STO

EMPLOYMENT TRIBUNALS

Claimant:	**Mr V Chidavaenzi**	
Respondent:	**Spencer & Arlington Ltd**	
Heard at:	**East London Hearing Centre**	**On: 24-27 September 2019 and 21 October 2019 (in chambers)**
Before:	**Employment Judge O'Brien** **Mr D Ross** **Mrs V Nikolaidou**	

Representation:

Claimant: Mr Supiya, Trade Union Representative

Respondent: Mr Sonaike of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. **The claimant's complaint of unfair dismissal pursuant to s98 of the Employment Rights Act 1996 succeeds.**

2. **Pursuant to s122(2), s123(1) and s123(6) of the Employment Rights Act 1996, the claimant is awarded a nil basic award and a nil compensatory award.**

3. **The claimant's complaint of unfair dismissal on the grounds of protected disclosure fails and is dismissed.**

4. **The claimant's complaint of detriment on the grounds of protected disclosure fails and is dismissed.**

5. **The claimant's complaint of direct race discrimination fails and is dismissed.**

6. **The claimant's complaint of harassment related to race and/or disability fails and is dismissed.**

7. **The Claimant's complaint of a failure to make reasonable adjustments fails and is dismissed.**

8. **The claimant's claim for damages for breach of contract (wrongful dismissal) fails and is dismissed.**

REASONS

1 On 6 June 2016, the claimant presented complaints of unfair dismissal, detriment and/or dismissal on the grounds of protected disclosure, direct trace discrimination, harassment related to race and/or disability and failures to make reasonable adjustments. The claimant also presented a claim for damages for breach of contract (wrongful dismissal without notice). The respondent resists the claims.

ISSUES

2 Consequential to a preliminary hearing before Regional Judge Taylor on 26 September 2016, the parties agreed a list of issues to be determined at the final hearing. The list was amended slightly by Employment Judge Brown at a preliminary hearing on 18 December 2018, and the final list is reproduced at pages 122 to134 of the agreed hearing bundle. It is lengthy and need not be reproduced in its entirety in these reasons. Instead, each individual issue is dealt wityh in our conclusions below with cross-reference made to its the paragraph number in the agreed list. The list was, however, amended to correct the following errors:

2.1 The verbal conversation referred to in paragraph 2.2.3 of the agreed list of issues took place on 12 July 2015 (and not 7 December 2015 as stated in the list) and concerned Theo (and not Adegbola).

2.2 Certain paragraph numbering errors.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

3 Over the course of this hearing, the Tribunal took evidence on the basis of written witness statements. The claimant gave oral evidence on his own behalf. On behalf of the respondent we heard oral evidence from: Matilda Stevens (Human Resources Manager); Shontel Parsons (Care Manager); and Patricia Ali (Registered manager).

4 The claimant had originally intended to rely on the evidence of Michelle Hudson, a former colleague; however, she was unable to attend. She would have been unable in any event to give any direct evidence of the claimant's complaints; and so Mr Supiya confirmed that he would not be relying on her evidence.

5 The Tribunal was also provided with a joint bundle comprising a little over 500 pages. A small number of additional documents were introduced by the parties by consent.

6 The parties each made oral submissions, which we took into account when determining the issues before us. The parties also provided us with written submissions which we took into account when deliberating on our reserved decision.

7 On 13 November 2019, the claimant's representative applied for an order that the respondent disclose certain email correspondence between Matilda Stevens and Redbridge Social Services: an email dated 15 January 2016 (already included in the bundle at p313D) and any response to that email. It was said that the emails might undermine the reliability of the Social Services report upon which the Respondent relied in the dismissal process or could in any event be used to impugn Ms Stevens's evidence.

8 The Respondent resisted the application by email later on 13 November 2019. Put simply, the respondent explained that Ms Roberts' email was already in the bundle, and the no response had been received to that email from Social services. There was nothing further to disclose.

9 This application and application and consequential correspondence was brought to my attention only on 6 December 2019, fortunately before I had promulgated this decision. Because the application had been made after my members and I had completed our deliberation, I considered the application as a judge sitting alone, and refused the application for the following reasons. No good reason had been given why the application had not been made at the beginning of the hearing. The respondent had already disclosed Ms Stevens's email and there was no response to disclose. Even if it transpired that Ms Stevens had omitted to attach to her email notes of a quality assurance visit by the on-duty manager to the service in question (see our findings of fact below), there was no reasonable prospect that that omission would have any material effect on our conclusions. The claimant had already had in any event the opportunity to make any submissions on the point.

FINDINGS OF FACT

10 In order to determine the issues as agreed between the parties, we made following findings of fact, resolving any disputes on the balance of probabilities.

11 We found the respondent's witnesses to be credible. Overall, they gave straightforward and honest answers. We perceived Ms Stevens to be perhaps more obdurate that her colleagues, but nevertheless truthful in her evidence. We were particularly impressed with the fact that the respondent's witnesses were balanced in their view of the claimant.

12 The claimant, on the other hand, gave us a number of reasons for concern about his evidence. He relied on a number of text messages to Diana Paul as public interest disclosures but failed to disclose them prior to the hearing. He gave inconsistent and ultimately false explanations for this failure. His text history with Ms Paul when ultimately disclosed failed to support his allegations, either because the alleged text did not exist, or did not read as alleged. We were drawn to the conclusion that the claimant had been aware all along that the texts did not support his case.

13 The claimant was inconsistent in evidence about whether he raised his voice in meetings with management, and also about the reason for his doing so. He never at the time suggested that he raised his voice because of a stammer.

14 Consequently, where we had to resolve a disputed issue of fact in the absence of corroborative documentary evidence, we found in the respondent's favour.

15 The claimant was employed by the respondent as a support worker from 2 May 2011 until dismissed without notice on 16 March 2016. Latterly, the claimant was key worker for CF, a vulnerable young adult with autism, a speech impediment, dyspraxia, and visual impairment.

16 The claimant is black Zimbabwean. He asserts that he suffered at the material time from a severe stammer, which he blames on the respondent's treatment him, and of which he became aware when told by his union representative in 2013 that he was stammering.

