EMPLOYMENT TRIBUNALS

Claimant: **Mr J Januszewski**

Respondent: **Ultima Furniture Systems Limited**

Heard at: **Sheffield** **On:** **30 November 2020**
1 and 2 December 2020
8 February 2021

Before: **Employment Judge Brain**
Mrs J Lancaster
Mr K Lannaman

Representation

Claimant: Mr S Healy of Counsel
Respondent: Miss R Levene of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not dismissed from his employment. The complaint of unfair dismissal fails.
2. The complaint of direct discrimination fails.
3. The complaint of harassment related to race fails.
4. The claim for compensation for holiday accrued but untaken is dismissed upon withdrawal.

REASONS

Introduction

1. After hearing the evidence and helpful submissions from counsel the Tribunal reserved judgment. We now give reasons for the judgment that we have reached.

2. The claimant brings the following claims against the respondent:

   2.1. That he was unfairly dismissed. This is a claim brought under the Employment Rights Act 1996.

   2.2. That he was subjected to direct discrimination because of the protected characteristic of race (that being his Polish nationality).

   The claimant's claim is that the respondent's decision to dismiss him was an act of direct race discrimination. This is a complaint brought under sections 13 and 39(2)(c) of the Equality Act 2010.

   2.3. That the respondent harassed the claimant. This again is allegedly related to his Polish nationality. This is a complaint brought under sections 26 and 40 of the 2010 Act.

3. For the sake of completeness, the Tribunal also records that the claimant brought a claim for compensation for payment in respect of holiday due and owing at the effective date of termination of the contract of employment. This complaint was withdrawn upon the respondent paying the outstanding sum of £105.

4. The case has benefited from two case management preliminary hearings. The first came before Employment Judge Davies on 24 February 2020. The second came before Employment Judge Little on 24 June 2020. During the course of these hearings, the issues in the case were clarified. These shall be set out in due course in our reasons.

5. The Tribunal shall firstly set out its findings of fact after which we shall set out the relevant law and the issues in the case. We shall then give our conclusions by applying the relevant law to the factual findings in order to arrive at our conclusions upon the issues.

Evidence and factual findings

6. It is common ground that the claimant worked for the respondent as a factory operative between 29 March 2016 and 13 June 2019. The respondent is a manufacturer and supplier of bespoke kitchens and kitchen accessories. It operates from a number of sites in South Kirkby. The claimant was employed at part of the South Kirkby premises known as Unit 30. The respondent has another site in Sherburn. This is about 18 miles from South Kirkby.

7. On behalf of the claimant, evidence was called from Dennis Sywak. Mr Sywak is also of Polish nationality. He worked for the respondent as a factory operative. He was dismissed on 14 June 2019.

8. The Tribunal heard from the following witnesses on behalf of the respondent:

   8.1. Piotr Tymosiak. He is a factory operative.

   8.2. Karl O'Brien. He is a production operative.

   8.3. Daryl Thompson. He is employed as the site manager at Sherburn.

8.4. Suzanne Pennington. She is employed as a supervisor.

8.5. Catherine Rhodes. She is employed as a performance manager.

8.6. Matthew Ellis. He is a director of the respondent.

8.7. Simon Clayton. He is the respondent's HR manager.

9. The claimant's contract of employment is in the bundle at pages 66 to 77. It was signed both by Mr Clayton (on behalf of the respondent) and by the claimant on 20 May 2016. The contract provided that the claimant would be located at South Kirkby but *"may be required at the absolute discretion of the company to work at or relocate to such other place of work as may be directed by the company from time to time".*

10. There is little in the way of documentary evidence in this case. The Tribunal shall therefore set out excerpts from or (where appropriate) a summary of each witness's evidence-in-chief given in their printed witness statement. The Tribunal shall then go on to record the salient parts of the witness's oral evidence before the Tribunal and which emerged from cross examination, supplemental questioning or re-examination and will then record its factual findings.

11. The Tribunal and the parties had the benefit of a Polish interpreter. The claimant was heavily reliant upon the interpreter. Mr Sywak called upon the interpreter for assistance from time to time. Mr Tymosiak felt able to manage without the interpreter's assistance.

12. It is, we think, worth setting out in full the relevant parts of the claimant's witness evidence which go to the central issues in the case. The claimant confirmed through counsel that the Polish interpreter had read through the witness statement with the claimant upon the morning of the first day of the hearing and before the claimant attested as to the truth of his witness statement. The Tribunal is therefore satisfied that after he took the oath, the claimant understood the witness statement which he then attested as his evidence. Before attesting as to his witness statement, the claimant made several amendments to it.

13. The claimant says the following:

"(4) On 13 June 2019 I was using the yellow truck and my colleague Karl O'Brien was using the red truck. These were electric palm trucks and each truck is a different colour. I had been using the truck all day so knew mine was the yellow truck.

(5) I left my truck for a matter of minutes to go to a different department to collect some pallets. When I returned to where I had left my truck I saw Karl O'Brien using my yellow truck because Karl's red truck had run out of battery.

(6) I approached Karl and asked for my truck back as I needed it to carry on with my work. I told Karl that I had been using that yellow truck since my shift had started and that I needed it to work on and not everything was for him. Karl then gave the truck back to me and went to Suzanne Pennington (supervisor), Vicky Young (supervisor) and Daryl Thompson (manager) to complain. When Karl walked away I continued with my job.

(7) I did not raise my voice in any way or act aggressively towards Karl. There was no argument or dispute with Karl. I just asked for my truck back and he gave the truck back and I continued with my work. I certainly did not push Karl he is much bigger guy than me and half my age. I did not tell him to "fuck off" either.

(8) Shortly after that, transport manager Catherine Marie Rhodes approached me and shouted at me very loudly and aggressively that I should go to the canteen now. Catherine repeatedly said "George get to the canteen now" and repeated this 5/6 times. This was witnessed by other co-workers. I've never nor has any other European worker in this company heard Catherine speak to an English worker in the same humiliating and aggressive manner as she did with me that day.

(9) The reason Catherine used the name "George" is because this is what I was called by everyone there as they could not pronounce my real name so "George" is a nickname they used.

(10) When I got to the canteen, waiting for me was production manager, Daryl Thompson, Matt Ellis (son of the owner of the company), Vicky Young and supervisor Suzanne Pennington. My colleague Piotr Tymosiak was the Polish person stood in the room with us trying to translate for me. Daryl informed me that Karl had been using that truck all day. This was not possible as one truck is red and the other is yellow so it was clear which truck was which and I knew I had been using yellow all day. I just started to laugh and said "how can this be – when I have used this truck all day?" Daryl was also laughing at the same time.

(11) I was accused of acting in an aggressive manner and shouting. I denied I was acting in such a way at all. They asked me why I am aggressive and I laughed at this point as I was not in any way aggressive.

(12) When in the canteen I was told by Mr Thompson that I should "go to Sherburn". I did not know what or where Sherburn was. I asked if I could finish my shift and Daryl then shouted "go home now". It was clear to me that I was being sacked. Daryl then escorted me out of the building and out of the gate. Mr Thompson watched me throw my work boots away. If I had not been sacked then why did Mr Thompson not ask me to stop and why did he escort me off the premises? Why did they not call me back?

(13) I was not given any information. Everyone was talking over each other and I did not get a proper chance to explain my side of what happened. I felt targeted due to my race. I felt threatened, intimidated, embarrassed, humiliated, bullied and degraded whilst in the canteen as all of them were shouting in a language that I only know a few words of. I did not leave of my own accord as I was told to leave and I was escorted out of the building by Mr Thompson.

(14) That day my colleague Dennis [Sywak] had heard me being shouted at in the canteen. I used to drive Dennis to and from work and as I would have been driving me home that day he asked Suzanne where I was when he saw her walking past where he was working after the incident. Suzanne's response to him that I had been sacked for being mouthy. Dennis told me this the next day when I spoke to him on the phone and I told him I had not been mouthy.

(15) There were witnesses to the event that happened that day, but they are fearful of losing their jobs as they still work for the respondent and they have children to feed and bills to pay. I would like the respondent to provide CCTV footage from 13 June 2019 to prove my actions were not as the respondent alleges.

(16) If I had only been sent home to calm down and my job remained open as the respondent alleges then why did I not receive any phone call to see where I was when I did not arrive to work after this incident happened? Or the next day or after. I received my P45 in the post."

14. The Tribunal shall set out in due course the salient parts of the rest of the claimant's evidence-in-chief. The Tribunal shall now focus upon some of the claimant's oral evidence which was given in cross examination.

15. The claimant accepted that the contractual provision cited above in paragraph 9 entitled the respondent to require him to work in Sherburn. He also accepted that there were half a dozen or so electric pallet trucks, that they are not assigned to any particular individual and that they may be used by factory operatives as and when, depending upon availability. He denied shouting at or using foul language towards Mr O'Brien but said that Mr O'Brien was wanting to use the pallet truck which he was using and that Catherine Rhodes shouted to the claimant to go to the canteen. He was working normally and could not understand why he was summoned to the canteen. He rejected Miss Levene's suggestion that Mrs Pennington asked him to go to the canteen in order to diffuse the situation because she had seen the claimant and Mr O'Brien arguing. It was put to the claimant by Miss Levene that there must have been cause for Mrs Pennington to ask him to go to the canteen as it makes no sense otherwise for Mrs Pennington to have requested the claimant to go there.

16. There were several inconsistencies between the claimant's oral evidence on the one hand and his evidence-in-chief in his printed witness statements on the other. These were as follows:

    16.1. The claimant said that it was not true that he was laughing in the canteen notwithstanding what was said by him in paragraph 10 of his statement.

