subjecting him to a detriment.

84. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

85. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) 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.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

86. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

87. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Direct Discrimination

88. Direct discrimination is defined in section 13(1) as follows:

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

22. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

89. . Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities.

90. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator. If the protected characteristic (in this case, race or disability) had any material influence on the decision, the treatment is "because of" that characteristic.

Harassment

91. The definition of harassment appears in section 26, for which race is a relevant protected characteristic, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (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.**

92. Chapter 7 of the EHRC Code deals with harassment. Paragraph 7.9 says that:

> **"Unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic."**

93. Paragraph 7.10 says that a connection with a protected characteristic may arise even where the employer knows that the worker does not have the protected characteristic himself. Further, the intention of the alleged harasser is not determinative: **Hartley v Foreign and Commonwealth Office UKEAT/0033/15** (27 May 2016).

Application of Law and secondary findings of fact

94. The claimant's claims are linked in that they all arise from the incident that occurred on 31st August/1st September 2017. In reaching our decisions on each of the claims it has been necessary to establish whether or not the claimant was dismissed by Mr Hobson on the night of 31st August and if so what was the reason for that dismissal. For the reasons we give later on the Tribunal find that the claimant was dismissed by Mr Hobson on behalf of the respondent on 31 August 2017. All employees are entitled to notice or pay in lieu of notice upon the termination of their employment unless the employer can show that it was entitled to summarily dismiss without notice or payment in lieu of notice. The respondent has not shown that it was entitled to dismiss the claimant without notice or payment in lieu and therefore the claimant's claim of breach of contract (notice pay) is well founded and succeeds. How much notice the claimant would have been entitled to is either what has been agreed between the parties or what is reasonable. For the reasons we have given in our findings of fact we find that the claimant was not employed on a fixed term contract and there is no other written or oral agreement in place. Consequently, in considering what is reasonable in these circumstances the Tribunal has regard to what is the industry norm and the provisions of s86 Employment Rights Act 1996. In industries such as the respondent, the Tribunal consider that employees of the claimant's standing would receive the statutory minimum period of notice. S86 ERA 1996 provides that employees who have more than one month but less than two years service are entitled to one weeks' notice.

95. Turning now to the claimant's claims that his dismissal was automatically unfair by reason that he:

a. Asserted the statutory right to be paid the National Minimum Wage (NMW)

b. Asserted the statutory right to take/be paid for statutory paternity pay

c. Made a Protected disclosure in telling the respondent that he had the

right to be paid the NMW

The claimant does not have to be entitled to the relevant statutory right in order for his claim to succeed, but he must have a reasonable belief that he has the right. He also does not have to have informed an employer that he is asserting a right or spell out what that right is as long as it is reasonably clear what it is.

96. The Tribunal accepts that even though it was subsequently found to be incorrect, the respondent sought to treat the claimant as a self-employed person in respect of any rights and obligations under employment law. It is the claimant's case that he asserted the right to NMW in a conversation that took place with Mr Hobson on 28 August 2017. The Tribunal accepts that there must have been some conversation about money prior to this date as the claimant's rate of pay was increased soon after he started from £6 per hour to £6.50 per hour. The claimant accepts that he did receive this increase but has claimed that he never agreed to it. It is Mr Hobson's case that this is what the other guards were paid and as the claimant had quickly shown that he was able to do the job, Mr Hobson arranged for his rate of pay to be increased. The Tribunal prefer Mr Hobson's explanation because although the claimant knew that his pay was to be increased to £6.50 per hour, and claims that he did not agree to it and told Mr Hobson he was entitled to the NMW, in texts to Mr Hobson after the pay increase eg. the undated one when he has returned from paternity leave and the texts in August asking about when he will be paid, he does not raise the fact that he is unhappy with his rate of pay or that he has not agreed to the increase in his pay. The tone and content of the emails give no suggestion of any dissatisfaction on the part of the claimant and in the undated text message he thanks Mr Hobson and puts smiling emojis at the sides of two of the matters referred to.

