Case Number: 2301799.2017

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr E Obiora	and	Castle Homes Limited

Held at Ashford on 8, 9, 10 October 2018 and 4, 5 and (in Chambers) 6 November 2019

Representation	**Claimant:**	In Person
	Respondent:	Mr P Martin, Counsel
	Members:	Mr N Phillips
		Mrs J Jerram

Employment Judge Kurrein

JUDGMENT

The Claimant's claims are not well founded and are dismissed.

REASONS

These reasons should be read in conjunction with all earlier orders and directions.

Claims and Issues

1. On 7 July 2017, having completed early conciliation, the Claimant presented a claim to the Tribunal alleging unfair dismissal, race discrimination and public interest disclosure detriment/dismissal. On 9 August 2017 the Respondent presented a response in which it contested those claims.

2. A preliminary hearing took place before Employment Judge Wallis on 12 September 2017. She set out the issues in her case management order which was sent to the parties on 28 September 2017. They were defined as follows:-

Automatically Unfair Dismissal claim – section 103A Employment Rights Act 1996

And detriment claim – section 49 Employment Rights Act 1996

b) was the Claimant's report of 10 October 2016 a protected disclosure;

c) did the report disclose information that the Claimant reasonably believed was in the public interest and which he reasonably believed tended to show that the Respondent failed to comply with its legal obligation to safeguard a young person in care;

d) if the report was a protected disclosure, was the protected disclosure the sole or principal reason for the dismissal;

e) if so, was there an automatically unfair dismissal;

f) if the report was a protected disclosure, was the Claimant subjected to the following detriments:-

   (i) on 8 November 2016 he was required to refrain from smoking on duty;

   (ii) some time before 20 January 2017 the investigation concluded that the incident did not happen, but nevertheless referred the Claimant to a disciplinary hearing for failing to report the incident;

   (iii) an interview lasting 6 hours on 4 November 2016, whereas others were interviewed for a relatively brief period;

   (iv) in or around November 2016, the Respondent warning off a witness who supported the Claimant's report;

   (v) the Respondent failing to interview all relevant witnesses and read all supervision notes;

   (vi) the Respondent failing to provide all relevant documents to the Claimant before the disciplinary hearing on 20 January 2017;

g) was the detriment claim presented within the time limit and if not are there grounds for extending time;

Race discrimination claim – section 13 Equality Act 2010

h) did the matters relied upon as detriments occur as described by the Claimant;

i) if so, did all or any of those matters amount to less favourable treatment of the Claimant (the Claimant relies upon a hypothetical comparator for detriments ii), iv), v) and vi); and on Mr Ashby for i); and on FK for iii));

j) if so, was the Claimant treated less favourably because of his race;

Harassment claim – section 26 Equality Act 2010

k) If the matters relied upon as detriments occurred as described by the Claimant; did all or any of them amount to unwanted conduct related to race;

l) if so, did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the perception of the Claimant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect;

Time limits – section 123 Equality Act 2010

m) was any claim presented to the Tribunal outside the time limit;

n) if so, is there evidence of conduct extending over a period that would bring the claim in time; or would it be just and equitable to extend the time limit;

Remedy

o) if any of the claims are successful, what is the appropriate remedy.

Procedural Matters

3. The initial hearing, which started on 8 October 2018, went part-heard in the circumstances set out in the reasons for the case management order made on 10 October 2018. Unfortunately, there was a substantial delay before the hearing could resume, which it did on 4 November 2019. In accordance with the case management order further disclosure had been given and supplemental statements and bundles prepared.

4. In the interim the Claimant had made applications for specific disclosure and to strike out the Response for an alleged failure to comply with earlier directions.

5. We dealt with these at the start of the re-convened hearing. Our conclusions were as follows:-

    a. There was no credible evidence that the Respondent had not given disclosure of all the documents it had in its possession that were relevant to the issues. While it was right that some documents were missing from the bundle this was not an unusual occurrence. They were interleaved.

    b. The Claimant sought disclosure of documents concerning other members of staff in which safe-guarding issues had arisen. He did not rely on them as comparators. We ruled those documents irrelevant and inadmissible.

    c. We were not satisfied there was any default by the Respondent, far less one that was deserving of a sanction.

The Evidence

6. We heard the evidence of the Claimant on his own behalf. We heard the evidence of Ms Bradley, Residential Home Manager; Miss Morton, Deputy Manager; and Miss Mitter, Residential Home Manager. We read and took account of the statements made on behalf of the Respondent by Mr Aulak, HR Advisor; Mr C Coombs, Regional Operations Manager; and Miss C Dunn, Group IT Director. Their evidence was not contested and their statements were taken as read. We considered the documents to which we were referred and heard the party's submissions. We make the following findings of fact.

Findings of Fact

7. The Claimant was born on 19 June 1959 and started his employment as a Residential Support Worker with the Respondent on 1 November 2010. He worked at the Respondent's residential care home known as Hobbit House in Meopham, Kent. He is of black African ethnic origin.

8. That property was one of several owned and managed by the Respondent. It

provided residential care for teenagers with emotional and behavioural vulnerabilities. They were cared for on a one-to-one or two-to-one basis. At the time with which we are concerned there were three residents being cared for by eleven staff including a Deputy Manager, with a Manager in addition. The home was staffed twenty-four hours a day, seven days a week. The Claimant was then living in Watford with his wife and teenage son, and worked two full days and two full nights in succession as his full working week.

9. As is to be expected of a business engaged in these activities, and which employed over 17,000 people as part of the Priory Group, the Respondent had detailed policies for discipline, supervision and safe-guarding.

10. The Claimant was subject to monthly supervision by either his Manager or the Deputy Manager of the home. He was a Residential Support Worker and there were a number of colleagues who were Senior Residential Support Workers. These included a Mr Ashby, white European, and Mr Spence, black British.

11. One of the residents at the home was CG. Another of the Claimant's colleagues, a young female who worked part-time as a Residential Support Worker whilst at university, we shall refer to as AA.