    16.2. The claimant then said that he did laugh but this was in shock.

    16.3. Contrary to what was said in paragraph 12 of his statement, the claimant denied that Mr Thompson said to the claimant that he should go to Sherburn or go home. The claimant said that this passage in his witness statement was *"a mistake".*

    16.4. The claimant said that Mr Thompson did not say to the claimant that he should go to Sherburn or go home. His account now was that Mr Ellis and Mr Thompson were discussing, in the claimant's presence, sending the claimant to Sherburn as a possibility but did not directly address the suggestion to him. The claimant's evidence was that at no stage was the proposal to go home or go to Sherburn directly put to him.

    16.5. The claimant said that Mr Thompson told him that the respondent *"needed to say goodbye"* and that the claimant had been *"behaving*

aggressively". He then went on to say that Mrs Pennington said, "*sorry George"* to him.

This important piece of evidence was omitted from the claimant's evidence-in-chief, claim form and the further particulars of his claim (at pages 41-43). It was suggested by Miss Levene that this was a remarkable omission given that the claimant had made several other changes to his witness statement after taking the oath but before attesting as to the truth of it. Miss Levene also pointed out that the claimant had, in the further and better particulars of his claim, taken the opportunity to correct an allegation directed at Mr Thompson in the particulars of claim (that as he was being escorted off site, Mr Thompson grabbed his jersey. This allegation within the claim form was withdrawn within the further and better particulars of the claim filed with the Tribunal).

16.6. In evidence given under re-examination, the claimant confirmed that he had asked, while in the canteen, if he could remain in work until the end of his shift. This was in order that he could clock up eight hours of work that day. Mr Thompson confirmed that on 13 June 2019 the claimant was working from 6am to 6pm. The normal hours for factory operatives were from 8am to 4.30pm. The claimant was therefore working overtime.

17. Turning back to the claimant's witness statement, he says:

"(17) A solicitor that was recommended to me contacted the respondent on my behalf and the respondent then got worried and said they did not dismiss me I walked out. I can categorically say I did not walk out. I was sacked. I was escorted off the premises. Further, Dennis was told by Suzanne that I had been sacked for being mouthy so it is not true at all that I left the job. I feel I have been treated in this way because of my race/nationality as I have never seen any English workers be treated in this way.

(18) I wrote a letter appealing against the decision to dismiss me on 2 July 2019 as well as a letter of complaint regarding the race discrimination I had suffered. The respondent responded by a letter dated 9 July 2019. In the letter they denied ever dismissing me and alleged that I had walked off site and refused to return after being asked to work from a different location.

(19) The respondent sent a further letter to me dated 23 July 2019 with the same response as in their letter of 9 July 2019. The only times that the respondent told me my job remained open was in the response to both of my handwritten letters. At no point before then had anyone from the respondent's company told me my job remained open. I think they know they did the wrong thing and then tried to backtrack."

18. To put paragraph 17 in context, Mr Clayton says in paragraph 9 of his witness statement that, *"Shortly after 13 June 2019, I received a call from a representative at the Citizens Advice Bureau. My best guess is that this was two to three days after the claimant walked out. The representative explained the claimant was with them and believed that he had been dismissed. I made it quite clear to the representative involved that the claimant had not been dismissed but that he had walked out of work but that he was welcome to come back."*

19. In oral evidence, the claimant confirmed that there had been a conversation between Mr Clayton and his representative. However, the claimant did not think that the conversation took place only a few days after 13 June 2019. He thought that it occurred on a later date. The claimant also believed Mr Clayton to be mistaken in his reference to a Citizens Advice Bureau worker. The claimant thought that the contact was made by a solicitor appointed to act for the claimant by the claimant's trade union. The claimant accepted that the contact between the solicitor and Mr Clayton was before his (the claimant's) letters of 2 July 2019. Mr Healy confirmed, during closing submissions, that the telephone call had occurred prior to the claimant's letters of 2 July 2019 and also prior to the claimant's receipt of the P45 dated 25 June 2019 (page 100). All of this being the case, it follows that on the claimant's account, he was aware when he wrote the letters of 2 July 2019 that the respondent's position was that they had not dismissed the claimant.

20. The claimant's letters of 2 July 2019 are at pages 79 and 80 of the bundle. In the letter at page 79, the claimant asked the respondent to treat the letter as an appeal against *"racial discrimination upon myself".* The claimant said that he had been *"sacked on the spot for no reason"* and alleged that the respondent treats *"English workers differently to the non-English workers."* The claimant's second letter of 2 July 2019 at page 80 was an appeal *"against the termination of my employment by reason of unfair dismissal."* The claimant went on to say that, "*I would like to challenge the decision to terminate my employment by reason of unfair dismissal which was notified to me verbally on 13 June 2019. This is because I believe the grounds in which the way I was sacked were unfair."*

21. During cross examination the claimant maintained that he *"was fired."* It was suggested to the claimant by Miss Levene that the claimant's letters of 2 July 2019 were at odds with the respondent's position (as conveyed in the pre-2 July telephone call) that the claimant had not been dismissed. The claimant replied that *"no one told me this until a month later."* This was difficult evidence to understand in the light of paragraph 17 of the claimant's witness statement. Paragraph 17 (when read with paragraph 18) conveys the impression that the telephone call took place before the claimant's letter of 2 July 2019 (in which he claimed that he had been dismissed by the respondent but which the respondent denied) and that he knew of the respondent's position upon the question of dismissal. Indeed, Mr Healy confirmed it to be the claimant's position that the telephone call took place before his letters of 2 July 2019. The claimant said that paragraph 17 *"doesn't make any sense".*

22. Miss Levene put it to the claimant that in that case it must be the claimant's position that someone (presumably the person who prepared the statement for the claimant) had made up paragraph 17. This was a proposition with which the claimant agreed.

23. It was not entirely clear what it was that the claimant had not been told until *"a month later."* It appeared to be his evidence before the Tribunal (contrary to his printed statement) that he was not told of the content of the telephone call by his representative and that the respondent denied the dismissal of the claimant. This stance was at odds with Mr Healy's acceptance that the call occurred before the letters. The claimant's case upon this aspect is a muddle. That being said, the Tribunal sees nothing untoward in the claimant's letters of

2 July 2019 in which the claimant maintained that he had been dismissed. This has been his position throughout.

24. Mr Clayton wrote to the claimant on 9 July 2019. This letter is at page 81. He said that the respondent:

    "…is confused to receive a letter of appeal from you as you have not been dismissed. As I confirmed to you via the gentleman from Citizens Advice over the telephone recently, your job remains open. Our clear recollection of events is that you chose to walk out when we asked you to work at another of our sites, something which we are perfectly entitled to do under your terms and conditions of employment. [The relevant clause is then cited]. Regarding your claim of racial discrimination, I note your comments with interest but again, since you have not been dismissed then your claim that you have been discriminated against is not relevant. For the sake of clarity, your job remains open. However please be aware that your contractual obligation to work at any of our sites still applies, and we fully expect that you will fulfil that obligation as and when required."

25. Omitted from the claimant's witness statement is reference to his undated letter which was received by Mr Clayton on 22 July 2019. This is at page 86. It is a reply to Mr Clayton's letter of 9 July 2019. After thanking Mr Clayton for the letter, the claimant wrote that, *"I cannot see how the company can be confused by my employment status when it considers its actions the week after I was escorted from the premises. I have noted your assertion that I was required to work at any site as directed "from time to time". But I do not accept that this included the company requiring me to move part way through a shift. If I was not dismissed last month can the company explain why it sent me a P45 stating that my last date of employment was 21 June 2019? A P45 is a legal confirmation that the employment contract has ended and I maintain my assertion that this was by the company on 13 June when I was escorted from work. If I am still employed as you assert then I believe that your actions amounted to suspension on full pay and I would ask you to confirm that I have in fact been suspended since June 13th. I conclude my letter as regarding race discrimination and my appeal against dismissal still stand and I look forward your further response prior to any potential legal action as advised by the union."*

26. The claimant suggested that his receipt of his P45 from the respondent was consistent with him having been dismissed. The P45 is at pages 100 to 102. It gives a leaving date of 21 June 2019. The P45 is dated 25 June 2019. That the claimant did not refer to getting his P45 in the letters of 2 July 2019 is consistent with him receiving it after they were sent. As we have observed, whatever muddle there may be over the evidence around the 2 July letters, the claimant has steadfastly maintained throughout that he was dismissed by the respondent.

27. In response to the claimant's undated letter, Mr Clayton wrote on 23 July 2019 (page 87). Mr Clayton said that the claimant was not escorted from the premises and that the claimant chose to walk out on 13 June 2019 after being requested to work at Sherburn. Mr Clayton said about the P45 that this was sent, "*as you have made no attempt to return to work since you walked out. This is despite me confirming to you via the gentleman from Citizens Advice over the telephone and also in my previous letter that your job remains open."*

He said that at no point was the claimant suspended. Mr Clayton concluded, *"Once again, for the avoidance of doubt, we maintain that you chose to walk out on 13 June and have made no attempt to return to work since, despite being told that your job remains open. Although you have been processed as a leaver I am happy to discuss your return to work."*

28. The claimant confirmed that he had not returned to work for the respondent. He had in fact obtained alternative employment from 17 July 2019. It was for that reason that the claimant did not respond to Mr Clayton's letter of 23 July 2019 at page 87.

29. Mr Sywak said this in his witness statement:

"(4) On 13 June 2019 I witnessed Catherine Rhodes shouting loudly and aggressively at Jerzy [the claimant] to go to the canteen now. She shouted at him several times to go to the canteen. As she was shouting to him she was stood near the machines about six metres away from me. When I saw her she was angry looking and I could tell by her body language that she was angry so I walked back to my work area.