97. When the claimant did receive his August pay he emailed the respondent in the early hours of 31 August asking them to tell him how many hours he has worked. He does not put a subject on the email or make any reference to concerns about his rate of pay. The first occasion when he emails the respondent with clear dissatisfaction with his pay is 1st September at 12.09, after he has been dismissed. He may well have started to write the email on 31st August but it was not communicated to the respondent until 1st September. He cannot therefore rely on that email as evidence of an assertion of a statutory right to the NMW on which he can rely because it is after his employment has ended.

98. It is however, a conversation on 28th August 217 that the claimant relies on in respect of both his claim that he asserted statutory rights to NMW and paternity pay/leave and in asserting his right to NMW made a protected disclosure. The claimant has given inconsistent evidence about when this conversation is said to have taken place, citing the 28th and 29th August in different accounts. In oral evidence however he is insistent that it occurred on the 28th but has not given any explanation of how he is so sure or why he has been inconsistent in his evidence. Perhaps one explanation for his determined stance before the Tribunal is that there is documentary evidence to show that Mr Hobson was most definitely not on site on 29th August because another supervisor visited the site that night. There is further documentary evidence that shows that Mr Hobson was not on duty on the night of 28th August which was a bank holiday. The claimant suggests that this evidence is fabricated but he is unable to support this with anything other than his evidence that he met with Mr Hobson on 28th August 2017.

99. In reaching our decision on whether the claimant did meet with Mr Hobson on 28th August and in addition to, and as a result of, raising his right to the NMW and paternity leave he was threatened with the sack and told amongst other things that there were suspicions about him working for the government and that he should shut his mouth, the Tribunal have considered the text exchange from around that time. The Tribunal note that prior to the 28th August, save for the undated text, which we

find is not even a suggestion of asserting the statutory rights relied on, the claimant does not make reference to his hourly rate of pay. In oral evidence when asked about why he did not refer to his rate of pay in his email to the respondent at 05.17 on 31st August or in fact what Mr Hobson is alleged to have said to him during the conversation of 28th August, the claimant maintained that he was merely trying to find out what hours he had worked so that he could see whether the respondent had made a mistake or not. The Tribunal note that if the claimant had met with Mr Hobson on the 28th August, he would not at that time have received his pay because of the delay in processing it following the bank holiday. He did not receive his pay until 30th August and it was after this that he emailed the respondent with his enquiry. His oral evidence that the email of 31 August, was to find out how many hours he had worked, so that he could see whether a mistake had been made or not, is inconsistent with his claim that he complained about his rate of pay to Mr Hobson on 28th August and was threatened with the sack.

100. The Tribunal find, having considered all the evidence, both oral and documentary, that the claimant's account of what he did or said is unreliable and is not supported by the timing of the alleged conversation or the documentary evidence. From the evidence before the Tribunal we find that the first time the respondent would have been aware that the claimant had an issue with his pay was through the email of 1 September at 12.09 when the claimant's employment with the respondent had ended. The Tribunal find that the employment ended prior to this time, because although in oral evidence Mr Wilson explained that the claimant was offered no more work because he was in dispute with the respondent, the facts are that although the claimant had not indicated that he would not be attending work, the respondent had already arranged for a replacement guard to cover the claimant's shift starting at 3pm on 1 September 2017. This demonstrates to the Tribunal that neither the respondent nor Mr Hobson anticipated the claimant coming to work that day because Mr Hobson had dismissed him.

101. In respect of the claimant's assertion of his right to take and be paid for statutory paternity leave. The Tribunal note that the only reference to paternity leave is in the undated text. Although the claimant did not have the necessary period of continuous employment when his child was born, the Tribunal note that it had been agreed that he would be able to take a week off work at that time and that the respondent would arrange to cover his shifts. The Tribunal accepts that the claimant expressed an understanding in the undated text that he was entitled to two weeks leave but the content of the text does not suggest that he had been refused two weeks leave or the fact that he took only one weeks' leave was anything more than an agreement between the two parties. Within the body of the text the claimant also makes reference to being paid for two weeks leave and asking whether this is what he will receive given that he took only one weeks' leave. The Tribunal note that the claimant is an educated man and any belief that he would have been entitled to be paid for leave that he did not take would not have been a reasonably held belief.