17 We do not accept that the claimant had a perceptible stammer at any material time. He has been inconsistent about when his stammer started (for instance, stating on 21 September 2016 that he had been stammering for 2 years, but on 16 November 2016 that the onset had been 3-4 years earlier). None of the respondent's witnesses ever perceived a stammer. The claimant never asserted at the time that he had a stammer.

18 On 19 April 2012, the claimant was issued with a final written warning. According to the respondent's disciplinary procedure, the final written warning remained live on the claimant's disciplinary record for 12 months.

19 On 22 April 2013, the claimant was issued with another final written warning for abusive, intimidating and aggressive behaviour towards a female colleague. That warning was expressed to remain live for 18 months.

20 On 28 June 2013, the claimant was invited to a disciplinary hearing on 4 July 2013 to answer allegations of failing to monitor his service user, an allegation which was not upheld.

21 The claimant was appointed CF's key worker on 7 November 2014.

22 On 22 April 2015, the claimant sent a text to Ms Paul regarding the situation at CF's 'service' (his residence). According to the claimant's ET1 and the agreed list of issues, this text was a protected disclosure raising issues of health and safety. In his witness statement, the claimant says, 'I informed Line Manager Diana Paul by text message on 22 April 2015 about the needs for urgent repairs of the kitchen with serious safety connotations, which had been outstanding for a year.' However, the text in full said:

'Hi Diane, can you please inform our landlord the days we will be away on holiday as he needs to upgrade our kitchen since last year, but couldn't do it due to communication break-down from both parties, as he needs plenty of time to book for kitchen fitters & that there's need to stop the gas pipes to fix the kitchen & the job requires 3-4 days, this can be best done when the clients are away & not in the building, I hope you remember this from last year?'

23 On 12 July 2015, CF had lunch with his mother KS, and told her that Theo, one of the claimant's colleagues recently assigned to care for CF, had taken CF with him

when Theo attended a doctor's appointment and then to visit his own parents. KS complained about this in an email to Patricia Ali on 13 July 2015, in which she also asked for confirmation that the claimant would continue as CF's key worker.

24 The claimant alleges that he told Ms Paul on 12 July 2015 about this issue with Theo. However, Mrs Ali was not aware of the issue until she received KS's email and invited the claimant to a meeting to discuss matters on 17 July 2015. Mrs Ali investigated C's claim to have told Ms Paul on 12 July 2015 and was told that he had done so only after 'much probing'. We accept that that was the case.

25 The claimant was given a verbal warning for failing to report to his line manager an incident reported to him by his service user. No appeal was allowed. This process, whilst strictly speaking in accordance with the respondent's policy, led to an understandable lack of clarity in the claimant's mind over whether he had been disciplined and was not, we find, best practice.

26 At that meeting, the claimant started shouting loudly and became aggressive towards Mrs Ali. Therefore, Mrs Ali, Ms Paul and Ms Stevens met with the claimant informally on 21 July 2015 to advise him to be aware of his tone and manner, and that further such behaviour would be dealt with formally.

27 In any event, having investigated matters, the respondent removed Theo from CF's service.

28 The claimant alleges that he sent a text messages to Ms Paul on 14 August 2015 raising concerns regarding the curtains at CF's residence. We note that the poor state of the curtains were commented upon by the Local Authority in a later investigation, as well as the claimant's evidence that Ms Paul had on occasion tried to repair the curtains, and so are satisfied that there was an ongoing issue with the curtains at CF's residence. However, no such text has been provided, even in the late disclosure by the claimant of texts between him and Ms Paul. The claimant has not therefore established on balance that he made a protected disclosure on 14 August 2015. In any event, there is no evidence that the claimant at any time raised the curtains as being a health hazard or otherwise a breach of legal obligation.

29 On 7 December 2015, Adegbola Moliki emailed Ms Paul regarding issues at CF's residence. He complained about the claimant's behaviour towards him, in particular in respect of a complaint the claimant had made on 3 December 2015 about E's medication (E being another service user living with CF), about the claimant's use of CF's money to buy a new microwave, and the claimant's attitude after implementation of the new rota.

30 At or around this time, the claimant alleges that he wrote a note to Ms Paul in the Communications Book for CF's residence, raising concerns about the verbal and physical abuse of CF by his colleagues, Mr Moliki and John Inedu. He was unable to tell us exactly what he had written, and we do not accept that any such note was left for the following reasons.

31 As the claimant himself accepted in evidence, the Communications Book was used for recording normal day-to-day issues rather than issues of abuse. Ms Paul would only see the Communications Book when she attended CF's residence and then

only if she decided to read it, which she did not always do. Mr Moliki and Mr Inedu would read the Communication Book every time they were on shift; therefore, it is incredible that the claimant would use the Book to make serious allegations about his colleagues. Whilst the claimant claims to have observed the abuse on 7 December 2015, he did not raise these allegations with Ms Paul in their meeting on 8 December 2015.

32 On 8 December 2015, the claimant attended the respondent's offices to discuss with Ms Paul, amongst other things, the rota and CF's feet. He did not raise the alleged abuse with her. She did, however, raise with the claimant the issues identified by Mr Moliki about the use of CF's money. The claimant shouted at her, saying such things as 'shut up' and 'no you are wrong'. Whilst the claimant denies doing so, we accept that the shouting was overheard by colleagues and visitors in the neighbouring rooms.

33 As a result, the claimant was invited to attend a disciplinary meeting on 16 December 2015, in respect of his behaviour towards Ms Paul. The meeting was rearranged at the claimant's request for 21 December 2015. He was offered the right to be accompanied, and was accompanied by Brian Woolgar, whom we accept was a very experienced trade union representative. At no point in that meeting did the claimant assert that he had a stammer, ask for adjustments, or claim that a speech impediment was the cause of his behaviour. On the contrary, the claimant simply denied raising his voice.

34 Mrs Ali concluded that the claimant had behaved in the way alleged, and gave him a final written warning, to remain live on his disciplinary record for 18 months.

35 The claimant appealed on 24 December 2015. In his appeal letter, the claimant said in particular:

'The tone that I used was meant to articulate the intention of management, the fuller picture of the serious and urgent matters to my point of view of the whole situation. The intension [sic] was for management to understand and grasp my points and take vital action required in the best interest of the client.'