12. It was not in dispute that a number of staff, including the Claimant, had concerns at the proximity of the relationship between AA and CG. These were discussed informally in the course of supervision both by her co-workers and by AA herself. Because of those concerns an individual risk assessment and risk management plan was prepared for CG, who was then seventeen years old. In addition, it was decided that AA should not work one-to-one with CG inside or outside the house and that she should sleep in an upstairs room if she worked the night shift. CG's room was on the ground floor of the home.

13. We thought the thoroughness with which the Respondent took its responsibilities was well illustrated by the content and length of that assessment and plan, which extended over seventeen pages. It was dated 7 September 2016, and all staff, including AA and the Claimant, were aware of it shortly afterwards.

14. On the evening of 1 October 2016 only the Claimant and AA were on duty. He was in the office. Contrary to the provisions of the risk assessment, which the Claimant was fully aware of, he asked AA if he could leave the home to have a cigarette. She agreed, despite knowing of the content of the risk assessment, and he left the premises and walked to the gate where he had a cigarette.

15. It is his case that on his return he saw AA and CG through the internal kitchen door window embracing on the ground floor of the house. He accepts that the door leading from the kitchen to the landing, where AA and CG were, was closed but he had observed them through the window in that door. He quietly made his way into the house and, depending on which of his reports is accepted, either went to the dining table in the dining room or to the sofa in another part of the house waiting for AA and CG to go up the stairs.

16. What is not in dispute is that the Claimant did not log or report what he witnessed, as he clearly should have done, at that time. It was his evidence that he did not do so because he did not believe anything would be done about it. He also believed that it would simply be his word against AA, who would deny it.

However, in the days immediately following the incident, the Claimant told both his senior colleagues separately, Mr Spence and Mr Ashby, about the incident, as well as others.

17. A regular monthly meeting of staff and management next took place on 10 October 2016. In the course of that meeting, as had occurred before, concerns were raised about the relationship between AA and CG. Immediately following that meeting, Mr Spence and Mr Ashby informed Miss Mitter of what the Claimant had told them had occurred in the previous week.

18. We thought it of note that earlier that day, in accordance with usual practice, the Claimant had completed an 'Arena of Safety Knowledge Test', the introduction to which emphasised the nature of trust that had to exist between staff and residents, and the vulnerability that had to be respected. The test involved a series of nineteen different questions setting out different scenarios and how the employee would deal with each. It appeared to us that the Claimant's answers, many of which were of some length, demonstrated a very full knowledge of his obligations and responsibilities.

19. Immediately after learning of these events Miss Mitter set out her own statement of what she had been told had taken place, and asked the Claimant to complete a detailed record of what he had observed. Miss Mitter completed her record the same day. The Claimant prepared his and handed it to Miss Mitter the next day. It is that record he relies on as being a protected disclosure.

20. In his detailed record the Claimant reiterated the basic fact of him leaving the premises to have a cigarette, although he does not mention that he asked AA for permission before he did so, and confirmed that he had seen AA and CG 'hugging each other very tightly' for 'at least five minutes (and it was probably longer than five minutes, because their actions started before I witnessed it)'. He then says he waited for at least five minutes sitting at the dining table, following which CG and AA went upstairs and he then went to the kitchen and tidied up. He confirmed that he did not challenge AA about what he had witnessed and did not log the incident. He gave as his reasons that he had made other reports concerning this relationship and was not aware of anything being done about it save the risk assessment, he had spoken to AA previously but her behaviour had not changed, he had been unable to speak to Miss Mitter before and he believed no meaningful action would be taken.

21. Miss Mitter acted entirely appropriately in referring the information she had received to the Local Authority Designated Officer ('LADO'), who thanked her for doing so on 12 October 2016.

22. Because of the information that came to her, Ms Bradley took the view that she should hold an investigation meeting with AA and did so on 13 October 2016. AA was clear that she had not hugged CG, and CG had not hugged her, and that any such contact would have been logged in the duty log. A debrief had taken place at 23:30 the same night and nothing untoward was reported.

23. On the same date Ms Bradley wrote to the Claimant to invite him to attend an investigation meeting with her. This took place on 17 October 2016. Ms Bradley was accompanied by a minute-taker. During that meeting the Claimant

confirmed the reasons why he had not reported the incident, and said he did not trust the 'whistle-blowing' system. The Claimant accepted that on 5 October he had told Mr Ashby about the incident on 1 October, and had been directed to speak to Miss Mitter or use the whistle-blowing phone line. The Claimant accepts that he did neither. He confirmed that he was aware of the risk management plan in place for AA and CG.

24. It appears that he was less than happy with that, because it meant that CG was receiving two-to-one care when he was not entitled to it. He also confirmed that he had told AA that he was going for a cigarette and that she had said "okay". He told Ms Bradley again of what he had witnessed through the window in the door, and that he had not taken any action because he was concerned that nothing would happen. It was specifically put to him that he had witnessed what could potentially be a safe-guarding issue, but he had preferred to do nothing, and he answered "Yes". He accepted that in going out for a cigarette and leaving AA alone with CG he had breached the risk assessment that had been put in place. He took the view that the only proper risk management plan would have been to prevent AA working with CG

25. It was put to the Claimant that when he told Mr Ashby of what he had seen and was told to report it, he said to Mr Ashby that he would deny that what he said had occurred had done so. The Claimant said that that was not what he said. He had simply said that he was not going to report it. The meeting concluded with Ms Bradley putting it on the record that she was seriously concerned that a potential alleged safe-guarding issue had not been reported for eleven days and the Claimant had not acted on an instruction that he should report it on 5 October. The Claimant confirmed that, but he also went on record to confirm that he did not have any confidence that reporting it would have resulted in any action.

26. When the Claimant arrived for work on the morning of 4 November 2016 there was a letter addressed to him marked 'private and confidential' which he was required to read and sign the contents of before starting work. The contents of that envelope were a risk assessment which forbade the Claimant from taking cigarette breaks and leaving the house while on duty. The Claimant signed that document and started work.

27. Later on on 4 November 2016 Ms Bradley carried out interviews with the Claimant, Mr Ashby, AA and Mr Spence. This was a normal working day for the Claimant, who had time out from his duties to be interviewed. The interviews were as follows:-

    Mr Spence was interviewed from 10.15 - 11.04.

    Mr Ashby was interviewed from 12.05 -13.01.