(5) I was working for around 15 minutes and I saw Suzanne Pennington come back and stood at her computer just next to my machine I work on as she was my supervisor. I asked Suzanne to come over to me and I asked what's happened with Jerzy and she said he had been sent home. I asked her has he been sent home or has he been fired? Suzanne then said "he's been sacked for being mouthy". Suzanne also did a hand movement as she said this to show with her hand that he was being mouthy. I asked Suzanne who had fired Jerzy and she said Daryl and that Daryl had walked him out.

(6) I know the respondent denies the fact Suzanne told me that Jerzy had been fired but I am very clear on this and categorically confirm Suzanne did tell me Jerzy has been sacked for being mouthy. There is no doubt in my mind about this. I understand the company now denies sacking Jerzy but this does not make any sense as Suzanne herself told me Jerzy was sacked and Daryl [Thompson] walked him out.

(7) I phoned Jerzy the next day to tell him about this. He told me over the phone he had been fired and I said "yes I know Suzanne told me". Jerzy then told me exactly what had happened to me. I was shocked that this was happening yet again to another non-English worker.

(8) I know the supervisor and managers in this company are racist as I have received racism myself. On one occasion Daryl Thompson called me a "Polish bastard" inside the workplace on the day I was dismissed for refusing to work overtime. I had worked overtime all week even though I was only contracted to work eight hour shifts on the Friday. I told Daryl Thompson I could not stay for overtime that day as I had a family matter. He told me no I had to stay. I said I'm sorry I can't I need to go home at my usual work time today and I did not contractually have to work the overtime. I went home. I returned to work the following Monday at 6am and there was a lot of co-workers in the building and Daryl shouted at me "what are you doing here?" I said "what do you mean? I've had no phone call to tell me not to come to work" and Daryl then said you've been sacked. I told him I'm going to wait for the boss to arrive and Daryl said "do what whatever you want you Polish bastard!". As he was walking into his office I said "did you just call me a Polish bastard?" He just

laughed at me. I think I then threw an empty water can on the floor and walked out of the building."

30. Mr Sywak concludes his witness statement (in paragraph 9) with the remark that, *"I think this company is very unfair and racist towards non-English workers. They have dismissed lots of non-English workers on the spot for no good reason and sometimes without any reason. A number of people witnessed what happened with Jerzy but some still work for the company and are scared to come forward to give evidence because they will be sacked or mistreated by the company after the hearing".*

31. Mr Thompson says that Mr Sywak worked for the respondent between 22 June 2018 and 14 June 2019. This is a somewhat shorter period than the year-and-a-half of employment claimed by Mr Sywak in paragraph 2 of his witness statement.

32. Mr Thompson says, in paragraph 15 of his witness statement, that, *"On 14 June 2019 Dennis informed his colleagues that he was leaving at 2.30pm as he had already done his contracted hours for the week. In fact all that had happened was that Dennis had been asked to do some overtime. This does not mean that he has permission to leave early. Overtime is exactly that, hours worked over and above his normal working hours. Staff working overtime do not have their existing hours automatically reduced as a result".* Accordingly, Mr Thompson told Mr Sywak that he needed him to stay at work until 4.30pm. In paragraph 17 of his witness statement Mr Thompson says that he told Mr Sywak that*, "if he left the site at 2.30pm I would take that as his resignation and that he would lose his job. Dennis left the site at 2.30pm regardless of my warning."*

33. Mr Thompson goes on to say in paragraph 18 of his witness statement, that *"Dennis [Sywak] did however attempt to attend work the following Monday 17 June 2019. However, at this point I informed Dennis that he was being dismissed for leaving his shift early, as I had warned him. Dennis became very angry and Dennis then gathered tins of waste paint and paint thinners and threw them over me in my office, damaging company equipment. Photographs of this incident can be seen at pages 89 to 93 of the bundle. The paint he threw is highly toxic and this was a very dangerous thing to do. If any paint had got in my eyes or mouth I could have been seriously injured."* Mr Thompson said that he is deeply offended by Mr Sywak's allegation of using a racially charged insult towards him.

34. In his case management summary of 24 June 2020, Employment Judge Little counselled caution against the Tribunal being invited to consider *"proxy"* claims of other individuals. However, as with much else in this case, a lot turns upon credibility. We therefore have to consider the competing claims of Mr Sywak and Mr Thompson a little further.

35. The Tribunal had the benefit of seeing CCTV footage of the incident which took place upon the morning of Monday 17 June 2019. The footage shows Mr Sywak and Mr Thompson exchanging words. There is also a clip which shows Mr Sywak filling a can with a liquid substance. Mr Thompson told the Tribunal that this is a by-product of the respondent's manufacturing process.

36. In oral evidence, Mr Sywak maintained that he had filled the can with water and not with paint or paint thinner. He accepted that he had thrown the liquid

over Mr Thompson. He said he had done so because he was angry after turning up for work on 17 June 2019 only to be told that he had been dismissed the previous Friday. Mr Sywak said that he had, on the Friday, told Mr Thompson to telephone him but Mr Thompson had not done so. Mr Sywak said that what had triggered his anger in particular was being called a "*Polish bastard"* when he (Mr Sywak) said that he was going to wait for Mr Ellis to turn up to discuss his job situation.

37. Miss Levene put it to Mr Sywak that there were a number of unsatisfactory elements about his evidence. These were as follows:

    37.1. In paragraph 8 of his witness statement, as originally drafted, he had said that he threw some clothes on the floor and then walked out of the building. The words "*some clothes*" was substituted for *"an empty water can"* before Mr Sywak attested as to the truth of his witness statement. It was suggested to him by Ms Levene that he had only changed his account upon seeing the video that morning. This was denied by Mr Sywak.

    37.2. Mr Sywak omitted mention from his witness statement of the fact that he threw liquid over Mr Thompson.

    37.3. Mr Sywak maintained that the water was grey and dirty. He denied that there was any paint thinner within it. However, the Tribunal had the benefit of seeing colour copies of the photographs referred to by Mr Thompson at pages 89 to 93 of the bundle. These were high resolution photographs as they were shown to the Tribunal on the respondent's solicitor's computer. The photographs show a grey or brown sludge-like appearance upon Mr Thompson's clothing and over the computers and furniture in his office. This is consistent with the liquid constituting more than simply grey water.

    37.4. The claimant's further and better particulars refer to the racist-laden insult being uttered by Mr Thompson as Mr Sywak was leaving the building whereas in oral evidence Mr Sywak has it as being uttered by Mr Thompson when Mr Sywak said he would to wait for Mr Ellis to arrive.

    37.5. There was no mention in Mr Sywak's witness statement of Mr Thompson being requested by Mr Sywak to telephone him over the weekend.

    37.6. In oral evidence, Mr Sywak had said that the reason he had to leave work at 2pm on a Friday 14 June was because his girlfriend had fallen sick and that there was some urgency to the matter. In contrast, in paragraph 8 of his witness statement, he simply refers to a "*family matter".* There was no sense of urgency conveyed in this paragraph.

38. Mr Tymosiak said, in paragraph 3 of his witness statement, that he witnessed the claimant and Mr O'Brien arguing over who was using a particular electric pallet truck. He said he returned to his work but could hear the claimant arguing with Catherine Rhodes. Mr Tymosiak was then asked to go to the canteen in order to assist *"because I am a native Polish speaker so I could translate for the claimant."* Mr Tymosiak then says:

    "(6) The claimant was told by Matthew Ellis (director) that his attitude was not acceptable. He was told he could continue working at the Sherburn site or go

home for the rest of the day. The claimant said he would prefer to go home. Jerzy seemed to be quite angry about the situation. I did my best to explain the situation to the claimant in Polish and find it very hard to believe that he could have thought he was being fired.

(7) I remember telling him specifically that he could still work for the company but that he could only do so from the other site at Sherburn. He refused to work from the other site. The claimant did not ask what Sherburn was and I got the impression he understood that this was the company's other site. This is common knowledge at the company. I never used any words that would suggest he was being fired.

(8) After the conclusion of the meeting I saw the claimant gathering his possessions and leaving the site. I do not recall seeing any violence or physical contact between the claimant and any other members of staff. I do not recall that he was followed out by a member of staff. "

39. In oral evidence, Mr Tymosiak said that he was not a professional interpreter. (Mr Clayton said that the respondent did not employ anyone in such a role). Mr Tymosiak said that he no problem with the claimant during the latter's time with the respondent and that he was a good worker. He accepted that the claimant's English was limited. Having said that, Mr Tymosiak said, *"I didn't need to translate a lot, not every word. He was able to talk."* He said that Catherine Rhodes had not shouted at the claimant. It was put to Mr Tymosiak that words had been said to the claimant to the effect *"we need to say goodbye".* Mr Tymosiak said that this had not happened. Mr Tymosiak confirmed that the claimant was angry over the episode with the truck. He denied that the claimant was angry because he had been dismissed upon the basis that this had not occurred and that being asked to work in Sherburn or go home was "*not the same as being fired."* Mr Tymosiak said he formed the impression that the option to go to work in Sherburn was for the afternoon of 13 June only and not upon a permanent basis. However, he appeared uncertain as at first, he said that he told the claimant that the move was to be permanent.

40. In his witness statement, Mr O'Brien said:

"(3) I worked with Jerzy for a couple of years, but we were on different shifts to start with so we didn't see much of each other. We were on the same shift from around February 2019. I didn't like the way Jerzy spoke to people, in my view he had no respect for anyone. It was his way or no way. If he didn't get his own way he would behave like a spoilt kid, ranting and raving but because it was in Polish I couldn't understand him, although I could tell he wasn't happy. One word he often shouted was "kurwa" which I now know translates as "whore/bitch/fuck".