36 The claimant alleges that this statement was a protected disclosure; however, it conveys no information which could tend to show any prescribed matter. It did, however, seek to explain the claimant's tone in a way which made no reference to a stammer.

37 The claimant's appeal was eventually heard by Shontel Parson on 27 January 2016. The claimant continued to deny that he had shouted. The minutes record the explanation given: 'As you can hear I use a deep voice my voice is deep so whether you can call this shouting I wouldn't know.' Indeed, in his email submission the day before the appeal hearing, the claimant said:

'With reference to witness statement of Martha Paulino Inactro's statement dated I will maintain that I never shouted as alleged by the witness and other witnesses, (Angelica – Meade and Robin – Skidmore). I will state that I have a deep and hoarse voice. This is my everyday voice.'

38 Again, on neither occasion did the claimant mention a stammer.

39 The appeal was dismissed. In the meantime, on 14 January 2016, KS emailed Ms Paul complaining of the treatment of CF by the claimant's colleagues, and the general state of the house. KS alleged that CF had told her that Mr Moliki and Mr Inedu shouted at him and scared him. As a result, Ms Paul conducted an unannounced visit to the residence. She informed KS and the Local Authority by email that she would be doing so and would provide KS with a response by 22 January 2016.

40 Ms Paul spoke to all of the care workers including the claimant, and to CF alone. Ms Paul was an experienced care manager, who also had considerable experience as a care worker. There was nothing inappropriate in the way she behaved that day. Ms Paul asked CF what he thought about his care workers. Her notes recall:

'6. I asked C if I could have a chat with him, and generally asked him how his day was, C seemed comfortable and relaxed, I asked C what he thought of his support workers, C stated that he liked his support workers including his keyworker Valentine.

'7. I probed C gently into further discussions on his interactions with his support team, C looked at his bedroom door, I assured C that everything is ok and that I'm here to support him.

'8. I asked C who is his favourite worker, C responded my keyworker (Valentine), I then went on to ask him about John and Adebola, C said that he liked them both, I asked C does anyone shout at you or is he frightened of anyone, C responded, no, I informed C that it was reported to me that a member of staff had shouted at him, C couldn't recall this, I suggested to C did you inform your Mother, he then paused and said yes.

'9. I then repeated the same question, C responded No, I like my staff, I informed C but you just mentioned to me that you had informed your mother that someone had shouted at you, C looked at the door and appeared a little agitated, I reassured C that he would be ok.

'10. C responded, Valentine told me to tell my mum that John and Adebola are mean to me, I asked C are they mean to you, C responded no. I asked C why would Valentine tell you this, C responded, Valentine told me "I must get John and Adebola out". I asked C if he could explain, C continued to state that he liked both John and Adebola.'

41 These were matters that it was necessary for the respondent to investigate. The respondent informed KS and the Local Authority on 14 January 2016, in an email to which Ms Paul's report was attached.

42 All three care workers were suspended on 15 January 2016 and invited to investigation meetings. The claimant refused to attend and so his suspension continued.

43 The Local Authority visited CF's residence on 18 January 2016 and produced a report on 27 January 2016 which noted in particular:

> 'C was asked if her knew why Adebola and John are not working in the house. C said it's because they are mean.
>
> 'C was asked what he would like to happen to Adebola and John. C said that he wanted them to go to the Police Station because they are mean.
>
> 'C was asked if someone had told him to say that Adebola and John are mean? C said that Valentine had told him that Adebola and John are mean and that he should tell his Mum that they are mean.
>
> 'C was asked why he felt that Adebola and John are mean? C said it because they make LB (Service User) brush his teeth.
>
> 'C was asked if Adebola and John are mean to him. C said that they told him to wash his mouth out with soap. C was asked if he knew why they would say that to him. C said he was brushing his teeth and he was asked to wash his mouth out with mouthwash. C was asked if it was soap or mouthwash that he was used to ask [sic] to wash his mouth. C said mouthwash and then said soap. It is still unclear whether C was asked to used soap or mouthwash to rinse his mouth and in what context.'

44 The claimant was invited on 20 January 2016 to investigatory meeting on 25 January 2016. He was informed that he did not have the right to be accompanied, a matter with which he did not take issue at the meeting. At no stage did the claimant assert that he had a stammer or was being disadvantaged as a result. When asked about his relationship with his team, the claimant said:

> 'I feel there is some connection ganging up on me, they're ganging up on me, they speak they tongue language that I don't understand, the clients even raised that. The house when you come in, is smelling of food that you have cooked, those are the type of the things. At one incident the client even said, my colleague came to me to say that the client told him that he pays for the TV and the new staff member is watching the channel maybe Nigerian Channel and the client came up to me to say that I pay for that TV, it was John telling me that the client came to him to say, so I said to him do you think there is a reason why he is saying that to you, he couldn't answer that.'

45 The investigation meeting continued on 22 February 2016. The following exchange is recorded in the minutes of the meeting between Ms Parson ('S') and the claimant ('V) in respect of the allegation that he had told CF to tell his mother that the staff were mean to him:

> 'V-That was one thing I wanted to clarify. In relation to us saying to C. I worked with C for a long time and I never persuaded anything of that sort, that nature. Everything that comes from C's mouth that is down to C. Diana my line manager can clarify that C is able to speak for himself
>
> 'S-Yes, C was speaking for himself
>
> 'V-I didn't say that
>
> 'S-OK, so are you saying that maybe sometimes he's telling untrue?

'V-That could be correct

'S-Have you witnessed that he (C) told untruths in the past in relation to any of the staff, because obviously you have been with him for quite a long time. In the time that you have worked there, have you noticed or witnessed him telling untruth to his colleagues about you or about staffing team?

'V-Not really because he doesn't have the capacity of knowing what he is saying so most of the time I ended up actually pronouncing the right words he wants to say but not in any form myself being manipulating C. I don't do that

'S-Normally when he is saying something you would have to correct him?