    The Claimant's interview started at 13.12 and finished at 19.15, but there were a number of different breaks in the course of it between 13.47 -13.50; and between 14.20 -16.19.

    During the latter period Ms Bradley interviewed AA, who had attended the offices on her day off for the purpose of the interview.

    There was then a further break between 16.48 - 16.50, and another from18.40

- 18.55, when Ms Bradley and the Claimant walked around the home.

28. In the course of his interview on 4 November 2016 the Claimant raised a number of concerns:-

    a. He had been made to sign a risk assessment on smoking.

    b. He had been told that he did not seek permission to leave to smoke, which was not true.

    c. His second interview took six hours, and he had been interviewed twice on the same issues.

    d. He had been told in the interview that he had fabricated his allegations concerning AA and CG, was stunned by this and felt victimised.

    e. Following his whistle-blowing the minutes had been sent to Miss Mitter which was a breach of confidentiality and the Data Protection Act 1996.

29. On 17 November 2016 Ms Bradley wrote to him setting out the concerns that he had raised and her responses to each of them:-

    a. The smoking risk assessment had been put in place to safe-guard him, the young people in the Respondent's care and his colleagues. It was felt to be appropriate until the investigations had been concluded. The allegation that he did not seek permission was one that had been made and would be discussed and explored, and investigated, as necessary.

    b. Whilst the meeting on 4 November had started and not concluded for six hours, there were significant adjournments. The meeting took place during his working hours and he had not at any time suggested that it was onerous.

    c. It had been suggested to the Claimant that he had fabricated the story concerning AA and CG because this was an allegation that had been made. The safe-guarding issue was serious and had to be investigated. The allegation of victimisation was not understood, but Ms Bradley was an independent manager and did not believe that there had been any victimisation. The Claimant could raise this with her further if he would give further particulars.

    d. Ms Bradley was unclear what the Claimant meant by the breach of confidentiality. The minutes had been sent to Miss Mitter so that they could be printed out and returned to the Claimant to be reviewed and approved. She concluded by reminding him of the confidential nature of the investigation meetings and of the availability of the Employee Assistance Helpline.

30. The next issue we have to deal with is the providence of a report which appeared at page 190 of the original bundle of documents and which extended to page 203. This was headed 'Overall Report' and below that, in bold,

    '1. Have there been any concerns/development about AA's work practice at Hobbit House – if so, what?'

    and went on to detail under that heading issues that had been raised in the

course of supervision with AA. The report continued with questions and answers concerning her work practice, the Claimant's work practice, how the allegation raised by the Claimant on 10 October had occurred, why he had not reported it immediately and whether similar incidents had happened before. It then continued with a review of all staff supervision over the previous year to see whether any patterns or cultures could be identified. It concluded with recommendations regarding members of staff and the action which should be taken.

31. When Ms Bradley gave evidence at the first hearing, she was asked in examination in chief whether she had seen that document at the time she completed her investigation report concerning the Claimant's failure to report a safe-guarding issue. She said that she had not. That question was also put to her in cross-examination. She again denied that she had seen it. It was at that point that the Claimant told us that he had an email from her that contradicted her knowledge of that report at the time she completed her management report on 7 December 2016.

32. As noted above, there has been further disclosure and supplemental witness statements regarding this issue, in particular. As a consequence of our further consideration of these issues, we believe the correct sequence of events to be as follows:-

    a. On 21 November 2016 Ms Bradley emailed Miss Mitter and Miss Morton with the subject 'Hobbit House Investigation' with an importance of 'High'. The body of the email said that Ms Bradley needed the following information which can be detailed in the same report and asked for it to be addressed as soon as possible. She then set out six questions which are very substantially the same as the six questions that were answered in the documents starting at page 190 in the bundle. This was the email that the Claimant produced on 8 October 2016.

    b. On 2 December 2016 Miss Mitter sent an email to Miss Morton with the subject and attachments identified as, 'Have there been any concerns about AA.docx', which attachment extended from page B30B to B30N which was very substantially in the form of the documents starting at page 190 and continuing to 202. (The other document started at page 30B and continued to 30M).

    c. It was Miss Morton's evidence that later on 2 December 2016 she sent a document to Miss Mitter with the subject 'Concerns' and an attachment, 'Have there been any concerns about AA.docx' saying,

        > "Please see if you are happy Re what I have written or whether you wish to amend or alter." which attached the document from page 30V to 30LL.

    It was Miss Morton's evidence that she had added passages at the end of the report she had received so as to amend the order of the comments and to add a series of recommendations in respect of each member of staff concerned. She said that when she was asking Miss Mitter if she was happy with what she had written, she was referring solely to the additional parts or amendments that she had made, although she was

unable to say how Miss Mitter was meant to identify them.

d. As amended by Miss Morton and sent to Miss Mitter, that document appears to be very substantially the same as the document in the original bundle at page 190 to 203.

33. On 6 December 2016 Miss Mitter sent that report, at pages B30KK to B30XX to Ms Bradley, with a copy to Mr Wells, with the subject and attachments 'Manager report of investigation.docx' and the body of the email reading, 'I have completed a manager's report regarding the on-going investigation, please read'. It was Miss Mitter's evidence that in referring to the 'on-going investigation' she was not referring to the investigation concerning the Claimant's conduct in failing to report a safe-guarding concern.

34. It was also Miss Morton's evidence that the report that she had prepared had no connection whatsoever with the investigation into the Claimant's conduct in failing to report a safe-guarding matter, but was solely concerned with a reflective exercise in which she wished to understand the issues that arose for her team from recent events.

35. We did not accept that evidence. In particular,

    a. We did not accept Ms Bradley's evidence that she did not recall seeing that document and it did not inform any part of her investigation. It is clear that on 21 November 2016 she asked for a report of this nature into these specific matters to be compiled at the earliest opportunity by the managers responsible for what had taken place at Hobbit House. At that time there was no investigation we have been made aware of concerning any events at Hobbit House other than those concerning the Claimant. No other report resulting from her request has been disclosed. We also thought the proximity in the timing of her receipt of the report and her completion of her management report into the Claimant's conduct, being on consecutive days, to be too much to be a coincidence. She was not an impressive witness, having little recall of the matters she was concerned with.

    b. Miss Mitter was equally unimpressive in her recollections. Whilst we accept that there has been a substantial delay between these events and the hearing, she was on notice of the details of this claim at a relatively early stage. We accept that she had a number of unfortunate circumstances in her private life at the time of the original events, but we thought her attempts to characterise this report as being unconnected with the investigation into the Claimant's conduct to be futile.

    c. Miss Morton's inability to recall anything concerning any of these events was impressive. She was frequently unable to answer simple questions, and on more than one occasion seemed to be trying to guess the answer..