102. Having considered all the evidence, the Tribunal find that the claimant did not assert a right to the NMW or paternity pay and his claim that he was dismissed for asserting such a right is not well founded and is dismissed. As the Tribunal have found that the claimant did not assert a statutory right during the course of his employment with the respondent, he did not make the disclosure of information that

he relies on in bringing his claim that he was dismissed for making a protected disclosure because he did not make one.

103. If the Tribunal is wrong and the claimant did assert either or both rights, and in asserting a right to NMW a protected disclosure, the Tribunal would have found that this would not have been the primary or any part of the reason for his dismissal because the reason for his dismissal was as set out below.

Unlawful discrimination

104. The Tribunal have found that the claimant has been inconsistent in some respects of his evidence, with a tendency to embellish facts, which has been a theme throughout. However, this does not mean that we are unable to rely on any of his evidence. It is also clear that the respondent has been inconsistent as well in the evidence produced before the Tribunal with inconsistencies not only between the ET3 and witness statements but between the respondent witnesses themselves. It is quite clear from the evidence before us that there was an incident that occurred between the claimant and Mr Hobson on 31st August 2017.

105. It is not disputed that the gates of the compound were open when Mr Hobson arrived on site. He accepts that he was annoyed about this but claims he did not show his annoyance. It is also not disputed that he saw the claimant eject a brown coloured fluid from his mouth onto the floor of the canteen. It is impossible for the Tribunal to determine whether it was vomit or spittle on the floor, but we find that Mr Hobson did genuinely believe that it was spittle and he was repulsed by it. It was this together with the gate being found unlocked that led to the way that Mr Hobson reacted to the claimant. The Tribunal find that it is likely on the balance of probabilities that Mr Hobson did react negatively to the claimant and say the words to the effect claimed by the claimant. We make this finding because if he had reacted in the way described by the claimant, the claimant would not have felt the need to take a photo 'as proof' that it was not 'shit' or that he had done it 'on purpose'. It is not disputed that the claimant did try to take a photo and the Tribunal find on the balance of probabilities that Mr Hobson did try to stop him from taking it, as alleged by the claimant, because if he had not done then the claimant would have had a photograph to show. It is not disputed that the claimant did not take a photograph but Mr Hobson was unable to explain the circumstances of why that did not happen.

106. The Tribunal does not accept that Mr Hobson merely sent the claimant home because he was sick. Despite seeing the claimant was unwell it is Mr Hobson's evidence that he sent the claimant to shut the gate and that he thought he would have done this. This is inconsistent with the suggestion that he was concerned for the claimant and the client as he was not fit for work. It is not clear why on entering the compound Mr Hobson would not have shut the gate if it was such a serious breach of security, but if he thought the claimant was so unwell that he was not fit for work and would need to go home, it would have been reasonable for Mr Hobson to have volunteered to go to close the gate himself.

107. The Tribunal have had the benefit of hearing from the claimant and have witnessed his determination to stand up for himself and say his piece, this has been evidenced by his determination, even though not well, to take a photo of the substance on the floor to prove it was not 'shit' as suggested or done on purpose but was the result of the claimant's illness at that time. The Tribunal find on the balance

of probabilities that the claimant would have objected to what Mr Hobson was saying and that this may well have inflamed the matter and led to Mr Hobson threatening the claimant with the police and escorting him off the premises. The Tribunal find on the balance of probabilities that Mr Hobson did tell the claimant he was dismissed in response to the claimant sticking up for himself, because the circumstances of him leaving that night were not consistent with an ongoing relationship. In addition the Tribunal note that the respondent had arranged a guard to cover the claimant's 3 o'clock shift the following day even though the claimant had not indicated he would not be in.