(4) On 13 June 2019, I was working on the shop floor and he had begun using one of the electric pallet trucks to move some items. There are about six pallet trucks used on the shop floor and they are used by anyone and everyone when needed. The claimant came over to me and immediately started being loud and aggressive with me, stating that I was using "his" pallet truck. He was being very loud and aggressive and repeatedly told me to "fuck off". At one point he even pushed me. I turned round and asked Catherine Rhodes if she had seen this, she said yes and came over. She asked what was going on, and Jerzy was waving his hands saying "fuck off, fuck off". Catherine then

went to get Daryl Thompson who then asked what was happening. Jerzy was still "kicking off". Daryl told him to go into the canteen to calm down and went with him. This is not unusual if things sometimes get a little heated. I remember a colleague called Craig who lost his cool and was asked to do the same. A short time later, Jerzy then Daryl left the canteen. I saw Jerzy grab his belongings and leave the building with Daryl following him.

(5) After the incident Daryl and Catherine asked me what had happened so I gave them my version of events."

41. In oral evidence, Mr O'Brien said that he had worked in South Kirkby for more or less the whole of his career with the respondent. He been asked to go to work in Sherburn for half a day on one occasion. Mr O'Brien stood by his description of the claimant in paragraph 3 of his witness statement. The frequency with which the claimant uttered the word *"kurwa"* prompted Mr O'Brien to *'Google'* it. He discovered it to be a Polish expletive: (the interpreter enlightened the Tribunal about this with an explanation that *kurwa* literally means *"whore"* but now is commonly used to mean *"fuck").*

42. Mr O'Brien stood by his description of events in paragraph 4 of his witness statement. He said that while the claimant did use expletives both in English and Polish these were not directed at Catherine Rhodes or him in particular. Mr O'Brien said that the claimant had laid his hands upon him. Mr O'Brien said, *"I could have gone for assault. I didn't. It's one of those things you forget about. You crack on with your work. It's not a big thing."*

43. Mr O'Brien said that he would not have requested the respondent to take disciplinary against the claimant arising out of the incident. Mr O'Brien said that he walked away and left the pallet truck there. Mr O'Brien denied being aggressive towards the claimant. He fairly accepted that the claimant was not trying to start a fight.

44. Mr O'Brien said that as Mr Thompson was escorting the claimant from the building after the meeting in the canteen the claimant was "*shouting and bawling in Polish"*. Mr O'Brien said that he expected the claimant to return to work the next day and that he was told that the claimant had chosen not to return to work. Mr O'Brien was asked to give a contemporaneous account of matters to Catherine Rhodes straight after the incident and then by Mr Thompson after the claimant had left the premises.

45. Mr O'Brien's contemporaneous account was not reduced to writing. This in fact may be contrasted with Mr Tymosiak who sent a text to Mr Thompson on 30 October 2019 (page 97). Mr Tymosiak's text says that he was, *"present on meeting with Jerzy as a supervisor and in case he would need translating. Jerzy being told about his bad attitude and informed that he can still work for us but in Sherburn. Jerzy refused it and he said that he want to go home. That's all I remember from that meeting. Later I saw Jerzy taking his things and coming out. I didn't see any violence."*

46. In his witness statement, Mr Thompson says that he found the claimant to be *"hardworking but very territorial".* He went on to say (in paragraph 4 of his witness statement) that, "*on a couple of occasions I have had to ask Jerzy to calm down as he was aggressive when speaking to others. I was aware that he has acted aggressively before. I did not witness all of them, but on occasion*

while walking around the factory I would see him flailing his arms about and shouting in Polish".

47. He describes in paragraph 5 of his witness statement being approached by Catherine Rhodes on 13 June 2019 about the claimant shouting aggressively on the shop floor because of the issue that had arisen with Mr O'Brien and the electronic pallet truck. He says in paragraph 6 of his witness statement that the claimant "*was asked to go to the canteen by Catherine. I followed along with Suzanne Pennington (supervisor) and Matt Ellis (director). I asked for Piotr Tymosiak to be brought to the canteen so that he could translate for Jerzy if necessary".*

48. Mr Thompson says in paragraph 7 of his witness statement that he told the claimant that it was not appropriate to shout at colleagues and that the pallet trucks did not belong to any individual member of staff. He then said in paragraph 8 that, *"because Jerzy was clearly quite still very agitated, I explained that he could either go home to calm down or go to work at the Sherburn site for the remainder of the working day. This was to try and avoid any further altercations taking place. This was suggested by Matt Ellis before I spoke with Jerzy. Piotr [Tymosiak] translated this into Polish for Jerzy.* Mr Thompson says in paragraph 10 of his witness that, *"I did not say that Jerzy was being dismissed or fired or anything like that. I stated quite clearly that he was free to continue working but at our other site. I find it very difficult to understand how he could have thought he was being dismissed."*

49. In paragraph 13 of his witness statement Mr Thompson says*, "Jerzy explained (again via Piotr) that he did not want to work at Sherburn. He did not say why. I walked behind Jerzy to escort him from the premises."* He goes on to say that, "*there was no physical contact between Jerzy and me. When Jerzy first went in the canteen he already had his bag with him and his boots on. He removed his boots while we were in there. As Jerzy left the premises he threw his work boots in the wheelie bin at the exit."*

50. In paragraph 13, Mr Thompson referred to the incident with Mr Sywak. He said in the witness statement that this incident was the justification for escorting the claimant from the premises. After taking the oath but before attesting as to the truth of his witness statement Mr Thompson amended paragraph 13. Of course, the incident with Mr Sywak happened on 17 June 2019 which was after the incident with the claimant of 13 June. Mr Thompson said that this notwithstanding he has had cause to escort other employees from the premises in order to diffuse a situation.

51. Mr Thompson expressed surprise, in paragraph 14 of his witness statement, that the claimant was now claiming to have been dismissed on 13 June. In evidence given under supplemental questioning, Mr Thompson denied that he had ever said to the claimant that it was *"time to say goodbye"* or words to that effect.

52. Mr Thompson confirmed that the claimant had deposited his work boots in a wheelie bin. (The boots are the property of the employee although the respondent makes a contribution of £30 towards them).

53. In oral evidence, Mr Thompson confirmed that he was not present when the argument broke out between the claimant and Mr O'Brien and when the claimant was instructed to go to the canteen by Catherine Rhodes. It was

suggested to Mr Thompson that the episode between the claimant and Mr O'Brien was something of a storm in a tea cup, a proposition with which Mr Thompson agreed.

54. Mr Thompson says that Mr Ellis first suggested to the claimant the option of going home or going to work at Sherburn for the remainder of the day. Mr Ellis left the meeting in the canteen before that suggestion was put to the claimant by Mr Thompson. He (Mr Thompson) said that Mr Ellis would not normally become involved in workplace issues of this nature. His involvement on this day arose simply because he happened to be on the shop floor. No note was made of the meeting.

55. Mr Thompson confirmed that had the claimant accepted the offer of working in Sherburn upon the afternoon of 13 June, it would have been a temporary move and he would have been expected back at South Kirkby the next day. Mr Thompson was satisfied that the claimant understood his options which were translated by Mr Tymosiak. He believed it to be a practical arrangement as the respondent runs a minibus to Sherburn and in any case the claimant has his own vehicle. Mr Thompson 's view is that the claimant was agitated albeit that he stopped for five minutes in order to change out of his work boots into his trainers.

56. Mr Thompson fairly accepted that had words to the effect "*it's time to say goodbye"* been said then this would in the circumstances be reasonably interpreted by the claimant as a dismissal. However, Mr Thompson said that he had *"definitely not"* said those words. Mr Thompson said that Mrs Pennington had not said *"sorry George"* or words to that effect. She had simply urged upon him that he should calm down. The claimant had asked if he could stay at work until 2pm.

57. Mr Thompson fairly accepted that there was a possibility that the claimant had not understood what was meant by *"going to Sherburn*" and that it would only be a temporary solution for the rest of that working day. Mr Thompson expected the claimant to return to work the next day notwithstanding that he had deposited his boots in a wheelie bin which, as Mr Healy put it, was somewhat unusual and suggested that the claimant was not intending to return to work.

58. Mr Healy asked Mr Thompson why no effort had been made to contact the claimant when he did not return to work. Mr Thompson was of the view that it was "*not up to me to do that. Employees have to ring in if they are not coming in".* In that eventuality Mr Thompson said, matters are in the hands of the respondent's human resources department. No letter was sent to the claimant after the meeting to confirm the respondent's position nor was any telephone contact made.

59. Mr Thompson denied escorting the claimant from the premises because he had just dismissed him.

60. With reference to the incident involving Mr Sywak of 17 June 2019 Mr Thompson denied using a racially laden expletive. Mr Thompson said that he was "*disgusted at that".*

61. Mr Thompson made notes of the incidents of 13 June (concerning the claimant) and 14-17 June 2019 (concerning Mr Sywak). These are at pages 98 and 99 and are consistent with his evidence before the Tribunal.

