**Case Numbers: 2200497/2020**

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON CENTRAL**
**BEFORE:** **EMPLOYMENT JUDGE ELLIOTT**
**MEMBERS:** **MS C BRAYSON**
**MR S GODECHARLE**

**BETWEEN:**

**Mr A Zielinksi**

**Claimant**

AND

**Crystal Units Ltd**

**Respondent**

**ON:** **8, 9, 10, 12, 17, 22 and 24 February 2021**
**IN CHAMBERS ON:** **25 and 26 February 2021**
**Appearances:**
**For the Claimant:** **Mr M Wiencek, consultant**
**For the Respondent:** **Ms H Platt, counsel**
**Interpreter in the Polish language:** **Ms M Broka**

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for whistleblowing detriment, automatically unfair dismissal, unfair dismissal and wrongful dismissal fail and are dismissed.
2. The claim for holiday pay is dismissed upon withdrawal.

## REASONS

1. By a claim form presented on 7 February 2020 the claimant Mr Adam Zielinski brings claims for unfair dismissal including automatically unfair dismissal for whistleblowing; detriment for whistleblowing and wrongful dismissal being a breach of contract claim for notice pay.

2. The claimant worked for the respondent as a machine operator. His dates of service were from 21 May 2007 to 10 December 2019.

## This hearing and the time estimate

3. The hearing was originally listed to take place in October 2020.

4. It was clear to the tribunal that with potentially 10 witnesses, a bundle of 664 pages, tribunal reading time, closing submissions and the additional time that would be needed for interpretation in Polish there was no prospect of this hearing being concluded in the 3 days allocated. The parties agreed. For reasons which we expect related to the pandemic, this case had not had a separate case management hearing which would have identified this at an earlier stage. The parties had not raised the matter.

5. The parties agreed and they preferred to go part heard and find additional dates rather than postpone the full hearing to a date many months ahead. The hearing took 9 days of tribunal time.

## This CVP hearing

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

7. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

8. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance. If any person "dropped out" of the hearing temporarily we waited for them to rejoin and stopped the hearing in the meantime, making sure that they updated on anything that they might not have heard.

9. The participants were told that it was an offence to record the proceedings in any way.

10. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials. We were satisfied that none of the witnesses were being coached or assisted by any unseen third party while giving their evidence.

## The issues

11. There was an agreed list of issues from the parties which was discussed and clarified with the parties at the outset of the hearing as it required some refinement. The issues had been agreed based on the law as it stood prior to the 2013 amendments to the whistleblowing legislation, so had to be amended to reflect the current law.

<u>The disclosures</u>

12. Did the claimant make a qualifying disclosure by:

    a. His representative's letter dated 28 October 2019 paragraph16 grounds of complaint; page 191. The respondent accepted that this was a protected disclosure on health and safety grounds only. It was not accepted as a protected disclosure in relation to any legal obligation or concealment.
    b. By a disclosure of information at a hearing on 10 October 2019. The claimant says he used the words at paragraph 7.2 of paragraph 4 of his Grounds of Complaint (bundle page 19): "*Non-compliance of the health and safety rules further to working on the factory floor without the required PPE. Furthermore, refusing to wear the PPE when requested to do so by the Health and Safety & Environmental Assistant. This is a serious health and safety violation*" and also the words at paragraph 8.2 (bundle page 19-20) "*He extensively explained why he had not worn the helmet on 1 October 2019 and whey he could not initially comply with Cornel's request to put the helmet on. He pointed out that other work colleagues in the same or similar situation (eg whilst at work and/or on the factory floor) did not wear PPE that they were treated differently (ie not subjected to any disciplinary sanctions). The respondent acted dishonestly. The claimant also disclosed instances of various breaches of H&S rules and procedures in the workplace, including by Mr Patel (Factory Supervisor) and Mr Hrisca (H&S Assistant). The thread the respondent tried to omit or belittle as allegedly irrelevant."*

13. In the reasonable belief of the claimant did the disclosure(s) tend to show that the health and safety of any individual has been, or is being or is likely to be endangered and/or that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and/or that any of the above matters has been, is being or is likely to be deliberately concealed? (Section 43B(1) ERA 1996 subsections (b), (d) and (f)).