'V- Ye, I would rather put for example if he says he wants to go to Egitor, then you say do you mean Exeter, then he says yes

'S-Ok, so you just rephrasing the fact that he has speech impediment you not correcting his all sentence because what we are saying here it would be his first, he has never done this before

V-I don't know because this investigation like you are saying has been done in my absence'

46 On 25 February 2016, the claimant was invited to a disciplinary hearing on 4 March 2016. The key allegations were manipulating CF, and bullying and threatening colleagues. The claimant was provided with extracts from the Local Authority report but not Ms Paul's report. Indeed, the claimant was not aware at the time of the existence of that report, although he was aware that Ms Paul had attended CF's residence on 14 January 2016 unannounced for a quality assessment visit and had spoken to CF alone, having been present at the residence when the visit took place.

47 The claimant alleges that he sent an email to the respondent on 8 March 2016 alleging physical abuse of a service by his colleagues, Pascal and Theo, and that Mr Moliki had threatened a vulnerable service user with having his mouth washed out with soap. No such email has been forthcoming; however it would appear that the claimant provided a written submission in advance of his disciplinary meeting, in which he asserted amongst other things that he was being removed for raising safeguarding concerns, and that he had heard Mr Moliki threatening to wash CF's mouth out with soap. In any event, by now both the respondent and the Local Authority were investigating whether threats had been made to CF to have his mouth washed out with soap.

48 The disciplinary meeting was rearranged for 10 March 2016 at the claimant's request to accommodate the availability of his trade union representative, Mr Woolgar. Although the respondent had informed the claimant that Santos Traquino was to chair the meeting, it appeared to us that his and Ms Stevens's roles were almost reversed. Mr Traquino presented the management case and Ms Stevens appeared to make the procedural decisions. For instance, she decided whether to grant breaks. It is unsurprising that the claimant and Mr Woolgar became frustrated and that there came a point when they refused to engage anymore with the process. However, at the end of the meeting, after concluding remarks had been made by Mr Traquino and then Ms Stevens, the claimant said 'You are all involved in this, these people they rely on you because they say they are Nigerian, you

are Nigerian so you are covering these people, so this is how I feel.' It does not appear to be challenged by the respondent that Ms Stevens, Mr Moliki and Mr Inedu are all Nigerian or of Nigerian heritage.

49 On 14 March 2016, the respondent dismissed the claimant without notice, relying on the following conduct: manipulation of CF, malicious behaviour; threatening behaviour; and bullying. The letter also referred to historical behaviour (raised by Ms Stevens in closing the disciplinary hearing) and failure to engage in the disciplinary hearing. The letter, which was written in Ms Stevens's own name, also alleged disrespectful and physically aggressive behaviour towards her by the claimant. We accept that the disciplinary panel genuinely believed that the claimant was guilty of this behaviour and that this belief was the principal if not sole reason for the dismissal decision.

50 The claimant appealed against his dismissal on 21 March 2016. Amongst other things, he disagreed with the disciplinary panel's conclusions, complained that no reason had been given for his suspension, and complained that he had not been provided with the full evidence against him.

51 The appeal hearing was originally arranged for 31 March 2016 at midday, to be heard by Mr Ali, director of the respondent. The claimant objected on 23 March 2016 to Mr Ali's involvement, and Ms Stevens arranged for an independent consultant to hear the appeal instead. However, at 10:40am on 31 March 2016, the claimant notified Ms Stevens that Mr Woolgar was unable to attend that day and asked for the date to be rearranged. Mr Woolgar offered to attend instead at 11am on 11 April 2016, and so the appeal hearing was rearranged for that date and time.

52 The claimant emailed Ms Stevens on 8 April 2016 acknowledging receipt of the minutes of the disciplinary hearing with the outcome letter. Given that the claimant referred in detail to the outcome letter in his appeal email on 21 March 2016, we are satisfied that he had had the letter by then and consequently that he had also received the minutes.

53 In his email of 8 April, the claimant also asked for a copy of the audio recording of the meeting. In response, Ms Stevens sent another copy of the minutes at 9:38am on 11 April 2016. At 10:43am, the claimant complained that he had not previously received the minutes and asked for an adjournment. The claimant was by then at the respondent's premises and Ms Stevens gave him a hard copy of the minutes, offering to postpone the meeting until 12:30pm. The claimant maintained that it would be unfair to proceed, and Ms Stevens agreed to reschedule to appeal for 22 April 2018.

54 Later on 11 April 2016, the claimant complained that he had still not received a copy of the audio recording and requested that a copy be provide pursuant to s7 of the Data Protection Act 1998. That request was reiterated by Mr Supiya on the claimant's behalf on 15 April 2016 and again on 20 April 2016. Whilst Ms Stevens explained in her replies to the claimant and later Mr Supiya that the recordings were made to ensure that the minutes were typed accurately, she failed to explain clearly that the recordings had by then been erased. It was her evidence to us, which we accept, that recordings of meetings are erased once the written record has been typed, and that the claimant's disciplinary meeting had been no exception. Consequently, no audio recording was ever provided.

55 The appeal hearing on 22 April 2016 had to re-arranged for 29 April 2019 because the chair had been taken ill. We note, however, that the claimant had not attended on 22 April 2019. He did not attend on 29 April 2016 either and the appeal hearing proceeded in his absence.

Findings Relevant to Contribution/Wrongful Dismissal

56 The claimant's behaviour towards his female managers was, we find, consistently combative, aggressive and inappropriate. Despite the claimant's denials, we are also satisfied on the contemporaneous evidence that the claimant did seek to influence CF to complain to his mother about his other care workers, and that CF otherwise would not have done so.

THE LAW Unfair Dismissal

57 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

58 Section 98 ERA provides:

> (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> (2) *A reason falls within this subsection if it—*
>
> *…*
>
> *(b) relates to the conduct of the employee,*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*
>
> …

59 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

60 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee.' (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

61 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

62 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

63 It is not for us to go behind an earlier warning unless that warning was manifestly inappropriate (including it having been made in bad faith or without any grounds to make it) (**Davies v Sandwell MBC [2013] IRLR 374**).

64 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

65 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

66 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that she would have been dismissed in any event, pursuant to s123(1) ERA and the authority of **Polkey v AE Dayton Services Ltd [1987] IRLR 503**.