36. It is also the case that following the adjournment of the original hearing, the various witnesses were asked to scour their laptops and hard-drives for any relevant documents. It is because of that exercise, and indeed the effective rebuilding of the original email servers at considerable expense, that much of the

new disclosure was given. One of the documents that came to light on Miss Morton's hard-drive was a document which started with the six questions posed by Ms Bradley's email of 21 November 2016 and then went on to set out details concerning AA's supervision, work practice, etc under similar heads to those questions. The totality of the document, however, is far shorter than any of the later versions of what became the report to Ms Bradley. However, it was created on 21 November 2016, the same day that Ms Bradley asked for such a report and having been edited for 157 minutes, (or open on the relevant computer), was last modified the following day at 17:36.

37. We were concerned to be told at the first hearing by the Respondent's Chief Information Officer, and Group Director of People in Transformation, that the Respondent, which is owned by an American healthcare group 'Acadia', had complied with a directive from its owners so that all emails over sixty days old had to be deleted from its systems with no copies/archive retained. We thought that surprising at the time. It was clearly inaccurate. The Group IT Director has made plain that all emails of any importance are taken off the email server and stored on hard-drives. We hope not to receive such inaccurate information again from a person so highly placed within a Respondent's organisation.

38. Ms Bradley's management report following her investigation was dated 7 December 2016. That report extended over eight closely typed pages. It was based on a proforma but set out in detail the allegations, the potential charges that could arise from them, the nature of the investigation, the people interviewed, the people who had given evidence and other sources of evidence. The witness statements and policies and procedures were appendices to that report, and it concluded with a recommendation that the matter should go to a disciplinary hearing to consider whether there should be a formal sanction.

39. Having considered that report we thought it notable that there was no mention of the report compiled by the Manager and Deputy Manager of Hobbit House. In that context the Claimant failed to raise any issue with any of the witnesses as to how the content of the report at page 190 had affected the management report that led to his disciplinary hearing or the disciplinary hearing itself.

40. However, we have concluded that Ms Bradley did see that report and rely on at least one very small part of it for the purposes of her management report. That passage appeared at page 8 of her report (page 211 of the bundle) just above the conclusion where she states,

> 'Despite supervision being examined in the previous twelve months there is no evidence from [the Claimant] of any work practice concerns of AA other than those stated above.'

It is clear from the evidence that she gave that Ms Bradley did not examine the supervision records herself. That is the exercise that was carried out by Miss Mitter and Miss Morton. In those circumstances that passage seems most likely to have come from the report sent to Ms Bradley the previous day. We remind ourselves, in this context, that one of the Claimant's alleged detriments was a failure to read supervision notes

41. On 10 January 2017 Mr Chris Wells, Regional Manager, wrote to the Claimant

to invite him to attend a disciplinary hearing at the Dover Regional Office on 20 January 2017. That letter set out the allegations made against him as follows:-

a. You failed to intervene or interject during the alleged situation on 1 October 2016

b. You did not report your safeguarding concern in an appropriate and timely manner

c. You didn't log the incident

d. You failed to adhere to risk assessments in place and left the building for a smoking break; and have done so without authorisation and leaving your colleague and young person at risk.

e. You stated to two other colleagues you would deny the allegations if they were reported to management by either CA or LS.

f. Your actions and/or inactions were driven by your own personal beliefs and views, rather than professional practice which impaired you from doing the right thing in relation to the incident

A further allegation below will also need to be fully discussed

g. The allegation that incident on the 1 October was false.

42. The Claimant was informed that the allegations were potentially gross misconduct and that he might be dismissed summarily if they were found proved. The letter enclosed a copy of Ms Bradley's management report and of the Respondent's disciplinary policy and procedure and informed the Claimant of his right to be accompanied.

43. On 18 January 2017 the Claimant submitted an annual leave request form seeking twenty-three days leave from 15 February to 17 March 2017. He explained that his daughter-in-law, who lived in the United States of America, was expecting a baby on about 16 February 2017 and his wife was travelling to support her because her husband would not be able to. The Claimant said he would have to remain at home in Watford in order to care for their fifteen-year-old son. Miss Mitter wrote to the Claimant the same day to ask him whether or not there were other people who might care for their son or whether he could manage a temporary shift pattern during the relevant period. The Claimant replied the same day to say that there was no-one else that could support him with childcare, and he could not accommodate any other shift pattern because of the distance he had to travel from Watford to Kent. It was against that background that Miss Mitter approved the Claimant's request shortly afterwards.

44. The disciplinary hearing took place as planned at the Dover Regional Office and was chaired by Mr Wells. The Claimant was not accompanied and a minute-taker was present. At the start of the hearing it appeared that the Claimant had not received all the witness statements he should have done in advance of the hearing. The meeting was then adjourned before reconvening and the relevant statement being provided to the Claimant.

45. The Claimant raised an issue as to whether or not the supervision notes concerning other members of staff had been examined because he did not

believe that was the case. It was confirmed to the Claimant they had been examined and the Claimant was informed that a 'separate investigation' had taken place into AA's conduct in her position at Hobbit House. Mr Wells then reiterated the allegations that the Claimant faced.

46. In the course of that hearing the Claimant criticised Ms Bradley's investigation on the ground that it had not made a finding as to whether or not the alleged disclosure made by the Claimant on 10 October 2016 was true or false. Mr Wells took the view that that was a separate matter, although there was an allegation to that effect, and he would make his decisions on those allegations. The Claimant took the view, as he has before us, that if the allegation he had made on the 10 October was false, he could not be disciplined for not having reporting it. He was quite unable then, or before us, to understand the fallacious nature of that position.