14. Was any such disclosure made in the public interest?

15. For the purposes of remedy only was the disclosure made in good faith, such that if it was not, to what extent should any award be reduced by the tribunal if it considers it just and equitable to do so, by up to 25% (section 49(6A) ERA 1996). There is no requirement for good faith at the liability stage.

Whistleblowing detriment

16. Was the claimant subjected to detriment on the ground that he had made a protected disclosure? The claimant alleges that he was subjected to the following detriment:

    a. his working time was reduced and he was transferred to a different place of work (paragraph 48 Grounds of Complaint).
    b. Being subjected to further disciplinary proceedings.

c. Being issued with a final warning which was upheld because of his disclosures on 10 October 2019 and 28 October 2019.

Unfair dismissal and automatically unfair dismissal

17. The parties agree that the reason the respondent gave for dismissal was gross misconduct. The date of dismissal was 10 December 2019, the claimant was informed of the decision in writing. This is a potentially fair reason pursuant to section 98(2)(b) Employment Rights Act 1996 (ERA).

18. The issues for the tribunal are therefore (taken from ***British Home Stores Ltd v Burchell 1980 ICR 303***):

    a. Did the respondent reasonably believe that the employee claimant had committed gross misconduct?
    b. Did the respondent have reasonable grounds upon which to sustain that belief?
    c. At the stage at which it formed that belief on those grounds, had the respondent carried out as much investigation into the matter as was reasonable in all the circumstances?

19. Did the respondent act fairly in dismissing the claimant for that reason (i.e. the reason shown by the respondent) having regard for example to the procedures it followed?

20. Was dismissal, if found to be misconduct, within the range of responses of a reasonable employer pursuant to section 98(4) ERA, having regard to: the circumstances, including the size and administrative resources of the employer; and to equity and the substantive merits of the case.

21. Was the reason, or the principal reason for the dismissal, that the claimant made a protected disclosure?

22. The claimant appealed against the final warning dated 22 October 2019. The dismissal was based, in part, on that warning. Was the warning inappropriate or unfair?

23. In the event that the dismissal is found to be procedurally or substantively unfair, did the claimant contribute to his dismissal by his conduct (100% contribution) and/or had a fair procedure been followed, would he have been dismissed in any event and if so when (the *Polkey* argument)?

Wrongful dismissal

24. Did the claimant's act of alleged gross misconduct constitute a repudiatory breach of contract justifying summary dismissal?

25. Is the claimant entitled to his notice pay (12 weeks?)

Holiday pay

26. There was a claim for holiday pay, this was withdrawn by the claimant.

Remedy

27. To what compensation is the claimant entitled if any?

28. Did the claimant contribute to his dismissal by his conduct? If so to what extent?

29. Should there be a *Polkey* reduction? If so by how much?

30. Should there be an injury to feelings award? If so in what amount?

31. Should there be any adjustment for any unreasonable failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

**Witnesses and documents**

32. For the claimant the tribunal heard the claimant himself. The tribunal also had witness statements for the claimant for two former employees of the respondent, Mr Marcin Watly and Mr Daniel Panocha, who were involved in disciplinary investigations and from his partner Ms Edyta Kuras, who was his companion at formal hearings. Counsel for the respondent said that she had no cross-examination for these three witnesses so their evidence was accepted as unchallenged.

33. For the respondent the tribunal heard from five witnesses:

    a. Mr Vijay Halia, Director and grievance officer
    b. Mr Pankaj Gorsia, Director, appeal officer on disciplinary 1 and dismissing officer
    c. Mrs Indira Halai, investigating officer, first disciplinary, HR and Health and Safety officer
    d. Mr Vikas Mehta, legal consultant, appeal officer on the final written warning and grievance appeal officer
    e. Mr Gary Self, a barrister and the appeal officer on dismissal.

34. There was a witness statement from Ms Darshana Gorsia, an administrative officer and the investigating officer on disciplinary 2. The respondent made a decision not to call Ms Gorsia. We could therefore only attach limited weight to this evidence as the claimant did not have the opportunity to cross-examine her.

35. There was an electronic bundle of documents of 664 pages.

36. We had a chronology, cast list and opening statement from the respondent.

37. We had written submissions from both parties to which they spoke. All submissions were fully considered together with any authorities referred to,

whether or not expressly referred to below.