62. Mrs Pennington said, in paragraph 4 of her witness statement, that she has *"known Jerzy since he started work with the company and have known him to lose his temper and be quite argumentative."*

63. She considered there to be nothing unusual about 13 June 2019 until the incident between the claimant and Mr O'Brien occurred. She then goes on to say in paragraph 6 of her witness statement that, *"On that day sometime before 14:30 I heard the claimant shouting at and arguing with Karl O'Brien (factory operative) over a pallet truck. Karl was acting calmly, not reacting aggressively or shouting. It was the claimant that had lost his temper. The claimant was being very loud and aggressive so Catherine [Rhodes] and I asked him to come to the canteen so that I could speak to him. I asked Daryl Thompson (production manager) to come in with us. Daryl was made aware of the incident by Catherine. I asked Daryl to come in with us as he was the manager. I then went to ask Piotr Tymosiak (factory operative) to come to the canteen so he could translate for the claimant. Jerzy did speak English but on occasion didn't seem to understand. Piotr was there to translate. I often asked Piotr to translate as his English is very good".*

64. Mrs Pennington confirms that Mr Ellis then came into the canteen. Mr Ellis was brought up to speed with events. Mrs Pennington says that, *"Matt [Ellis] suggested we could ask the claimant to work at the Sherburn site for the rest of the day so that he could be kept away from Karl whilst they both calmed down."* This passage appears consistent with the claimant's account that a discussion took place between members of management as to what to do with the claimant and that this discussion initially was about him rather than with him.

65. In paragraph 8 of her witness statement Mrs Pennington then gives an account consistent with that of the other respondent's witnesses. She said that the claimant was given the option of going to work at the Sherburn site for the rest of the day or to go home. She says that *"At no point did the claimant say he didn't understand nor did he say he didn't understand what Sherburn was. He said he was going home and collected his bag and boots from the sand area where he worked. Daryl walked behind the claimant as he left the site on his own accord. I didn't hear him saying anything to anyone as he was leaving. I did not see Daryl touch the claimant in any way as they left."*

66. Mrs Pennington confirms in paragraph 9 of her witness statement that she was approached by Mr Sywak who enquired as to the claimant's whereabouts. However, she says that it was not true that she informed Mr Sywak that the claimant had been dismissed.

67. It was suggested to Mrs Pennington that Mr Thompson told the claimant that there was a need to *"say goodbye"* and that she had said to the claimant, *"sorry George".* Mrs Pennington said that she disputed this when it was put to her by Miss Levene in supplemental questioning.

68. In oral evidence, Mrs Pennington said that both she and Catherine Rhodes told the claimant to go to the canteen. She said that the claimant had to be asked several times to go to the canteen, *"because he was waving his arms in the air and swearing, saying it was his pump truck."*

69. She confirmed that Mr Ellis had joined the meeting after she and the others had convened in the canteen. She said that she had a recollection of Mr Ellis

saying to the claimant that his options were to go to work in Sherburn or to go home. She thought that the proposal to work at Sherburn was for that afternoon only. She said that the claimant was angry and refused to go. He accused those present of being racist because he is Polish. She sought to reassure him that this was not the case.

70. In contrast to Mr Tymosiak, Mrs Pennington formed the impression that the claimant relied heavily upon him for interpretation. She expected the claimant to return to work the next day.

71. Like Mr Thompson, she witnessed the claimant changing his footwear during the course of the meeting in the canteen. She said that the meeting ended angrily as the claimant went to collect his bag from the sand area. He was *"shouting something in Polish and was escorted by Mr Thompson who followed him behind. I never saw him [the claimant] again."*

72. Mrs Pennington prepared a handwritten note of the event which is dated 24 October 2019 and is at pages 94 and 95. The handwritten note is very much in accordance with the evidence given to the Tribunal by Mrs Pennington. Mrs Pennington denied telling Mr Sywak that the claimant had been dismissed for *"being mouthy"* or making a hand gesture to demonstrate the reason for the claimant's dismissal. She said that she expected to see the claimant back to work in South Kirkby over the ensuring few days.

73. Catherine Rhodes said in paragraph 3 of her witness statement that the claimant's name had *"popped up quite a few times due to his aggressive attitude towards other colleagues."* She says in paragraph 4 that on 13 June 2019 she *"heard the claimant shouting loudly. I saw and heard the claimant acting very aggressively and loudly with Karl O'Brien. Karl appeared to be acting quite calmly but the claimant was shouting and being very aggressive. He was standing very close to Karl and shouting. Karl walked over to the area at the side of the sanding machine where there were two or three pallet trucks, Jerzy was on the sanding machine. Jerzy walked up to Karl and pushed him back with one hand telling him to "fuck off" and that he needed that pump truck."*

74. In paragraph 5 of her witness statement Mrs Rhodes says that, "*As this was not the first time the claimant had acted loudly and aggressively on the shop floor, I approached Daryl Thompson (production manager), told him what was happening and asked whether he could do something about it because it was unacceptable. Daryl stated that we should ask the claimant to go into the canteen to let things cool down and have a word with him. I believe I asked Daryl to go into the canteen. The claimant has stated that I shouted at him to do so. This is not true. I may have raised my voice slightly but this was only so I could be heard over the claimant's own shouting. I was not aggressive in any way and simply asked the claimant to go into the canteen."*

75. In oral evidence, Mrs Rhodes says that she had to ask the claimant to go to the canteen on two occasions. (She denied shouting at him five or six times as contended by the claimant in paragraph 8 of his witness statement). He walked over to where she, Mr Thompson and Mrs Pennington were standing. She said that he simply walked over to the group. In doing so he was calm. The four of them walked to the canteen. Mrs Rhodes did not witness the events in the canteen.

76. Mrs Rhodes said that she had to raise her voice because of the machinery and the extractors *"in the background."* Her evidence about background noise is corroborated by Mrs Pennington. There was no evidence that the noise was so great as to require the wearing of personal protective equipment. That said, the Tribunal accepts the respondent's evidence that the background noise would entail a need for voices to be raised.

77. Mr Ellis says, in his witness statement, that he became aware of the incident having been told of it by Mr Thompson and Mrs Pennington. Mr Ellis says in paragraph 6 of his witness statement that, *"I suggested that the claimant be sent over to work from our other location in Sherburn. The only reason I did this was to prevent any further arguments happening and allow the claimant to calm down and be away from Karl.* Mr Ellis denies being influenced by the claimant's nationality. He said, *"it is offensive to suggest that I would be influenced by the fact the claimant is Polish. Around half our workforce are Polish and I have excellent working relationships with many of our Polish employees. I have never and would never treat any employee in a different way because of their nationality. I've never been accused of being biased towards Polish employees before."*

78. In oral evidence, Mr Ellis confirmed that he is the most senior figure who is regularly working upon the shop floor. He would not normally get involved in a workplace dispute of this nature but said that he did so on this occasion because he happened to be in the area at the time. Mr Ellis' intention upon joining the meeting in the canteen was to try to diffuse the situation.

79. Mr Ellis said that he had offered the claimant the options of going home or working the rest of the day in Sherburn. Mr Ellis preferred the latter option. This was not intended to be a permanent arrangement. The claimant could have made it to Sherburn as he has his own vehicle. After a few minutes, he left the canteen to attend to other matters, leaving the matter in the hands of Mr Thompson. Mr Ellis confirmed that when he departed the meeting he could tell that the claimant remained agitated and was *"not happy".* Mr Ellis said that he had heard that the claimant had thrown his *"work clothes in the bin".* Mr Ellis said that it was no part of his plan when attending the meeting in the canteen to dismiss the claimant that day.

80. Mr Healy sought to impugn Mr Ellis' credibility upon the basis of a somewhat unfortunate posting upon Mr Ellis' Facebook account. The claimant had taken a screenshot of Mr Ellis' profile page dated 25 May 2013 (at 07:05). The photograph shows Mr Ellis standing next to a waxwork model of Adolf Hitler. Mr Ellis is smiling while making the *'Nazi salute'*: extending his right arm in the air with a straightened hand.

81. It appears that this image had a very short-lived existence as Mr Ellis' profile page. Mr Ellis produced what the Tribunal understood to be his up-to-date profile picture which was also dated 25 May 2013 but timed at 07:07. This shows an image of Mr Ellis standing with a child in what appears to be a holiday location. Therefore, the image of Mr Ellis standing next to the waxwork model of Hitler featured as his profile page for only two minutes. (That said, it must remain accessible upon his Facebook account given that the claimant had managed to obtain a copy of it).

82. The current profile picture of Mr Ellis in a holiday location is accompanied by a number of small '*thumbnail*' photographs. One of these is an image depicting

Britannia, the female personification of Britain, with the words *"Britannia Rules the Waves"* clearly visible upon the image.

83. The downloading of a photograph depicting oneself smiling next to a waxwork model of Hitler is ill-judged, the more so when shown making a Nazi salute. This is unfortunate behaviour from a senior individual within an organisation which employs many workers from Eastern Europe (whether the image is a profile picture or simply upon the Facebook account). That poor judgement is compounded when viewed in conjunction with the *Britannia* image. The Tribunal takes judicial notice that this has recently been appropriated by those promoting a nationalist ideology. Mr Ellis said that he had put it up because of the statues controversy last summer.

84. Mr Ellis protested that he is in *"no way racist"* and has many Polish friends. He is learning Polish. He fairly accepted the uploading of the photograph of himself with the model of Hitler (taken in Madam Tussauds in London) was "*not the best move in the world".* It was put to him by Mr Healy that some would find the image to be offensive. Mr Ellis replied, "*people who know me wouldn't. Those that don't maybe".* Mr Ellis will doubtless reflect upon the wisdom of these infelicitous postings, particularly given his senior position within the respondent.

85. Mr Clayton was not a witness of what occurred on 13 June 2019. He was made aware of the incident by Mr Thompson. In paragraph 6 of his witness statement he says that, *"Occasionally, rows between employees on the shop floor occur and it is not wholly unusual for them to be sent home to cool off or be asked to work from the other site, in order to diffuse any situation that has arisen."* He goes on in paragraph 7 to say that, *"My expectation was that the claimant would likely return to work the following day. It was likely that had he done so he would have faced disciplinary action over his conduct. However, the claimant did not return to work."* He says in paragraph 8 that, *"it is not uncommon for employees to "storm out" whilst they are at work. Sometimes they will come back the following day but sometimes that is the last we see them. We often have a high level of unexpected absence on the shop floor so we are able to cover any absence quite easily by moving employees around, at least in the short term. This meant that for a few days at least, we were waiting to see if the claimant would return having had some time to "cool off".*

86. Mr Clayton then says that two or three days after 13 June 2019 he received a call from the Citizens Advice Bureau. Mr Clayton says that he told the individual with whom he spoke that the claimant had not been dismissed and that he was welcome to come back. Mr Clayton then refers to the letters to which the Tribunal referred in paragraph 20 above. He explains that the P45 was processed upon the basis that the claimant had failed to return to work after 13 June 2019 and there was no indication that he would return.