47. At the conclusion of the disciplinary hearing Mr Wells informed the Claimant that the six primary allegations concerning the Claimant's alleged disclosure on 10 October 2016 had been made out. He concluded that the Claimant should be subject to a final written warning for twelve months, and be the subject of a performance improvement plan.

48. Mr Wells confirmed that decision in a letter to the Claimant of 27 January 2017, in which he set out his reasons for finding each of those matters proved and again advised the Claimant of his right of appeal.

49. In a supervision session on 30 January 2017 the Claimant was given an opportunity to raise any concerns he had with Miss Morton. The Claimant wanted to discuss his concerns, but requested they be dealt with by an external manager.

50. On 1 February 2017 the Claimant met Miss Mitter to discuss her intended performance improvement plan. In the course of that discussion the Claimant was informed that the smoking ban imposed as part of the risk assessment in November 2016 was lifted.

51. On 3 February 2017 the Claimant wrote to Mr Wells to appeal against the disciplinary findings made against him. The points he made were:-

    a. That as the investigation had concluded that the Claimant's allegation had been unsubstantiated based on the evidence available and it was highly unlikely that the Claimant would have seen what he said he saw through the small window he had stated he had looked through. He could not be disciplined for failing to report an event that had not taken place.

    b. There was clear evidence, contrary to that of Miss Morton, that the Claimant did ask permission to leave the premises to smoke on many occasions.

    c. He should not be criticised or disciplined because his personal morality dictated that he should not report matters concerning other members of staff.

52. On 15 February 2017 Mr Coombs wrote to the Claimant to invite him to his

appeal hearing. This was to be a full re-hearing of the original disciplinary hearing that Mr Coombs would chair. That invitation reiterated the allegations faced by the Claimant and again advised the Claimant of his right to be accompanied. Mr Coombs also summarised his understanding of the Claimant's points of appeal in bullet-points:-

- The investigation into the allegation concluded that the allegation was unsubstantiated; namely 'witnessing a clinch is highly unlikely if not impossible' and the investigation report concludes there is 'nothing to report … as the alleged incident did not take place'.
- Chris Ashby's statement regarding notification around cigarette breaks appears to have been disregarded and is highly relevant. Furthermore you are one of many who smoke and you adhere to protocols more than most.
- People should be judged by their actions and not their words; even if you had stated to your colleagues that you would deny the allegation, if it wasn't followed with action. You should not have to answer this.
- Your position is that although others may find your personal beliefs repugnant, you feel that no one should be condemned for his or her personal beliefs; the question should be around whether or not you violated a code of conduct regardless of motivation
- As the investigation report concludes the incident did not happen, a disciplinary process should not have been instigated.
- In relation to the latter point the investigation was a sham and false evidence has been put together as well as conveniently ignoring other highly relevant evidence.
- The evidence put forward by Rekha Mitter is fabricated; Tracey Morton has made a false statement against you
- The young person's disclosures were completely ignored; even though they corroborated your allegation.
- All of the above suggest a hint of racial discrimination and victimisation; Chris Ashby who is white was told to think of his career by Carol Bradley and to step away from the investigation.

53. The Claimant suggested that management had interfered with the witness evidence which might potentially be given by Mr Ashby.

54. Mr Ashby had been interviewed as part of Ms Bradley's investigation on 4 November 2016. In the course of that interview he confirmed to her that the Claimant always told him when he wanted to have a smoke and he sometimes told him he could not.

55. On 20 January 2017 Miss Mitter had a conversation with Mr Ashby, one of many he had with her regarding his feelings and the allegations made against the Claimant. It appears that Mr Ashby was 'extremely angry' at the Claimant for dragging him into the situation in which he had no involvement. At that time Mr

Ashby, who was then a Senior Residential Support Worker, was hoping to be promoted to a position as an Assistant Manager. He was studying hard to do so. It was against that background that Miss Mitter explained to him that he should use the experience as part of his learning and ensure that all protocols were followed by him and anything that was brought to his attention must be logged and passed on to relevant parties. He was told that he should 'step away from the investigation as any involvement could 'deem to be collusive'. The matter was being investigated by an independent person, Ms Bradley, and he should focus on his own development.

56. Mr Ashby confirmed that was his position in an email to Mr Coombs' department on 27 February 2017. That was in response to an enquiry made by Mr Coombs, and Mr Ashby made clear that at no time did he feel that his job was in jeopardy as a consequence of the part he had taken in the events.

57. On 13 March 2017 the Claimant telephoned Miss Mitter to inform her that his wife had extended her stay in the United States of America because the baby was overdue. The Claimant told Miss Mitter he was unable to return to work because of his childcare responsibilities. Miss Mitter asked him when his wife was expected to return and the Claimant told her he did not know, saying that it might be another two weeks. Miss Mitter explained that she would have to discuss the matter with others and would return to him.

58. Miss Mitter telephoned the Claimant on 17 March 2017 to say that she had written to him to tell him that his request for further annual leave had been declined as he had already had twenty-two days leave. He was told that his next shift was due to start that weekend. The Claimant explained that he had no one else to look after his son and when asked if there was no one else that could do so, he replied "no". Miss Mitter then spoke to HR and took advice from them to the effect that the Claimant's leave should not be extended. When Miss Mitter telephoned the Claimant later that day, she had the phone on loudspeaker with Miss Morton present to take notes. Miss Mitter informed the Claimant of her conversation with HR and that the leave granted to the Claimant could not be extended. The Claimant again said he could not do anything as he had no one to look after his son and Miss Mitter explained to him that this was not an emergency and the Claimant should take steps to secure reasonable care. The Claimant again complained that he could not leave his son and Miss Mitter agreed that she would arrange cover for his weekend shifts to allow him additional time to make arrangements and that he should return to work on the 22 March 2017.

59. The Respondent's position regarding the Claimant's request for extra leave was set out in a letter dated 15 March 2017. It was the Claimant's case that he did not receive that letter until much later. We did not accept that evidence. The original of that letter, on headed notepaper and signed, was in the Claimant's list of documents. There was no explanation as to why it would not have been received in the normal course of posting.