## Findings of fact

Relevant background

38. The claimant worked for the respondent as a machine operator from 21 May 2007 to 10 December 2019. The respondent is a supplier of glazing products and employs about 100 people with about 45 people in the place where the claimant worked. The respondent is a family run business with two sites, the main site is situated at West Hendon Broadway and a smaller site on the North Circular Road, NW2. The sites are less than a mile apart. As at the date upon which the matters in issue commenced, 1 October 2019, claimant was working at the smaller site.

39. The claimant accepted and we find that he had a good working relationship with his colleagues and managers, including the managers involved with his disciplinary and grievance procedures, until 1 October 2019 which was the date of the first disciplinary incident.

40. The claimant agreed and we find that the respondent invested in him as an employee. He completed an NVQ3 on 29 October 2019 (certificate page 664) paid for by the respondent. The respondent invested £60,000 in 10 employees for this NVQ training and the claimant was one of them.

41. The claimant agreed that he signed a Training Fees Agreement on 29 August 2018 to the effect that if he left the respondent's employment within a year of completing the training, he would have to repay £1,200. As set out above, the date of his certificate was 29 October 2019 so he was liable to pay £1,200 if he left before 29 October 2020.

42. The claimant confirmed that the NVQ course was conducted in English. He has lived in the UK since 2006, so for 13 years by the date of his dismissal. He suggested that his English was not that good and that he worked with Polish people at work and spoke Polish at home with his partner so there was not much opportunity to develop his English.

43. The claimant did a level 1 English course in July 2016 paid for by the respondent, the Certificate was at page 652. This included speaking, listening, reading, writing and communication (page 653). The claimant said that he did not know who made the decision to issue the certificate when he did not speak English, but he did not go so far as to say that the certificate was fraudulent. He admits that he sat the exam. He accepts that he worked with people of many nationalities at work for the respondent, not just Polish speakers.

44. Based on the evidence of the respondent's Director Mr Pankaj Gorsia, we find that the respondent employed people from a wide range of nationalities, including Polish, Romanian, Asian "*of different dialects*" - to quote Mr Gorsia - and Afghan. Instructions are given at work in English

and in Mr Gorsia's experience the claimant had a sufficient understanding of English to do the work. He said that the claimant's English was not too good when he started but it improved over the years and they paid for him to do an English course. We find that the claimant was not fluent in English but he has a sufficient command of English to understand the instructions and communications he was given in English in the workplace.

Perfect Crystal Windows Ltd

45. It is not in dispute that the claimant was dismissed on Tuesday 10 December 2019 and that he started a new job at Perfect Crystal Windows Ltd on Friday 13 December 2019, three days later.

46. It was put to the claimant that when he returned to work on 1 October 2019 after a two week holiday, he engineered the first disciplinary incident in these proceedings so he could be dismissed and go to work with his friends at Perfect Crystal Windows, to avoid paying the £1,200. The claimant denied this.

47. The claimant initially denied that he had any friends at Perfect Crystal Windows. He was taken to paragraph 9 of his remedy witness statement, which said: *"On 12th of December 2019 I called one of my friends and asked whether he knew of any job vacancies at the company he was employed with, namely Perfect Crystal Windows Ltd. I was asked straightaway to come to work on the following day."* The claimant then agreed that he had friends at Perfect Crystal Windows Ltd.

Relevant contractual provisions

48. The claimant's contract of employment was at page 77 of the bundle. It included clause 15 on "*Place of Employment*" which said:

> *Your normal place of work is at the above address. [This was 100 West Hendon Broadway, Hendon, London NW9 7AQ]*
>
> *However, you accept that you would work at any other site or establishment, of the Company throughout the UK or abroad as our Contract with the Company shall so require for the needs of the Business.*

49. The claimant's hours of work were at clause 17 (page 78) at 40 per week, five days per week with a 60 minute lunch break. In relation to overtime clause 17 says: "*it is expected that you will be able to finish your work within your normal hours. However, you may be required to work overtime if it is necessary for the proper performance of your duties. The Company reserves the right to vary hour hours in order to meet the needs of the business".*

50. The claimant signed the contract on 25 July 2007 (page 80).

51. Staff were told by email on 12 December 2018 that the use of mobile phones was not permitted in the factory (page 95). They were told that it was a serious health and safety hazard because the type of work they did in the factory required their full attention. They were told that it could be the cause of an accident to themselves and those working around them and that only supervisors and management could use phones in the factory. They were told that they could receive a "*an on-the-spot formal written warning*" for this.