87. Mr Clayton also explains the provenance of the statements from the employees at paragraphs 94 to 99. He says that they were obtained upon receipt of the claimant's Employment Tribunal claim. These consist of the notes made by Mrs Pennington, Mr Tymosiak, Mr Thompson and Vicky Young.

88. The claimant says in paragraph 20 of his witness statement that the respondent regularly dismisses those who are of Polish nationality and those of other nationalities who are not British "*on the spot with no process or right*

of appeal". He gives a number of examples in his further and better particulars of claim. Mr Clayton seeks to deal with these.

89. Before doing so, he makes the general point in paragraph 21 of his witness statement that the respondent has a high turnover of staff. Between 13 June 2017 and 23 March 2020 249 dismissals were recorded. 93 of those (37.3%) involved Eastern European nationals from Poland, Latvia and Romania. In the two years' period prior to the claimant's dismissal 156 dismissals were recorded. 54 of those (28.9%) involved employees who were foreign nationals (being from Poland or other Eastern European countries). Around 42% of the workers on the shop floor where the majority of the dismissals (206 out of the 249) occur are foreign nationals. Therefore, statistically, the respondent dismissed less foreign national employees than British employees taking into account their respective proportions of the workforce. *(The Tribunal observes that 54/156 is 34.6% and not 28.9%. Nonetheless, Mr Clayton's point still stands).*

90. Mr Clayton says that the respondent has a policy of dismissing anybody with less than two years' service without a formal disciplinary process because of their inability to claim unfair dismissal. Mr Clayton's case is that length of service and not race or nationality is the point of differentiation between employees. He said that there is no point of differentiation between the employees by reference to race, sex or any other protected characteristics.

91. He said that the canteen, where the meeting took place, is frequently used for informal meetings. It is the *"closest empty space available. There is no office to go to."* Mr Clayton corroborated the evidence of Catherine Rhodes to this effect. He then dealt with the sample cases cited by the claimant in support of his case of less favourable treatment of foreign nationals.

92. At the first case cited by the claimant in support of his case concerns a Moldovan employee. The leavers' form dated 14 June 2019 for her records that she resigned her position as she did not like to be moved between jobs. She only had one month of service as at the date of her resignation.

93. The second cited by the claimant in his further and better particulars concerned Mr Sywak. The Tribunal has already recorded the evidence which it heard about the circumstances of Mr Sywak's dismissal.

94. The third case cited by the claimant concerned a Romanian couple. Mr Clayton refers to the leavers' forms at pages 83 and 84. This records that they both resigned because they did not wish to move around the sites. Neither of them had two years of service. The claimant's informant, according to the further and better particulars, was Mr Sywak whereas in evidence he said he was told of it by the husband, John.

95. The next case cited by the claimant concerns a female Polish employee. Mr Clayton, by reference to the record at page 85 of the bundle, gives evidence that she was dismissed for poor performance. The claimant says that when the employee presented a fit note, Mr Clayton told her to "*fuck off".* Mr Clayton says that, *"it is ridiculous and offensive to suggest that as a HR manager with over 15 years' experience, I would treat any employee so rudely."* Further, in evidence before the Tribunal, Mr Clayton said that the respondent now employed her son.

96. The fifth allegation raised by the claimant concerns a female Romanian employee. Mr Clayton refers to page 88 which is a letter addressed to her confirming her dismissal because of poor performance.

97. The claimant cites a sixth case involving a male Romanian employee called Joseph and a Romanian female employee whose name is unknown to the claimant. The claimant says that both of them were dismissed for no reason. Mr Clayton asserts his records and was unable to find any information to assist the Tribunal with that aspect of the claimant's claim.

98. The claimant maintained, about the Moldovan employee mentioned in paragraph 87, that she had been mistreated in a number of ways by Vicky Young. The claimant said that he had a message from the Moldovan employee on his telephone. However, this was not produced for the benefit of the Tribunal.

99. The claimant appeared to distance himself from the contention, in paragraph 26 of his witness statement, that Mr Clayton used offensive language to the female Polish employee referred to in paragraph 93. The claimant said, "*I'm not claiming that something was said to her.*" This is to be contrasted with the evidence given by the claimant that an expletive was uttered by Mr Thompson towards her (contained in paragraph 27 of the claimant's witness statement) and in his further and better particulars. He said in his further particulars that he had learned of this from an ex-colleague named Tomek but in evidence seemed not to know of this individual and said that his informant was called Emil.

100. The claimant said that in all six of these cases, the Eastern European workers had been replaced by a *"white British national".* He gives this account in paragraph 20 of his witness statement. The claimant said that he was informed of this by Emile. The claimant said that he had lost contact with this individual. It was pointed out by Miss Levene that the first time upon which the individual's name had been mentioned by the claimant was during the course of the hearing.

101. The claimant also gave evidence, in paragraph 21 of his witness statement, that the respondent only engages white British staff on the day shift and the night shift is made up of non-British employees. In evidence given under cross-examination the claimant said that he did not claim this to be the case. He said that his own account in paragraph 21 of his witness statement was not true.

102. If it were needed, Mr Clayton gives evidence in paragraphs 26 to 28 of his witness statement in which he rebuts the claimant's assertion that the allocation of the day and night shifts are determined by nationality. In light of the claimant's acceptance that what he said in paragraph 21 of his witness statement is untrue, the Tribunal need not concern itself with those passages from Mr Clayton's witness statement.

103. Mr Clayton also said that a number of Eastern European workers had risen to management roles, including the financial controller who is Polish.

104. An extract from the respondent's handbook was in the bundle at page 253. This is headed *'Equal employment and non-discrimination policies.'* Mr Clayton said that the policy was in place before he joined the respondent six years ago. It was reviewed by him in October 2020. There is no staff training

on the policy. Indeed, Mr Thompson and Mr Ellis said that they had had no equal opportunities training during his time with the respondent. Mr Clayton and Mr Ellis both confirmed that signage is in English and Polish.

105. Mr Clayton was asked about the respondent's inaction when the claimant did not turn in for work on 14 June 2019. He confirmed that the respondent would not routinely chase employees as cover is readily available. (This evidence may be contrasted with that of Mr Thompson in paragraph 16 of his witness statement that he was reluctant to sanction Mr Sywak's departure because of difficulty in arranging cover. Further, in the respondent's dismissal records commencing at page 51 there are instances of calls being made to some (but certainly not all) absent employees).

106. Mr Clayton said that he took no steps to investigate the claimant's allegations of race discrimination against him and others set out in the letter of 2 July 2019 at page 79.

107. Upon the basis of the evidence heard, the Tribunal is now in a position to make the following additional factual findings. The first of these is that the claimant was thought of as a good worker. However, he also had a flawed temperament. The Tribunal refers in particular to paragraphs 39, 40, 45, 46, 48, 62 and 73.

108. The palm trucks are not assigned to any individual. An argument ensued on 13 June 2019 when Mr O'Brien sought to take the truck being used by the claimant. While the trucks do not *"belong"* to any particular employee it was perhaps unfortunate that Mr O'Brien took the one being used by the claimant. Whatever the rights and wrongs, an argument ensued. This was witnessed by Mrs Pennington and Mrs Rhodes both of whom heard raised voices. Mrs Rhodes witnessed the end of the altercation from which it seemed that the claimant was behaving inappropriately, in particular by pushing Mr O'Brien. For his part, Mr O'Brien did not consider the matter to be particularly serious notwithstanding the physical contact.

109. The claimant denies behaving aggressively or inappropriately. The claimant's account is against the preponderance of the evidence from the respondent to the contrary.

110. The claimant's credibility is, unfortunately, tainted by inconsistencies in his account. Some of these are set out in paragraph 16. What weighs with the Tribunal is the claimant's disavowal of paragraph 12 of his witness statement cited above (in paragraph 13 of these reasons) and his introduction of what was tantamount to a new case that at the meeting in the canteen the claimant was told that the respondent needed *"to say goodbye".* This is not the only example of the claimant disavowing his own evidence in chief. For example, there is the unsatisfactory evidence from the claimant over the sequence of events post-dismissal (in paragraphs 21-23 above) and the claimant distancing himself from his own evidence around the comparator cases (for example in paragraphs 94, 99 to 101).

111. These unsatisfactory aspects of the claimant's evidence tainted the credibility of the claimant's account. In contrast, the evidence from the respondent was consistent and straightforward. That of Mrs Pennington, Mr Tymosiak and Mr Thompson were supported by accounts given before they prepared their witness statements (at pages 94 to 95, 97 and 98 to 99 of the bundle).

112. The unsatisfactory nature of the claimant's account of matters is such that generally, where there is conflict between the claimant and the respondent, the respondent's version of events is preferred. Accordingly, the Tribunal finds that the claimant did behave inappropriately on the shop floor on 13 June 2019. There was cause for Catherine Rhodes and Suzanne Pennington to take the claimant away from the situation to diffuse the situation. There is, we think, much in Miss Levene's point that they would hardly have done so without cause. They would not have had time to waste on a busy day.