60. Following that telephone call on 17 March the Claimant emailed Miss Mitter to inform her that his wife would not return from America until nearly midnight on 17 April. He confirmed that he had no one who could care for his son in close

proximity and he expected to return to work on 19 April 2017.

61. On 21 March 2017 Miss Mitter emailed the Claimant to acknowledge receipt of his email of 17 March and referred to her letter of 15 March. She reminded him that he was only entitled to reasonable time off to care for dependents, such as that necessary to make arrangements, and his continued absence could not be considered to be 'time off for dependents'. She went on to say that in light of the vulnerability of those that the Respondent cared for, the Claimant's continued absence was having a considerable impact on their resources and the ability to cover the necessary shifts. She reiterated her expectation that he should return to work on 22 March 2017. She also informed him that any absence without leave was treated very seriously under the Respondent's disciplinary procedure and action could be taken against him up to and including dismissal.

62. The Claimant responded a little later that day. He stated, incorrectly, he had not received the letter of 15 March 2017. In effect the Claimant was saying he had no alternative but to not return to work, and he thought that he had been working for the Respondent long enough to have earned the Respondent's 'trust and appreciation' that he would not deliberately or intentionally refuse to turn up for work. He thought it grossly unfair to be threatened with disciplinary proceedings potentially leading to dismissal.

63. On 22 March 2017 Miss Mitter wrote to the Claimant to invite him to attend an investigation meeting the following day, 23 March 2017, in the Dover office. The allegations to be investigated were:

- A failure to attend work following the period of annual leave which expired on 18 March 2017, which was then extended to 22 March 2017, resulting in your unauthorised absence to date.
- The reason you have reported for failing to attend work following 18 March 2017 is in relation to your wife extending her travel arrangements without having adequate alternative childcare provisions; a decision which was presented as a fait accompli by you and any request for further leave should have been requested and authorised in advance.

The Claimant was warned that if he failed to attend that meeting a decision might be taken based on the evidence available at the time. The letter enclosed a copy of the Respondent's disciplinary procedure and informed the Claimant that he did have a right to be accompanied.

64. The Claimant did not attend that investigation meeting. He emailed on the 22 March to say that he could not attend any meeting before 3 April when his son had a break from school.

65. On 23 March 2017 Miss Mitter wrote to the Claimant to invite him to attend a disciplinary hearing on 30 March 2017 to consider the concerns raised in the investigation meeting invitation letter. The Claimant was advised of his right to be accompanied.

66. The Claimant responded the following day to reiterate that he could not attend any meeting until after the 3 April 2017. As a consequence, Miss Mitter wrote to the Claimant again on 27 March 2017 to invite the Claimant to attend the

disciplinary hearing on 4 April 2017 and again advised him of his right to be accompanied.

67. That meeting took place as intended on 4 April 2017. It was chaired by Ms Bradley , who was by then an Acting Regional Manager, and a minute-taker was present. The Claimant was unaccompanied. It was a brief meeting, in which the Claimant responded to the questions put by Ms Bradley. It appears the Claimant had driven to the meeting with his son who was sitting in the car outside. He confirmed that he would provide Ms Bradley with the paperwork concerning his wife's trip as soon as possible. Those documents showed that the Claimant's wife was informed by British Airways on 14 March 2017 at 15.46 that her booking had been changed so that her return flight was then booked for 17 April 2017.

68. Ms Bradley then had a telephone call with the Claimant that was noted by using the loudspeaker on 7 April 2017. In the course of that conversation the Claimant was asked for copies of the original booking, which he had then provided, but which he thought irrelevant.

69. By letter of 10 April 2017 Ms Bradley set out her decision and the reasons for it. She concluded the Claimant's conduct amounted to 'gross insubordination'. She noted that he was at that time subject to a final written warning, and that as the matters that she had now found proved against him were gross misconduct, his employment would be terminated with immediate effect.

70. On 11 April 2017 the Claimant wrote to Mr Coombs, the Regional Operations Manager, to appeal against the decision that he should be dismissed. He made the following points:-

    - He had kept his employer informed of the situation throughout the relevant period;
    - He had been a dedicated and loyal employee for several years and had never been late, including supporting the Respondent in working in emergency situations.
    - The request that he attend the meeting on 23 March sent on 22 March was unreasonable in light of the manager's knowledge of his living arrangements.

71. The Claimant's appeal was acknowledged by a letter of 19 April 2017. On 8 May 2017 the Claimant wrote to Mr Coombs to express his concern at the delay in his appeals being heard.

72. On 9 May 2017 the Respondent wrote to the Claimant to invite him to attend appeal hearings regarding both his final written warning and his dismissal, on 16 May 2017 at its Dover office. The Claimant was advised of the process of the appeal and provided with a copy of the Respondent's disciplinary procedure.

73. Those appeal hearings took place as intended before Mr Coombs. The Claimant was unaccompanied and a note-taker was present. The Claimant took no issue with what had taken place in the course of the appeal hearings. He had no cross-examination for Mr Coombs.

74. On 24 May 2017 Mr Coombs wrote to the Claimant to give his appeal decisions.

They were set out over six closely typed pages in which Mr Coombs gave reasoned decisions in respect of each finding when he upheld the original decisions in all respects. The Claimant did not seek to challenge any aspect of those reasons in any way.

Submissions

75. We heard and considered the submissions of the parties. It is neither necessary nor proportionate to set them out here.

The Law

76. We have had regard to Part IVA, Ss. 98 and 103A of the Employment Rights Act 1996.

77. We have had regard to Sections 13, 26, 123 and 136 of the Equality Act 2010.

78. On the issue of unfair dismissal, we have referred to the following authorities:-

    British Home Stores Ltd v. Burchell [1978] IRLR 379

    Iceland Frozen Foods v. Jones [1982] IRLR 439

    Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

    Taylor v OCS Group Ltd. [2006] IRLR 163

    Newbound v. Thames Water Utilities Ltd [2015] IRLR 734

    On the issues arising on the claims for discrimination, we have referred to the following authorities together with the authorities referred to by the Claimant:-

    Carmelli Bakeries Limited v Benali 2013

    Alexander v Bridgen Enterprises Limited 2006

    Shamoon v The Royal Ulster Constabulary 2003 (ICR 337)

    Laing v Manchester City Council 2006 (ICR 1519)

    London Borough of Islington v Ladele 2009 (IRLR 154)

    Nagarajan v London Regional Transport 1999 (IRLR 572)

    Okyere-Whalley v Nando's Chickenland Limited

    Richmond Pharmacology v Dhaliwal 2009 (ICR 724)

    Jessemey v Rowstock Limited 2014 (EWCA Civ 185)

Further Findings and Conclusions

Out of Time Issue

79. In light of all the evidence we have heard we have taken the view that we should consider the out of time issue in respect of the Claimant's alleged detriments, direct discrimination and harassment claim before going on to consider the other issues.