52. On 5 June 2019 staff were sent an email (page 98) telling them that it had come to the respondent's attention that there had been harassing behaviour between employees in the factory and that this could result in disciplinary action and in serious cases, dismissal. Examples of prohibited acts of harassment were set out in the email.

53. On 2 August 2019 staff were sent an email (page 100) which said that as a result of a fatality which occurred due to an employee in possession of a mobile phone whilst operating lifting equipment on site, they had decided that as from Monday 5 August 2019 possession of mobile phones was prohibited in the factory and the yard. Phones were to be left in employees' lockers. They were told that breaching this instruction would result in disciplinary action.

54. On 24 October 2019 a further email was sent reinforcing the subject of mobile phones on the factory floor (page 101). Staff were reminded that they needed permission from the manager otherwise the phone must be left in the locker. They were reminded that if anyone was seen with their mobile on the factory floor it would result in disciplinary action and they were given phone numbers that family members could contact (land line numbers at work) so that they could be contacted if necessary. The claimant confirmed in evidence that he received this email and that he understood it.

55. The respondent also has a Health and Safety Handbook which started at page 102 of the bundle. At page 112 it says: "***Hard hats*** *must be worn at all times.".* The Employee Handbook was at page 128.

<u>The first disciplinary matter</u>

56. The first disciplinary arose out of an incident on 1 October 2019 between the claimant and his colleague and supervisor Mr Cornel Hrisca and resulted in a final written warning. Mr Hrisca is the respondent's Health and Safety Officer with responsibility to ensure that health and safety procedures are adhered to. Mr Hrisca was in charge of maintaining the health and safety standards on site during the shift on 1 October 2019.

57. On 1 October 2019, Mr Hrisca told the claimant he should be wearing his hard hat which formed part of his PPE. There was a photograph in the bundle at page 161, which the claimant accepted was of himself at work on 1 October 2019, not wearing his hard hat or gloves. At the time the

claimant was operating an overhead crane lifting a large sheet of glass. The purpose of the hard hat was to protect him in case of an accident. The allegation was that the claimant responded by swearing at Mr Hrisca and that he spat at him. It was alleged that the claimant called Mr Hrisca a "*F**king idiot"* and made a racial slur towards Mr Hrisca which was in Romanian and translated as "*You Romanian gypsy*". Mr Hrisca is Romanian.

58. In evidence the claimant accepted the following matters: (i) that if an employee called a superior a "*f**king idiot"* then disciplinary action may follow; (ii) that he used the words "*f**ing idiot",* he said that "*these words came out of my mouth"* but that it was "*unintentional*" and "*not aimed at anyone*"; we noted that in his representative's letter of 28 October 2019 (relied upon as his protected disclosure) there was a denial of using these words (letter page 187, point 3) saying: "*In any event, our client denied he used such words…",* (iii) and that he should have been wearing his hard hat on 1 October 2019.

59. By a letter dated 4 October 2019 (page 165) the claimant was invited to a disciplinary hearing to take place on 10 October. The claimant accepted in evidence that inviting him to this meeting could not have been a detriment for any whistleblowing, as on his own case he had not made any protected disclosure by 4 October 2019.

<u>The investigation into the 1 October 2019 incident</u>

60. The incident on 1 October 2019 was investigated by Ms Indira Halai who carries out the HR function for the respondent. Mrs Halai carried out investigatory meetings with the claimant, Mr Hrisca, (on 1 October 2019 – notes page 162) and Mr Alpesh Patel, a supervisor (on 1 October 2019 - notes page 163). Mr Patel had been present during the incident.

61. The disciplinary allegations were set out in a letter from Mrs Halai dated 4 October 2019 inviting the claimant to a disciplinary hearing on 10 October 2019 (page 165). The disciplinary charges were:

    a. *"The altercation that took place between yourself and Cornel Hrisca on Tuesday 1st October at 7.30am – you have been accused of harassment in the workplace further to your abusive language towards Cornel when he asked you to wear your PPE. This is considered a serious misconduct*", and
    b. *Non-compliance of the health and safety rules further to working on the factory floor without the required PPE. Furthermore, refusing to wear the PPE when requested to do so by the Health and Safety & Environmental Assistant. This is a serious health & safety violation*".