Protected Disclosures

67 Section 43A ERA(‘Meaning of 'protected disclosure’) provides:

> ‘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 sections 43C to 43H.’

68 Section 43B ERA (‘Disclosures qualifying for protection’) provides:

> ‘(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, is being 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,
> …’

69 ‘Reasonable belief’ is to be considered in the personal circumstances of the individual concerned; therefore, where they have special skill or professional knowledge of the matters being disclosed the bar of reasonableness may be raised (**Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**).

70 Section 43C ERA (‘Disclosure to employer or other responsible person’) provides:

> ‘(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure–
>
> (a) to his employer,...’

Automatically Unfair Dismissal

71 Section 103A ERA provides:

> ‘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.’

Protection from Detriment

72 Section 47B ERA provides:

> ‘(1) 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.
>
> (2) ... this section does not apply where –

(a) the worker is an employee, and

(b) the detriment in question amounts to dismissal (within the meaning of Part X). …'

73 A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment (**Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] IRLR 285**). Moreover, any protection afforded in the field of employment from unlawful detriment must necessarily be limited to detriments that have arisen in that field (para 34 of **Shamoon**).

74 Section 48(2) ERA provides:

'(2) On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.'

75 Therefore, it is for the employee to prove on the balance of probabilities that she has made a protected disclosure and that she has suffered a detriment; if so, the employer then has to prove that the act in question was no more than trivially influenced by the protected disclosure (NHS Manchester v Fecitt [2012] ICR 372).

Disability, Discrimination and Reasonable Adjustments

76 Section 6 of the Equality Act 2010 (EA) defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. An effect of an impairment is long-term if it has lasted for or is likely to last for at least 12 months or is likely to last the rest of the affected person's life. If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is treated as continuing to have an effect if the effect is likely to recur. The effect of medication is to be disregarded when assessing the effects of an impairment.

77 An employer must not discriminate against an employee by dismissing her or subjecting her to any other detriment (ss39(2)(c)&(d) of the Equality Act 2010 (EA)).

78 A person directly discriminates against another if because of a protected characteristic he treats that other less favourably than he treats or would treat other people (section 13 EA). Race and disability are such protected characteristics. Section 23 EA provides that 'on a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to the case.'

79 Pursuant to s20 EA, where, in particular, a provision, criterion or practice of the employer and/or a physical feature of the workplace, places a disabled person at a substantial disadvantage in comparison with persons who are not disabled then the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. However, an employer does not contravene the duty to

make reasonable adjustments if he did not know and could not reasonably have known that the employee was disabled and about the substantial disadvantage.

80 Consideration of whether the duty arises will require asking the following (applying **Environment Agency v Rowan [2008] IRLR 20** (modified to apply to the EA):

80.1 whether there is a provision, criterion or practice applied by or on behalf of an employer; or

80.2 whether there was a physical feature of premises occupied by the employer; or

80.3 whether there was a need for an auxiliary aid;

80.4 the identity of the non-disabled comparators (where appropriate); and

80.5 the nature and extent of the substantial disadvantage in relation to a relevant matter suffered by the employee.

81 In respect of harassment, s26 EA provides:

> (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 in subsection (1)(b), each of the following must be taken into account— (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
> (5) The relevant protected characteristics are—
> …
> disability;
> …
> race
> …

82 Where harassment is alleged, the Tribunal should consider separately whether any conduct proved was a) unwanted, b) had the proscribed effect and c) was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**).

Burden of Proof

83 Pursuant to s136 EA, if there are facts from which the Tribunal could decide in the absence of any other explanation that a person contravened the provision of the Act, the Tribunal must hold that the contravention occurred unless the employer can show to the contrary.

84 The key question is why the treatment complained of occurred. A Tribunal must be alert to the fact that individuals will rarely admit to discriminatory behaviour event to themselves and draw whatever inferences are appropriate from secondary findings of fact (**Igen Ltd v Wong [2005] IRLR 258**). However, as observed in the case of **Madarassy v Nomura International plc [2007] IRLR 246**, it is not sufficient to show merely a difference in treatment and a difference in characteristic; there must be 'something more' to indicate a connection between the two. Similarly, unfair or unreasonable treatment of itself is insufficient to shift the burden of proof onto the respondent **Bahl v Law Society [2003] IRLR 640** per Elias J at para 100, approved by the Court of Appeal at **[2004] IRLR 799**).

85 Regarding reasonable adjustments, the Tribunal must find the existence of a PCP and/or workplace feature, the consequential substantial disadvantage and facts from which a breach of the attendant duty could be found, before the burden of proof passes to the employer (see **Project Management Institute v Latif [2007] IRLR 579**).

Breach of Contract

86 Pursuant to art 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

87 An employer is only entitled to dismiss an employee without sufficient contractual notice (or pay in lieu, the contract so permits) if dismissing in acceptance of a repudiatory breach on the part of the employee.

88 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

89 The burden lies on the employer to prove that the employee was in fundamental breach of contract.

CONCLUSIONS

90 Consequent to our findings of fact above, we have reached the following conclusions on the agreed list of issues (the bracketed references being to the corresponding paragraph numbers in the list):

Unfair Dismissal

91 (1.1.1) Has the respondent shown a potentially fair reason, namely misconduct? We are satisfied that the respondent dismissed the claimant because of how Mr Traquino and Ms Stevens believed that he had behaved at work, in particular his manipulation of CF and his behaviour towards his managers and colleagues. These are properly considered issues of conduct.

92 (1.1.2) Did the respondent follow a fair procedure in terminating the claimant's contract of employment? The Respondent did not provide the claimant with Ms Paul's report nor the full report of the Local Authority. Given the seriousness of the allegations, any reasonable employer would and should have provided the claimant with all of the evidence concerning his behaviour towards CF. The disciplinary hearing itself was shambolic and understandably resulted in the claimant's refusal to cooperate further. The procedure therefore fell outside the range of reasonable procedures.

93 (1.1.3) Did the respondent believe that the claimant was guilty of misconduct? We accept that the respondent genuinely held such a belief.