Public Interest Disclosure Detriment

80. A complaint that a person has been subject to a detriment by reason of making a public interest disclosure must be presented to a Tribunal in accordance with

section 48(3) Employment Rights Act 1996. The test is the same as that for claims of unfair dismissal,

> Was it reasonably practicable for the Claimant to present the claim within three months of the date of the event that he complains of and, if not, was the claim presented within such further period as is reasonable in all the circumstances of the case?

81. The first event of which the Claimant makes complaint is the 8 November 2016.

82. The last event in the original pleadings was the failure to provide all relevant documents before 20 January 2017.

83. It may be that the complaint regarding his ban on smoking, which started on 8 November 2016, was a continuing act. However, that ceased on 1 February 2017.

84. The Claimant started early conciliation on 25 May 2017. The result is that events prior to 26 February 2017 are potentially out of time. In light of our above findings relating to the dates of the Claimant's claims alleging detriment, all of those claims are out of time.

85. This was a specific issue that the Claimant was aware of from at least the date on which the case management order sent to the parties on 28 September 2017 was received. It was discussed in the course of that hearing. It was identified in the reasons at paragraph 4g.

86. The Claimant gave no evidence at all explaining why he had presented his claim late, what his knowledge of the Employment Tribunals and time limits was, and why it was not 'reasonably practicable' for him to have presented the claim in time. The last event was, at the latest, 1 February 2017, and his effective date of termination was 10 April 2017. He appears to have done little, if anything, between those dates, or after his dismissal, to research or enforce his rights.

87. When issues of this nature arise the onus is on the Claimant to establish, on the balance of probabilities, that it was not reasonably practicable for him to have presented his claim in time. He has failed to discharge that burden and we find as a fact that we have no jurisdiction to hear this aspect of the Claimant's claim. It must be dismissed.

Direct Discrimination and Harassment

88. The matters relied on by the Claimant for these claims are the same as those relied on as public interest disclosure detriments.

89. The time limits for presenting such claims is also 3 months, but we have a wide discretion to extend time if, in all the circumstances of the case, it is just and equitable to do so.

90. We accept that the decision in Robertson v Bexley Community Centre [2003] IRLR 434 is authority for the proposition that such extensions of time are the exception rather than the rule, but that is not itself a rule. We must have regard to all the circumstances of the case.

91. Once again, the onus is on the Claimant to establish, on the balance of probabilities, that it would be just and equitable in all the circumstances to grant

an extension of time. That extension would have to be sufficient to bring at least one of his claims within time, if not all. By way of example:

a. To bring his first alleged detriment into time would require the Claimant to have started early conciliation no later than 7 February 2018, so an extension of 3.5 months would be needed.

b. To bring his last alleged detriment into time would require the Claimant to have started early conciliation no later than 19 April 2018, so an extension of a little over 1 month would be needed.

92. As a general principle we accept that the shorter the relevant extension needs to be, the easier it will be for a Claimant to establish it would be just and equitable to grant it. However, in this case we have heard no evidence at all from the Claimant directed to supporting the granting of an extension of time. We accept that such evidence if not always necessary, however, there must be some evidence on which we can legitimately find it would be just and equitable to grant an extension.

93. The Claimant is clearly an intelligent man. He was aware of the issues he wished to complain of at the time they occurred. He knew from receipt of the Response in about August 2017 that an out of time issue was being raised. He was further informed of this at the Preliminary Hearing and the resulting Case Management Order. Even a cursory internet search for “out of time” and “employment tribunal” will provide a wealth of material and numerous sources of information. The Claimant did not even suggest he had looked at the issue at all.

94. In all the circumstances of the case we have concluded that the Claimant has failed to discharge that burden of establishing it would be just and equitable for us to grant an extension of time and we find as a fact that we have no jurisdiction to hear this aspect of the Claimant’s claim. It must be dismissed.

Public Interest Disclosure

95. We have given careful consideration to the terms of Part IVA Employment Rights Act 1996 and make the following findings.

96. The report compiled by the Claimant on 10 January 2017 contained information that was potentially in the public interest because, if true, it exposed serious wrongdoing by a person exercising duties on behalf of a local authority.

97. However, the Claimant did not believe the disclosure to be in the public interest at that time. That finding arises from the following unchallenged evidence:-

a. The Claimant did not report the information at the time he allegedly witnessed it.

b. He did not do so because it was contrary to his own morality to inform on his colleagues.

c. He told his colleagues that he would deny the information if asked.

98. We also find, largely for like reasons, that the Claimant did not disclose the information in good faith. He only did so because he was required to do so by his manager.

99. In light of our above findings we have concluded that this was not a qualifying disclosure, and was not a protected disclosure.

The Alleged PID Detriments

100. Despite our above findings, for the sake of completeness, we go on to consider each of those detriments in light of the provisions of section 48(2) Employment Rights Act 1996, placing the burden on the Respondent to establish the reason for the treatment complained of:-

    a. We accepted the Respondent's explanation as to why it imposed a ban on the Claimant smoking while on duty. It was only because he left the premises to have a cigarette that AA was left lone-working with CG. That was contrary to the risk assessment that was in place and that he was aware of. It was entirely reasonable.

    b. The fallacy of the point made by the Claimant, that he could not be disciplined for an event that did not take place, is too obvious to require further explanation.

    c. The Claimant's interview on 4 November 2018 did not last for six hours. We refer to our findings set out above. There was a fundamental difference between the Claimant's position, as the employee facing the allegations and being investigated, and those giving evidence relevant to the issue. It was wholly justified.

    d. Our findings of fact regarding the conversations between Miss Mitter and Mr Ashby are set out above. Mr Ashby was not 'warned off' as a witness. His witness statement, to the extent it was of assistance to the Claimant, was attached to the investigation report and was before the disciplinary and appeal hearings. There was no impropriety at all.

    e. The Claimant has failed to identify any relevant witness who was not interviewed. It is clear from our findings above that the relevant supervision notes for the entire year of 2016 had been considered in the report that was prepared and appeared at page 190.

    f. It appears that one statement may not have been provided to the Claimant prior to the disciplinary hearing on 20 January 2017. That was remedied at the start of the hearing and a brief adjournment took place. The Claimant has failed to establish any disadvantage arising from that failure. In any event we accepted the Respondent's explanation that it was an oversight.