113. The canteen is regularly used as a break out area (paragraphs 40 and 85 and 91). Summoning the claimant to the canteen was in accordance with the respondent's routine practice where matters become heated.

114. Mrs Rhodes had to raise her voice to ask the claimant to go to the canteen. She had to do so because of the background noise caused by the respondent's operation. At the point at which the claimant was asked to go to the canteen, he was calm (paragraph 75).

115. There was a discussion in the canteen between members of the respondent's management about how to deal with the situation. Initially, that discussion took place in front of the claimant but did not involve him (paragraphs 48, 54 and 77).

116. It is inherently unlikely that following the discussion between management, no one would have turned to the claimant to address him. It is against the probabilities that, having been left in charge of the situation by Mr Ellis, Mr Thompson would not have spoken to the claimant about the situation. We therefore reject the claimant's evidence that no one spoke to him directly about the matter. We do however accept that the claimant will have found it difficult to follow the conversation between management due to the language barrier.

117. The Tribunal accepts that the respondent's witnesses subjectively did not intend to dismiss the claimant and that their intention was for the claimant to go to work in Sherburn for the rest of the day or alternatively to go home for that day and was expected to return the next day. The respondent had a contractual entitlement to ask the claimant to go to work in Sherburn. Other employees had been asked to go to work there in the past when such a situation arose (see for example paragraphs 41 and 51).

118. The respondent's subsequent dealings with the claimant and the claimant's representative is consistent with the respondent's case that the claimant was not dismissed and that the respondent did not intend to dismiss him. We refer in particular to paragraphs 18 to 27.

119. A difficulty for the respondent is that the claimant formed a different view. His belief that he had been dismissed was relayed consistently to the respondent in the subsequent dealings and correspondence.

120. We accept that the claimant was reliant upon Mr Tymosiak for assistance. The Tribunal was struck by Mr Tymosiak's equivocation as to whether or not the claimant moving to Sherburn was to be a permanent move (paragraph 39).

121. For the reasons given in paragraph 111, the Tribunal rejects the claimant's case that Mr Thompson said to him words to the effect that the respondent *"needed to say goodbye"* and that Mrs Pennington said, *"sorry George".* It follows, therefore, that the height of the claimant's case on the facts as found

by the Tribunal is that the respondent effectively said to him "*go home*" or *"move to Sherburn permanently".* The Tribunal finds that the claimant was told to go home or go to work in Sherburn.

122. The Tribunal accepts Mrs Pennington's evidence that she did not say to Mr Sywak that the claimant had been dismissed. The Tribunal found Mr Sywak to be an unreliable witness for the reasons given in paragraph 29 to 37. The Tribunal, for this reason, rejects Mr Sywak's evidence that Mr Thompson used foul language towards him.

123. There is no satisfactory evidence that the respondent treats foreign workers differently from British workers. Mr Clayton satisfactorily explained away all of the instances of comparator cases cited by the claimant. The respondent has a mixed workforce. The statistical analysis shows there to be no prevalence of less favourable treatment of Eastern European workers when compared with British workers. It is striking that some of the Eastern European workers have risen to management positions. There is no evidence that Eastern European employees are targeted for unfair or discriminatory treatment. The point of distinction is length of service and not nationality or race.

124. All of this being said, there is material from which the Tribunal may draw an inference against the respondent. The Tribunal formed the impression that the respondent only pays lip service to the equal opportunities policy. This was not reviewed after 2014 until Mr Clayton did so in October 2020. There was no evidence that there had been any active consideration of it before then for a period of some six years. There was no evidence that the respondent's senior management had any equal opportunities training. Mr Clayton did not investigate the allegations of race discrimination raised by the claimant.

125. These features against the respondent need to be weighed in the balance along with Mr Ellis' somewhat unfortunate Facebook postings. The Tribunal rejects Miss Levene's submission that Mr Ellis pays little attention to his Facebook account. This is at odds with his uploading the *'Britannia'* image in response to the statue protest events of last summer. Her submission that Mr Ellis wished to show-off his slimmed down physique is unconvincing. There was no need for him to adopt such a controversial way to so do.

126. However, weighing all of the factors in the balance, the Tribunal determines there to be no structural or institutional discriminatory regime against foreign workers. The absence of equal opportunities training and serious engagement with the equal opportunities policy must be weighed against the respondent's practice *"on the ground".* Such includes the promotion of foreign workers to managerial positions, the absence of any imbalance of treatment and Mr Clayton's satisfactory explanation around the comparator cases cited by the claimant.

127. Mr Ellis' business regime may be considered to be at odds with the personal views apparently conveyed in his Facebook postings. Given the non-discriminatory regime operated by the respondent, the Tribunal accepts Mr Ellis' account that those who know him would not consider him to have racist views or opinions. However, he may wish to reflect upon the difficulties to which certain of his postings have gave rise in the respondent's defence of the claimant's discrimination complaints.

The issues in the case

128. The Tribunal now turns to a consideration of the issues in the case and the relevant law. The issues are set out in the case management order of Employment Judge Davies sent to the parties on 26 February 2020. These are as follows:

“*Unfair dismissal*

1.1. Was the claimant dismissed on 13 June 2019? The claimant does not say that he was dismissed on any other occasion. The respondent says that the claimant was not dismissed. It accepts that if the Tribunal finds that he was dismissed on 13 June 2019, that would have been unfair.

2. Direct race discrimination

2.1. Did the respondent dismiss the claimant?

2.2. Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant’s.

2.3. If so, was it because of race or nationality?

3. Harassment

3.1. Did the respondent do the following things on 13 June 2019:

3.1.1. Mrs Rhodes approaching the claimant and shouting at him that he should go to the canteen.

3.1.2. Mr Thompson telling the claimant that he must go home or go to Sherburn.

3.1.3. Mr Thompson grabbing the claimant’s top and escorting him from the building; and/or

3.1.4. Dismissing the claimant with no procedure.

3.2. If so, was that unwanted conduct related to race?

3.3. Did the conduct have the purpose of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.4. If not, did it have that effect? The Tribunal will take into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. “

129. The first limb of the harassment complaint in paragraph 3.1.3 above is not pursued by the claimant. Accordingly, the third harassment complaint is only that Mr Thompson escorted the claimant from the building on 13 June 2019.

130. Employment Judge Davies’ list of issues then goes on to consider issues of holiday pay and remedy. The holiday pay claim was withdrawn by the claimant upon the respondent remitting the outstanding sum to him. Remedy issues are otiose in the light of the Tribunal’s judgment and need not be set out here.

The relevant law

131. The Tribunal now turns to a consideration of the relevant law. By section 94 of the Employment Rights Act 1996, an employee has a right not to be unfairly dismissed by the employer. Pursuant to section 95 of the 1996 Act, an employee is dismissed by the employer if (amongst other things) the contract under which he or she is employed is terminated by the employer (whether with or without notice).

132. For the purposes of section 95 of the 1996 Act, a dismissal may also arise where the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct. This is known as constructive dismissal.

133. The claimant does not pursue a constructive unfair dismissal claim. It is his case that the employer dismissed him. (This is known as an express dismissal). It is for the claimant to show that the respondent dismissed him. If the claimant is unable to satisfy the Tribunal that he was expressly dismissed then the unfair dismissal complaint will fail.

134. As Miss Levene said in paragraph 3 of her written submissions, *"It is a simple fact of employment life that there might be circumstances when parties will often not be acting or speaking with legal clarity or calmness".* In disputed dismissal cases, it is (as she says in paragraph 4 of her submissions) *"important to construe the language used against the relevant context and industry background."*

135. The law draws a distinction between unambiguous statements and ambiguous statements. Mr Healy's and Miss Levene's written submissions are at one upon the question of the appropriate tests to apply.

136. If the words spoken were unambiguous then one starts from the subjective position that the speaker has to take the consequences of clear words taken at face value. This position is subject to an exception if there are *"special circumstances"* when the words were uttered, in which case a more objective approach may be taken to see what was reasonably meant. In short, therefore, unambiguous words are to be taken at face value unless a special circumstance (such as duress or words spoken in the heat of the moment) arises.

137. If the words are ambiguous, then the test is how a reasonable listener would have construed the words used in all the circumstances of the case. This is an objective test. An objective view is to be taken of the statements uttered.

138. Should the claimant succeed in showing that he was dismissed by the respondent, then the complaint of unfair dismissal will succeed. This is because it is for the respondent to show a potentially fair reason for the dismissal of the employee. In this case, the respondent advances no fair reason for the claimant's dismissal. Such would, of course, be contrary to the respondent's case that he was not dismissed. Therefore, the unfair dismissal complaint will succeed as no fair reason is advanced by the employer for the dismissal of the employee (should such be established).

139. By section 13 of the Equality Act 2010, direct discrimination occurs where because of a protected characteristic an employee is treated less favourably by the employer than the employer treats or would treat others in the same or similar circumstances. The less favourable treatment must be because of a protected characteristic. In this case, the relevant protected characteristic is race (being the claimant's Polish nationality).

140. It is for the claimant to show a *prima facie* case that he was less favourably treated by the respondent in comparison to real or hypothetical comparators in the same or similar circumstances and that the reason why he was less favourably treated was because of Polish nationality.

141. Direct discrimination is unlawful in the workplace pursuant to Part 5 of the 2010 Act. By section 39(2) an employer must not discriminate against an employee by (amongst other things) dismissing the employee.

142. By section 26 of the 2010 Act, an employer harasses an employee if the employer engages in unwanted conduct related to a relevant protected characteristic and that such conduct has the purpose or effect of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Harassment is made unlawful in the workplace pursuant to section 40 of the 2010 Act.

143. If the Tribunal concludes that the conduct was undertaken for the purpose of violating the employee's dignity or creating an intimidating *etc* environment for the employee, then harassment will be established.