94 (1.1.4) Did the respondent have in mind reasonable grounds upon which to sustain belief? There was a wealth of corroborative evidence regarding the claimant's behaviour towards management, with which his alleged behaviour towards other colleagues was consistent. The reports of Ms Paul and the Local Authority were similarly consistent, and substantiated the allegations concerning CF. The respondent had reasonable grounds to sustain its belief in the claimant's guilt.

95 (1.1.5) At this stage in which that belief was formed on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in the circumstances? Yes. All of the relevant witnesses had been interviewed. Furthermore, the claimant did not raise any issues which necessitated further investigation. Certainly, we accept that the investigation fell within the range of reasonable investigations.

96 (1.1.6) Did the steps taken by the respondent fall within the range of reasonable responses of a reasonable employer? Yes. Given the seriousness of the claimant's behaviour, and in particular his behaviour towards CF, it cannot seriously be argued that dismissal was not a sanction available to a reasonable employer in the circumstances.

97 (1.1.7) Is the claimant's complaint in time? Yes.

98 (1.1) Is the respondent able to show on balance of probabilities that the dismissal was a lawful dismissal for the purposes of s98 ERA? Consequent to our findings above, we find that the respondent did, by reason of procedural defect, unfairly dismiss the claimant.

99 It is convenient, having heard all of the relevant evidence, to consider however whether (and when) the respondent could have dismissed the appellant fairly had a fair procedure been followed (per **Polkey v AE Dayton Services Ltd**) and, in any event, the extent to which any eventual award should be reduced to reflect culpable conduct on the claimant's part (contribution).

100 We find that, had the procedural defects identified in our findings of fact not occurred, the claimant would inevitably have been dismissed. His submissions to us, that Ms Paul had influenced CF's evidence, would have gained no more traction with the respondent than it did with us. She is an experienced care worker/manager who had no reason, we find, to put words in CF's mouth or to fabricate a case against the claimant. Moreover, their relationship had been (save for his occasional

behaviour towards her as found above) cordial. We do not find that the claimant and Mr Woolgar would have said anything which would have materially altered the outcome, even if the disciplinary hearing had been fairly run. Moreover, a fair disciplinary hearing would have taken no longer than that followed by the respondent.

101 Incidentally, the claimant could and should have raised the matters at the appeal stage, at which point the respondent could have remedied them. We do not accept that he behaved reasonably in failing to attend the appeal hearing.

102 The claimant's behaviour towards his managers and his attempt to influence CF to complain about his colleagues was culpable behaviour which occurred before the giving of notice and caused his dismissal. The extent and seriousness of the behaviour we find justifies a 100% reduction in the basic award and any compensatory award.

Automatically unfair dismissal contrary to s103A ERA

103 (2.1) Has the claimant made a "qualifying disclosure" for the purposes of section 43B of the Employment Rights Act 1996? (2.2) What is the nature of the alleged disclosure? When was the alleged disclosure made? Who does the claimant allege each disclosure was made to? The claimant alleges the following disclosures:

103.1 (2.1.1) A text message from the claimant to Diana Paul dated 22 April 2015 raising concerns regarding CF's kitchen. The text message in question did not disclose any health and safety issues or breach of a legal obligation (or any other prescribed matter).

103.2 (2.2.2) A text message from the claimant to Diana Paul dated 14 August 2015 raising concerns regarding curtains. There was no such text message.

103.3 (2.2.3) A verbal conversation between the claimant and Diana Paul on 12 July 2015, where the claimant alleged that his colleague Theo had taken a service user to his own personal doctor's appointment. The claimant did inform Ms Paul about Theo's actions on the occasion in question but only after being pressed, and after KS had complained herself.

103.4 (2.2.4) A verbal conversation between the claimant and Diana Paul on 7 December 2015, where the claimant alleged that his colleagues had neglected a service user causing him to develop an ingrowing toenail. The claimant did raise the toenail issue with Ms Paul, but a day later on 8 December 2015.

103.5 (2.2.5) Entries in the communication book written by the claimant which raised concerns with Ms Paul regarding the claimant's colleagues' misconduct, suggesting that the claimant's colleagues were engaging in physical and verbal abuse of a service user. No such concerns were raised by the claimant in the Communication Book at CF's residence.

103.6 (2.2.6) A letter dated 24 December 2015, in which the claimant appealed to Matilda Stevens regarding his tone of voice. In this letter, the claimant stated:- 'The tone that I used was meant to articulate to management the intention of

management, a fuller picture of the serious and urgent matters to my point of view of the whole situation. The intention was for management to understand and grasp my point and take vital action required in the best interest of the client.' The letter of 24 December 2015 did contain the statement alleged; however, it conveyed no information which might disclose health and safety issues or a breach of legal obligation (or any other prescribed matter).

103.7 (2.2.7) Verbal comments made by the claimant during the course of an investigatory hearing on 25 January 2016, in the course of which the claimant alleged that his colleagues were watching Nigerian television and preventing the vulnerable adult service user from watching television in the lounge, and as such abusing service user funds. The comments alleged were made, although not the express allegation that the colleagues were abusing service user funds.

103.8 (2.2.8) An e-mail dated 8 March 2016 from the claimant alleging physical abuse of a service user by two of the claimant's colleagues, Pascal and Theo, and in which the claimant alleges that his colleague Adegbola had threatened a vulnerable adult service user with having his mouth washed out with soap. No email dated 8 March 2016 has been shown to us and we are not satisfied on balance that any such email was sent, although we do accept that criticisms similar to those alleged were made in the claimant's written submissions for his disciplinary hearing at or around this time.

103.9 (2.2.9) A verbal assertion raised by the claimant during the course of the disciplinary hearing that his colleague Adegbola had threatened a vulnerable adult service user with having his mouth washed out with soap. We accept that the claimant did make such an assertion, although we find that it was most probably made in writing in his pre-hearing submission.

103.10 (2.2.10) A verbal assertion raised by the claimant during the course of the disciplinary hearing that the Respondent was removing him from the company because he had raised safeguarding concerns. We accept that the claimant did make such an assertion, although we find that it was most probably made in writing in his pre-hearing submission.

104 (2.3) Did the claimant make any "disclosure of information" for the purposes of s43B(1) in respect of each alleged "qualifying disclosure"? We accept that the communications detailed in paragraphs 2.2.1, 2.2.3, 2.2.4, 2.2.7, 2.2.8, 2.2.9 and 2.2.10 of the list of issues disclosed information. The communications detailed in paragraph 2.2.6 disclosed no such information. The remaining communications were not made at all.