108. The Tribunal cannot be certain what happened between the claimant and Mr Hobson but the Tribunal find that although there are inconsistencies in the claimant's version of events, it prefers his evidence for a number of reasons. It is not disputed that the claimant returned to the site with members of Murphy's staff who told Mr Hobson that he was making allegations. The Tribunal find that it is not credible that Mr Hobson would not have asked what the allegations were if he was not already aware and had not dismissed the claimant. Mr Hobson was the claimant's supervisor and Murphy's the respondent's client. The Tribunal do not find it credible that time management and operational matters were more important. The respondent seeks to discredit the claimant's evidence that there was someone called Freddie that he gave his statement to or that a Zac asked him to make one. It is the respondent's evidence that Murphy's had never heard of these people and even the police had been unable to find them. Mr Hobson now attempts to distance himself from his own evidence by saying that he doesn't know why he mentions a Zac and that he has never given a statement. Whatever the reason these two individuals are not now identifiable, the claimant has not made them up because Mr Hobson himself refers to Zac in his shift report that was written up almost immediately after the incident. If the claimant has made Zac up as seems to be suggested, it would be more than a co-incidence that Mr Hobson had chosen the very same name, to put in his shift report. The Tribunal have also had sight of the texts the claimant sent to both Freddie and Zac which support his version of events.

109. The Tribunal also have regard to the way in which the claimant's formal letter of complaint was handled by the respondent. There would appear to have been no investigation at all and the response was essentially that the claimant had not provided any evidence and if he had any he should let them have it so it could be sent to the company solicitors so any claim can be defended. This is not indicative of any desire to uncover any wrongdoing by a respondent employee. Contrary to Mr Wilson's evidence, Mr Hobson is adamant that he never spoke to Mr Wilson and from the inconsistency in the account given of the events of that night by Mr Wilson it would appear there may be some truth in that. For example he refers to Mr Hobson finding the claimant asleep, which is incorrect, and that no replacement guard could be found so that Mr Hobson had to covered the shift, again incorrect. Mr Wilson purports to have experience of handling HR matters, yet his response to the claimant's complaint is woefully lacking. It is true that there was co-operation between the respondent, Mr Hobson and the police when they commenced their enquiry following the claimant's complaint to them but there is no evidence of any investigation being carried out by the respondent itself. The Tribunal also note the absence of any communication with Murphy's about the incident. It is clear that something happened from Mr Hobson's shift report, yet everything appears to have been swept under the carpet to be spoken of no more. The Tribunal find that if there

had been a genuine attempt to investigate the claimant's complaints the respondent would have written to Murphy's asking for copies of the statements that were said to have been given.

110. In contrast to the respondent's inconsistent and contradictory evidence the claimant's evidence is supported by the fact that he made an appointment to see his GP. The Tribunal do not accept Mr Middleton's submission that the claimant would have sought medical attention earlier if his account was genuine. It is well known that getting an appointment at the doctors is difficult in today's climate and given that in terms of working days his attendance was the next working day following the incident, the Tribunal find that the claimant sought medical attention within an appropriate time period and that, on the balance of probabilities the injuries complained of at that appointment, occurred as he explained during the incident of 31 August 2017. Whilst the Tribunal note that the record of the GP is based upon that which he is told, he would have been able to witness the emotional trauma experienced by the claimant and visualise the injuries incurred. Whilst it is true that these might have been incurred under different circumstances after the incident of the 31st, it would be more than a co-incidence for the injuries to be in keeping with the circumstances described as occurring by the claimant on the 31st.

111. In further support of the claimant's claim is that he reported the matter to the police. Although he did not do this immediately, the Tribunal recognise that raising a formal complaint with the police is a serious issue and something that most people would take time to consider before doing, especially if complaining of a race/hate crime.

112. The Tribunal is mindful that it has found much of the claimant's evidence unreliable in respect of his claims of automatic unfair dismissal however this does not mean that we are unable to rely on any of his evidence. The Tribunal find respondent's evidence in respect of these parts of the claimant's claims to be inconsistent, contradictory and unreliable. Whether consciously or unconsciously the Tribunal find the respondent's evidence to be something short of the truth or the whole story. The Tribunal have consequently drawn an adverse inference from this finding.

113. Having had regard to all the evidence before it and attaching appropriate weight to the same, the Tribunal find on the balance of probabilities that the claimant's version of what occurred during the incident of 31st August is what happened. For the avoidance of doubt, the Tribunal does not accept all of that which the claimant has written in his email to the respondent of 4 September 2017, but rather finds on the balance of probabilities that Mr Hobson used the alleged names and words and caused the injuries complained of to be incurred.