144. However, if the Tribunal decides that such conduct was not done with that purpose but had that effect then the Tribunal must decide whether it was reasonable for the employer's conduct to have that effect upon the employee. This is an objective test. The employer's conduct will only be considered as having that effect upon the employee if it is reasonable for the conduct to have that effect (taking into account the employee's perception and the circumstances of the case).

145. Therefore, in order to decide whether conduct had the proscribed effect, the Tribunal must consider whether the claimant perceived himself to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect taking into account all of the circumstances.

146. Again, it is for the claimant to show a *prima facie* case that he was subjected to harassment related to Polish nationality. The test of conduct of being *"related"* to a protected characteristic is wider than the test for direct discrimination which requires treatment *"because of"* a protected characteristic.

Conclusions

147. We now turn to our conclusions. We shall firstly consider the unfair dismissal complaint.

148. The claimant's case (as presented in evidence) was that the respondent (through Mr Thompson) said to him that he needed *"to say goodbye"* and that this was followed up by Mrs Pennington saying, *"sorry George".* The Tribunal has found as a fact that these words were not said by Mr Thompson and Mrs Pennington. (Had they been, then we would have been in little doubt that

the words were unambiguous. *"We need to say goodbye"* has a permanence about it such that at face value they would have constituted words of dismissal. The follow up sentiment *"sorry George"* serves to reinforce the message of permanent severance).

149. However, on the Tribunal's findings, these words were not said. The question that arises therefore is how a reasonable listener would have construed the words used at the meeting in the canteen.

150. There is merit in Mr Healy's observation, in paragraph 1.2 of his written submission, that, *"the task of resolving the key factual dispute is made doubly difficult by the fact that the claimant speaks very little English and some of what the respondent's staff were saying to him in the canteen was translated by an unofficial translator whose command of English is also limited. The Tribunal may find that it is quite possible that what he said to the claimant was different to what the respondent's staff had intended to be told to the claimant but what is important is the language spoken to the claimant and his understanding of that. Would a Polish speaker reasonably interpret what he was being told as a dismissal?"*

151. The Tribunal agrees with Mr Healy's submission (in paragraph 1.3) that this is a problem of the respondent's own making. (The Tribunal would not go so far as to say that the respondent ought to permanently employ professional interpreters. It is of course no part of the Tribunal's function to direct how the respondent should carry out its business. That said, the potential for misunderstanding is great in circumstances such as presented in this case. The Tribunal tentatively suggests that the respondent may consider the use of freelance professional interpreters from time-to-time as and when such circumstances arise. Misunderstandings are an undesirable feature where an individual's job is at stake).

152. It is, we think, significant that Mr Tymosiak equivocated (when giving evidence before the Tribunal)) as to whether he had made clear to the claimant that the proposed move to Sherburn was permanent or temporary. The prospect of the move being permanent was mooted. Upon this basis, the Tribunal determines that a reasonable listener with limited English would reasonably interpret what was being said to him as presenting a choice of a permanent move to Sherburn or going home.

153. In our judgment, a reasonable listener in these circumstances would have understood that continued employment in South Kirby was off the table. That being the case, being invited to *"go home"* may be have reasonably been interpreted to be a proxy for dismissal and *"going to Sherburn"* a proxy for remaining in the respondent's employment.

154. Essentially, in our judgment, a reasonable listener with limited English would have interpreted the words used at the meeting in the canteen both as words of dismissal <u>and</u> as words of continued employment with the respondent but in a different location with the choice of what to do being that of the claimant. The respondent had a contractual right to require the claimant to re-locate to Sherburn. Mr Healy is correct to say that a mobility clause is usually coupled with an implied obligation to give reasonable notice of any move. In our judgment, the claimant was given reasonable notice. It was practicable for him to work in Sherburn. He had his own vehicle and in any case the respondent runs a minibus between the locations.

155. The essential question that arises is *"who really ended the contract of employment?"* On any view, it is difficult to see how "*be dismissed or stay in our employment"* can constitute unequivocal words of dismissal such that the employer had ended the relationship. This point caused Mr Healy some difficulty during the course of closing submissions when asked to address it.

156. Here, there were no unambiguous words of dismissal. There was ambiguity about the respondent's intentions (largely caused by the language barrier). A reasonable listener would have interpreted the words used by the respondent as effectively a choice between continued employment or dismissal. The position as reasonably understood by the claimant was one of ambiguity and equivocation on the part of the employer.

157. In those circumstances, in our judgment, the claimant resigned his position. He deposited his work boots in a waste bin. This conveyed the message that the claimant considered the employment relationship at an end. He did not return to work the next day or indeed at any point. In our judgment, by his conduct, the claimant resigned from his position and was not dismissed.

158. It follows therefore, that the complaint of unfair dismissal fails. We now turn to the claimant's complaints brought under the 2010 Act.

159. The complaint of direct race discrimination must fail. This is because the respondent did not dismiss the claimant. That is the only complaint of direct discrimination. It must fail upon the facts given the Tribunal's findings that no dismissal in fact occurred.

160. We now turn to the harassment complaints. The first of these is about Mrs Rhodes' actions in approaching the claimant and shouting at him that he should go to the canteen.

161. The Tribunal agrees that this is unwanted conduct. On any view, an employee would not wish to be shouted at and summoned to what is effectively an *ad hoc* disciplinary meeting. The Tribunal accepts that Mrs Rhodes did not shout at him with the purpose of violating the claimant's dignity or creating an intimidating *etc* environment for him. Her purpose was to get the claimant to go to the canteen. To convey her intentions, she had to raise her voice. However, we agree with the claimant that given all the circumstances her conduct reasonably had that effect. Being shouted at in the presence of other employees was humiliating for the claimant such that he perceived himself to have suffered the effect in question. We also hold that it was reasonable for the conduct to have that effect given the environment in which the words were spoken.

162. The crucial question is whether Mrs Rhodes' conduct in shouting at the claimant was related to Polish nationality. We have found as a fact that Mrs Rhodes shouted to make herself heard above the background noise of the respondent's operation. She had good cause to require the claimant to go to the canteen. It was common practice for the respondent to take employees there as a safe space in order to diffuse volatile situations. An inference favourable to the respondent is drawn from our findings about the way in which the respondent treats its foreign employees.

163. In those circumstances, therefore, the Tribunal determines that Mrs Rhodes' conduct was not in any way related to Polish nationality. It related to the need to deal with a volatile situation. This limb of the harassment complaint therefore fails.

164. The second limb is that Mr Thompson told the claimant that he must go home or go to Sherburn. We find as a fact that Mr Thompson did say these words. We accept that this was unwanted conduct. The claimant wanted to stay until 2pm in order to finish his shift.

165. We agree with the claimant that subjectively he perceived Mr Thompson's words to be a violation of his dignity or the creation of an intimidating *etc* environment. He found himself facing an *ad hoc* disciplinary process in the presence of senior members of the respondent's organisation. The claimant was struggling to follow the conversation. In our judgment, it was reasonable for that conduct to be regarded as having the effect of violating, dignity or creating an adverse environment for him. The claimant was being removed from his duties there and then and presented with a choice, against his will, of going home or moving to a workplace which is18 miles away.

166. Again, the key question is whether Mr Thompson's conduct was related to Polish nationality. For the same reasons, favourable inferences are drawn in favour of the respondent against the claimant's case. The Tribunal finds that Mr Thompson's instruction was not related in any way to Polish nationality but rather was related to the claimant's conduct on 13 June 2019. We have found that the claimant was behaving inappropriately. We have determined that the respondent was bound to take steps to deal with the matter. There is no evidence that a British worker behaving in the same way would have been dealt with any differently. In short, Mr Thompson's actions were a diffusion technique and not related to race.

167. The third limb of the harassment complaint is that Mr Thompson escorted the claimant from the building. On any view, this is unwanted conduct. No employee would relish being escorted from the premises in the presence of workmates. For that reason, there was a violation of the claimant's dignity and the creation of an intimidating *etc* environment for him. To be followed out of the workplace by management in circumstances in which it was plain that the employee is not returning to their workstation is inevitably a humiliation for the employee.

168. Again, the key question is whether this related to the claimant's nationality. This limb of the harassment complaint must fail for the same reason as the second limb. It was a diffusion technique. Mr Thompson had seen the agitated state of the claimant. Mr Thompson was left with no choice other than to ensure that the claimant left the premises without further incident. Mr Thompson's conduct in escorting the claimant from the premises was therefore not related to race but rather was related to the unfortunate events of that day.

169. The fourth limb of the harassment complaint must fail as we have found as a fact that the claimant was not dismissed.

170. It follows therefore that all of the claimant's complaints fail and stand dismissed.

171. By way of concluding remarks, it has to be said that the respondent did not help itself in this situation. We have observed that there is evidence within the bundle of the respondent chasing absent employees. It is surprising that the respondent did not write to the claimant when he failed to turn in to work on 14 June 2019 or at least contact him to ascertain the position. This is unfortunate given the general view that the claimant was a good worker. The respondent's management must have known that the claimant had limited English. Indeed, that was the whole purpose of involving Mr Tymosiak. The respondent therefore ought to have been aware of the scope for misunderstanding on the part of the claimant. It is unfortunate that the respondent did not clarify its position until after the claimant had taken the initiative to involve a representative and make contact with the respondent. The respondent's poor management of the situation perpetuated the claimant's misunderstanding of the position which could have been corrected by proactive and timely intervention. Such may have nipped in the bud the claimant's understanding of the position, secured his return to work and ultimately avoided the matter reaching Tribunal. Doubtless, the respondent will reflect on these remarks for the future.

Employment Judge Brain

Date: 17 February 2021