105 (2.4) Which of the subcategories under s43B(1) is it alleged that each "qualifying disclosure" falls within? Of the communications which were made and disclosed information, we accept that the information in all but paragraph 2.2.1 tended to show a breach of legal obligation. Whilst the communication detailed on paragraph 2.2.1 disclosed information, it tended to show none of the matters prescribed in s43B(1).

106 (2.5) Did the claimant have a "reasonable belief' that each "qualifying disclosure" was made in the public interest? We accept that to have been the case.

107 (2.6) Did the claimant have a "reasonable belief" that each "qualifying disclosure" shows that one of the subcategories under section 43B(1) applies? We accept that also to have been the case.

108 (2.7) Were the alleged disclosures made in good faith? This is a matter which goes to remedy (see s123(6A) ERA) and so is irrelevant in any event, given our conclusion below. However, we did accept that the claimant made the protected disclosures described in paragraphs 2.2.3, 2.2.4, 2.2.7, 2.2.8, 2.2.9 and 2.2.10 in good faith.

109 (2.8) Was the reason or principal reason for the claimant's dismissal that the claimant made a protected disclosure? We find not. All of the matters raised by the claimant were investigated and remedial action was taken by the respondent. The Local Authority was notified immediately of the most serious allegation, those matters involving CF. The respondent was clearly not interested in covering up the matters, and we find it simply incredible that the respondent (and in particular Mr Traquino and Ms Stevens) would in the circumstances expose itself to liability by dismissing the claimant for bringing those matters to its attention.

110 (2.9) Is the claimant's complaint in time? Yes.

PIDA Detriment

111 The issues identified in paragraphs 3.1 to 3.7 of the agreed list are the same as those identified in paragraphs 2.1 to 2.7 and are answered above.

112 (3.8) Was the claimant subjected to any detriment by any act, or any deliberate failure to act by the Respondent on the ground that the claimant had made a protected disclosure? The Claimant alleges the following detriments:

112.1 (3.8.1) Issuing a verbal warning on 17 July 2015 and failing to respond to the claimant's appeal against same. The claimant was issued with an informal warning on 17 July 2015, against which he had no right of appeal under the respondent's policy. We accept that the claimant was given the warning for failing to report to management issues regarding CF. In other words, we find that the claimant was given the warning because he had not made a protected disclosure until pressed by Ms Paul, rather than because he eventually did so. We also accept that the claimant's appeal was not actioned because he had no right of appeal under company policy.

112.2 (3.8.2) Issuing a final warning to claimant on 23 December 2015 and a failure to consider properly his appeal. The claimant was given the warning in question; however, we that that was because he had shouted at Ms Paul on 8 December 2015, and not because of any protected disclosure. We consider that the claimant's appeal against that final written warning was properly considered, and so find that no detriment thereby arose.

112.3 (3.8.3) Suspending the claimant on 16 January 2016 and instigating a disciplinary investigation against the claimant on 25 January 2016 and 22

February 2016 whilst transferring and not suspending Adegbola and John, nor conduct investigations in relation to allegations made against them. The claimant was suspended; however, Mr Moliki and Mr Inedu were also initially suspended. The claimant's suspension continued because he refused initially to engage with the investigation. To the extent that Mr Moliki and Mr Inedu were not disciplined, we are satisfied that the fact that the claimant was subjected to disciplinary proceedings was unconnected with any protected disclosure but instead was solely the result of the serious allegations made against him.

112.4 (3.8.4) Holding a disciplinary hearing on 10 March 2016 with a view to dismiss on spurious grounds and in particular the manner in which that hearing was conducted. Far from being spurious, we find that the grounds for the claimant's dismissal were serious and well-founded. The decision to hold the disciplinary hearing was, we find, entirely unconnected to any protected disclosure but instead was to deal appropriately with the allegations against the claimant. We agree that the disciplinary hearing was badly handled, but do not find any connection to the claimant's protected disclosures.

112.5 (3.8.5) Dismissing the claimant on 17 March 2016 on those spurious grounds. This is not a detriment as a matter of law (see s47B(2) ERA). In any event, we are satisfied that the claimant was dismissed solely because he was found guilty of gross misconduct and not in any way because he had made protected disclosures.

112.6 (3.8.6) Failing to provide claimant timeously with the minutes of the disciplinary hearing. We are not persuaded that there was any material delay in the claimant being provided with the disciplinary minutes. In any event, he suffered no detriment; when he complained that he had not been provided with the minutes, even though the respondent was sure he had been, he was allowed an adjournment. As it is, there is simply no basis to connect the respondent's actions in this regard with any protected disclosure made by the claimant.

112.7 (3.8.7) Refusing the claimant's data access request. The audio recording of the disciplinary meeting was no longer available by the time that the claimant began requesting it. Therefore, the claimant suffered no detriment when his requests were not fulfilled, nor was the respondent's failure to provide the claimant with the audio recording in any way connected to his having made protected disclosures.

112.8 (3.8.8) Frustrating the claimant's appeal and purporting to hold an appeal in absentia which turned out to be a total sham. The respondent did not frustrate the claimant's appeal; on the contrary, the claimant refused to engage in the appeal. The claimant failed to attend his appeal hearing, it having been adjourned at his request. It was entirely proper, and unconnected with any protected disclosure, for the respondent to proceed in the claimant's absence.

113 (3.9) Did the Respondent take all reasonable steps to prevent its employees from subjecting the Claimant to any detriment in the circumstances of this case or from doing anything that description? Given our findings above, it is not necessary to deal with this issue.

114 (3.10) Are the Claimant's complaints in time? We accept that the detriments alleged by the claimant appeared on the face of it to be a series of similar acts, the last of which was in time. As it is, we did not find any of the allegations to be well-founded.