114. Having established the same we now turn to the claimant's individual claims of unlawful discrimination. The claimant relies on the protected characteristic of race. The Tribunal have found on the balance of probabilities that Mr Hobson used the words complained of by the claimant during the incident of 31st August 2017. In particular *"fucking liar" "you clear your shit up from the floor". 'You fucking shit. You little rat. You fucking paki".*

The claimant complains that the words used are both acts of direct discrimination and harassment under the Equality Act 2010.

There can be no doubt that the words *'you fucking paki'* are related to the protected characteristic of race and that would amount to unwanted conduct without the need for that to be pointed out to the person saying them. It is also clear that using those words to the claimant would have the purpose or effect of violating the claimant's dignity and creating an intimidating hostile degrading humiliating or offensive environment.

The claimant's claim of harassment in respect of this allegation is well founded and succeeds.

115. The Tribunal find that these words would only be directed at a person of race, and whilst the claimant is not of Pakistani origin, he is of African/Asian appearance. The words are derogatory and would not be directed to a person who was not of the claimant's race or appearance. In a claim of direct discrimination under s13 Equality Act 2010, it is necessary for the claimant to show that he was subjected to less favourable treatment because of a protected characteristic and that someone who did not share his race/appearance would not have been treated in the same less favourable way. The claimant relies on a hypothetical comparator. The Tribunal find that being called a 'fucking paki' is less favourable treatment because of the claimant's race and that those words would not be said to a white comparator having carried out the same actions as the claimant during the incident of 31st August 2017.

For these reasons we find that the claimant's claim of direct discrimination in respect of this allegation is well founded and succeeds

116. The Tribunal find that the remaining words are not related to the protected characteristic of race and therefore those allegations of harassment are not well founded and are dismissed.

117. The claimant also complains that being hit with his helmet and pushed to the ground are acts of harassment and direct discrimination. In respect of the claims of harassment, the Tribunal find that while this was unwanted conduct neither act was related to the claimant's race. The Tribunal have considered the reason why Mr Hobson acted in the way in which he did that night and find that he was repulsed by the substance ejected from the claimant's mouth onto the floor. He was already annoyed that the gate to the compound had been left open and unattended and when this happened he reacted negatively to the claimant verbally assaulting him in the manner described by the claimant. The Tribunal find that some of those words relate to the claimant's race, but that the reason that Mr Hobson reacted in the way he did was not for a reason related to or because of the claimant's race it was because he was repulsed by what he had seen and annoyed at the gates being left open and unattended. The matter then escalated when the claimant tried to take a photo of the substance and stick up for himself. We do not find that the claimant telling Mr Hobson that he was being racist contributed to the way in which Mr Hobson behaved. He was annoyed with the claimant because of what he had done and failed to do and also because of the way he reacted to Mr Hobson's abuse in trying to take a photo of the substance on the floor. None of this was related to or because of his race. The Tribunal find that Mr Hobson would have behaved in the

same way with any guard who had acted as the claimant did. Consequently the acts of hitting the claimant with his helmet and pushing him out of the door onto his knees were not unwanted conduct related to his race, or less favourable treatment.

For these reasons the claimant's claims of harassment and direct discrimination is respect of these allegations are not well founded and are dismissed.

Conclusion

118. The claimant's claims of automatic unfair dismissal under s103 and s104 Employment Rights Act 1996 are not well founded and are dismissed.

119. The claimant's claims of harassment under s26 Equality Act 2010 succeeds in respect of one allegation. The remaining allegations are not well founded and are dismissed

120. The claimant's claims of direct discrimination under s13 of the Equality Act 2010 succeeds in respect of one allegation. The remaining allegations are not well founded and are dismissed.

121. The claimant's claim of breach of contract (notice pay) is well founded and succeeds.

122. A remedy hearing is listed for 12th September to determine the amount of compensation to be awarded.

_____

Employment Judge Sharkett

Date: 22 August 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

3 September 2019

FOR THE TRIBUNAL OFFICE