101. The Claimant failed to adduce any evidence from which we might infer that the reasons given by the Respondent were unreasonable or which undermined them in any way. There was no evidence to suggest a causal connection between the Claimant's alleged disclosure and the events he complained of.

<u>Less Favourable Treatment</u>

102. We repeat our above findings in respect of the alleged detriments that the Claimant relies on as being acts of direct discrimination. In respect of each of those detriments, we make the following further findings:-

a. There was no evidence before us that Mr Ashby was treated differently from the Claimant in respect of any permission or ban on smoking. We have no knowledge whether Mr Ashby was a smoker or not.

b. The Claimant has wholly failed to establish any evidence to show that a hypothetical comparator, being a person with all the same characteristics as the Claimant, but of European, white ethnicity, would have been treated any differently to the way that he was treated in reaching the conclusions it did.

c. AA was not an appropriate comparator for the purposes of this allegation. There was a fundamental difference between her and the Claimant; she was a witness, he was a person under investigation. In any event, we were entirely satisfied that if a hypothetical comparator was used in place of AA the Claimant had failed to establish any basis on which that hypothetical comparator would have been treated differently to the Claimant.

d. The Claimant has failed to establish that a suitable comparator to him would have been treated differently to him, in that Mr Ashby would not have been spoken to in the way he was at the relevant time. There was simply no evidence to justify this.

e. In light of our above findings, we can find no evidence to support the suggestion that a hypothetical comparator would have been treated differently; it was our view that the Respondent did interview all relevant witnesses and considered all the relevant supervision notes.

f. In light of our above finding, we are quite unable to find the Respondent would not have fallen into the same error in respect of a hypothetical comparator in failing to provide one of the statements that it should have done.

Burden of Proof Discrimination/Harassment

103. In addition to the above findings, we remind ourselves that pursuant to section 136 Equality Act 2010, the onus lies on the Claimant to establish on the balance of probabilities, where he has established a difference in treatment (which he has not done), evidence from which we could conclude that that difference in treatment might be because of his race. The Claimant has failed to adduce any evidence at all that would enable us to draw such a conclusion. That aspect of his claim must be dismissed.

104. We make a like finding in respect of the Claimant's allegations of harassment. He has failed to adduce any evidence from which we might infer that the treatment that he alleges as unwanted conduct could be related to race. There was simply no basis on which a finding could be made. He has not got to the point, as above, where the burden has shifted to the Respondent.

105. We should, however, reiterate our finding above that we were entirely satisfied by the Respondent's explanations for the events that the Claimant relies on as detriments even had the Claimant satisfied us that the burden had shifted. For the above reasons the Claimant's claims alleging discrimination must fail.

Unfair Dismissal

106. We have gone on to consider the Claimant's claims alleging unfair dismissal. We note that the case management order by Employment Judge Wallis did not record that the Claimant was making a claim of ordinary unfair dismissal, she only recorded a claim alleging automatic unfairness for making a public interest disclosure. We took the view that it was clear from the claim form and everything the Claimant said that he was also making a claim for unfair dismissal and we therefore deal with both claims.

107. We took the view that the Respondent had acted entirely reasonably in carrying out an investigation into the circumstances in which the Claimant was absent without leave from 18 March 2017 until the date of his dismissal. It has not been suggested otherwise by the Claimant.

108. We were also satisfied by the Respondent that it complied with its obligations to inform the Claimant of the nature of the allegations against him, to provide him with the relevant documents and to give him a reasonable time to prepare for the hearing that took place on the 4 April 2017. He has made no complaints concerning this, or concerning what took place in the course of the hearing itself.

109. We have given careful consideration as to whether the decision to dismiss was within the bands of reasonableness in all the circumstances of this case. We noted that the Respondent's disciplinary policy specifically provided that being absent without leave was an offence of potential gross misconduct.

110. The Claimant was clearly warned in the letters sent by the Respondent that his absence might lead to disciplinary proceedings and dismissal. Both the Respondent and he were aware that at that time, subject to his appeal, he was on a final written warning concerning his failure to make a disclosure in a timely fashion.

111. Having regard to all the circumstances of the case, we have concluded that the Respondent's decision to dismiss the Claimant was within the band of reasonable responses open to an employer in the circumstances of this case.

112. However, we have gone on to consider whether the Claimant has established evidence of a prima facie case that his dismissal could have been because he had made a public interest disclosure.

113. Ms Bradley's evidence was clear; she had dismissed the Claimant because of his unauthorised absence. That was not challenged by the Claimant in his cross-examination in any way at all. We also thought it relevant that Ms Bradley had previously been concerned with his failure to report a safe-guarding issue, not that he made a disclosure. In the circumstances we thought it highly unlikely that Ms Bradley would have seen the Claimant as a whistle blower.

114. We are also mindful that the Claimant's disciplinary sanctions, both that of a final written warning and his dismissal, were the subject of full re-hearings by Mr Coombs, who upheld the original findings. His evidence was again, wholly unchallenged, and his lengthy and detailed reasoning for rejecting the Claimant's appeal was unquestioned.

115. In light of our above findings we are unanimous in concluding that the

Respondent has established on the balance of probabilities that the reason for the Claimant's dismissal was his conduct, being his failure to attend work without permission. In those circumstances the Claimant's claim of unfair dismissal and automatic unfair dismissal are not well founded and must be dismissed.

Employment Judge Kurrein

28 November 2019