Direct discrimination on the grounds of race

115 (4.2) Has the Claimant been treated less favourably on the grounds of his race, or is there some other factor which explains the treatment he has received? The claimant relies on Mr Moliki and Mr Inedu as comparators (4.4), both of whom it is alleged were black Nigerian. The claimant relies on the same treatment as alleged to be PIDA detriment (4.3), save that the allegation in respect of the disciplinary hearing, the specific treatment alleged is: 'Holding a Disciplinary Hearing on 10 March 2016 with a view to dismiss on spurious grounds and in particular the manner in which that Hearing was conducted' (4.3.4).

116 In truth the claimant relies on little more than a difference in race (he being Nigerian and his comparators being Zimbabwean) and a difference in treatment in 2016 to establish that he was treated less favourably on the grounds of race. Insofar as the claimant also relies on the fact that Ms Stevens is Nigerian and so presumably was biased towards her countrymen, it was not put to her or any of the witnesses that they had treated the claimant differently because of race, or that race had had any influence on their actions. We also that Mr Traquino is Zimbabwean himself. In addition, we find that the claimant was facing materially different allegations to his comparators, of which in each case we find that he was guilty. Consequently, we do not find that the burden of proof has shifted to the respondent to provide an innocent explanation for the alleged lessfavourable treatment.

117 Even if the burden had shifted, we note that the claimant's comparators engaged in the investigative process from the beginning, unlike the claimant. We are entirely satisfied that the respondent behaved as alleged for the reasons set out above in our conclusions on detriment above and not in any way because he is Zimbabwean.

118 (4.1) Are the race discrimination claims in time? Given our findings above, it is not necessary to deal with this issue.

Harassment on the grounds of race

119 (5.1) Has the Respondent engaged in unwanted conduct relevant to the Claimant's race which has the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? The claimant relies on the same treatment alleged to be direct race discrimination (5.2). We find that the respondent's actions were unconnected to race for the reasons given above in respect of direct race discrimination.

120 (5.3) Given the perception of the Claimant, and the other circumstances of the case is it reasonable for the alleged conduct to have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? (5.4) Are the Claimant's complaints in time? Given our findings above, it is not necessary to deal with these issues.

Failure to make reasonable adjustments

121 (7.1) Was the Claimant disabled by reason of a stammer within the meaning of section 6 of the Equality Act 2010 at the relevant time? It was the single joint expert's opinion that the claimant either exhibits a psychogenic stammer or is malingering. Both are very rare diagnoses and the single joint expert is unable to say which is the case with the claimant. The claimant has seen another speech therapist and is scheduled to begin stammering group therapy. However, all of this was arranged after he had commenced proceedings and so ultimately takes his case no further in our judgment. We are unable to say with any confidence whether the claimant is malingering or not, in particular given our findings on his credibility, and his inconsistent account of when his stammering began. It is sufficient to note that the burden lies on the claimant to prove on balance that he has a disability and we find that he has not.

122 (7.8) Did the Respondent know both that the Claimant was disabled and that her disability was liable to affect him, i.e, that it was placing him at a substantial disadvantage? (7.9) If not, ought the Respondent to have known both that the Claimant was disabled and that his disability was liable to affect by placing him at a substantial disadvantage?

123 Even if we had found that the claimant did have a stammer at the material time (and that it had the requisite substantial and long-term effect), we find that the respondent was unaware of any disability. It was argued that the claimant's behaviour in meetings ought to have placed the respondent on notice of his disability. However, we reject any suggestion that the claimant shouting or behaving in a manner perceived as angry should have resulted in a referral to Occupational Health or the respondent investigating matters further. On the contrary, we accept that the respondent was entitled to suggest that the claimant seek help with anger management and leave the matter there. The claimant failed on every opportunity to bring to the respondent's attention any difficulty he had speaking or that he was placed at any disadvantage as a result.

124 (7.2) Has the Respondent imposed a provision, criterion or practice (PCP) which places or placed the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled? The alleged PCP is not permitting employees to be accompanied by a colleague or representative at investigatory meeting is so that they could be assisted in explaining their version of events. (7.4) What is the nature and extent of the substantial disadvantage the Claimant alleges he has suffered from? (7.5) The alleged adjustment that would have remedied the disadvantage Is allowing employees to be accompanied at investigatory meetings. (7.6) Would the alleged adjustment have reduced or avoided the disadvantage to the Claimant? (7.7) Was the adjustment a reasonable one to make? (7.10) Are the Claimant's complaints in time? Given our findings above, it is not necessary to deal with these issues. We would add that the claimant was placed at no particular disadvantage by attending investigatory meetings unaccompanied in any event. Neither was he placed at any particular disadvantage by any failure on the respondent's part to place the claimant on notice before each meeting of the nature or substance of the meeting, or being given the questions in advance in writing, as he alleged during this hearing.

Harassment on the grounds of disability

125 (8.1) Did the Claimant have a disability at the relevant time? For the reasons given above, we find that he did not

126 (8.2) Has the Respondent engaged in unwanted conduct relevant to the Claimant's alleged disability which has the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her? (8.3) What are the alleged acts of harassment? (8.4) Given the perception of the Claimant, and the other circumstances of the case is it reasonable for the alleged conduct to have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? (8.5) Are the Claimant's complaints in time? The claimant relies on the same matters that he alleges to be direct race discrimination. However, given our findings on disability, it is not necessary to deal with these issues.

127 Even if we had accepted that the claimant was disabled as claimed and that his shouting was a manifestation of the claimant's disability, we would still have found that the respondent's consequential treatment of him was not harassment. The respondent was not aware that the claimant was disabled and behaved reasonably in disciplining him for his behaviour. Therefore, it was not reasonable in the circumstances for the alleged treatment to have had the proscribed effect.

Breach of contract/wrongful dismissal

128 (9.1) Has the Respondent breached any term of the Claimant's contract of employment in effecting the termination of his employment? The claimant's attempt to influence CF to complain about his colleagues was a manifest safeguarding issue and fundamental breach of trust and confidence which justified summary dismissal in its own right. The respondent did not therefore commit a breach of contract when dismissing the claimant without notice.

129 (9.2) Is the Claimant entitled to compensation in terms of his notice pay as a result of this alleged breach? Consequently, the claimant is not entitled to damages.

130 (9.3) Are the Claimant's complaints in time? Yes.

Employment Judge O'Brien

Date: 23 December 2019