<u>The investigatory meeting with the claimant</u>

62. Mrs Halai met with the claimant on 8 October 2019. The claimant accepted during cross-examination that he met Mrs Halai on this date and we find, on

this admission, that the meeting took place. The claimant initially denied this in his witness statement paragraph 17, saying no such meeting took place. He sought to explain this in evidence by saying that it was not a "*formal*" meeting and that it was not documented. There was a note of the meeting at page 166 so we find that it was documented.

63. During the meeting on 8 October 2019 Mrs Halai asked the claimant why he had left his shift early that day without notifying his supervisor Mr Patel. Mrs Halai considered this uncharacteristic of the claimant. She asked if there was anything going on in his personal life that might be affecting him. He told her there was not, but that he was angry about the accusations made against him. Mrs Halai allowed him to go home early that day with no reduction in pay. The meeting was informal and Mrs Halai took her own notes. She did not send them to the claimant.

64. We find that Mrs Halai spoke with the three people directly involved in the incident on 1 October 2019. The claimant did not suggest that she should have spoken to anyone else. We find that this was a fair and reasonable investigation.

First disciplinary hearing 10 October 2019

65. The disciplinary hearing in relation to the 1 October incident was conducted by Mrs Halai, with Ms Jalpa Varsani as notetaker. The claimant was accompanied at the disciplinary hearing by his partner Ms Edyta Kuras. She was not an employee of the respondent or trade union representative but was permitted to accompany the claimant at the hearing. The notes of the hearing commenced at page 168.

66. The claimant complained in submissions (point 9.1) that Mrs Halai had been both the investigatory and disciplinary officer. It was not put to Mrs Halai in cross-examination that she should not have conducted the disciplinary hearing. We find that whilst ideally the investigatory and disciplinary processes should be conducted separately, this is not always practical in a small organisation. We find that the HR function consisted only of Mrs Halai and Ms Varsani who was HR admin support. It is a small organisation. The key in our view, is to establish whether the overall process was conducted fairly and justly and we make further findings on this below.

67. The claimant told Mrs Halai that he had forgotten to wear his PPE on 1 October 2019 because he had just come back to work after a two week holiday (notes page 168). He did not deny that he was not wearing it (his witness statement paragraph 21). His issue was that Mr Hrisca ordered him to put it on "*in an aggressive way"* and that the claimant challenged Mr Hrisca back, as to why he was not wearing his hi-vis.

68. The claimant's partner Ms Kuras told Mrs Halai that the claimant had "*lost his anger*" which we find meant lost his temper because he felt pressurised by Mr Hrisca (notes of disciplinary hearing page 169). The claimant said he

"*lost control"* and did not remember the conversation with Mr Hrisca very well.

The disclosures made on 10 October 2019

69. During the hearing on 10 October the claimant made allegations that Mr Patel had been consuming alcohol and had not been wearing his PPE boots (notes of disciplinary hearing page 170 and Mrs Halai's statement paragraph 7). The claimant was asked when this happened; he could not give dates but said it was about 3 months prior to his complaint. The claimant also complained that Mr Patel had been in an argument and had been rude to a driver from a company called Tough Glaze.

70. We have considered what if any disclosures the claimant made to Mrs Halai during this hearing on 10 October 2019. The matters he relied upon in his Claim Form and the matters relied upon in the List of Issues (above), were not the same as the matters relied upon in his witness statement.

71. In paragraph 22 of his witness statement, referring to the disciplinary hearing, the claimant said:

> *I also reiterated my complaints previously discussed with Mrs. Halai, namely that A. Patel (her cousin) was (page 170):*
>
> > *a) Constantly disobeying H&S rules (not wearing safety boots, hi-vis, helmet),*
> > *b) Often shouting at other employees and acting in a manipulative way,*
> > *c) Swearing all the time at factory workers and other people,*
> > *d) Having a drinking problem.*

72. The reference to page 170 is to the respondent's note of the disciplinary hearing. This consisted of a string of complaints against Mr Patel, that he disobeyed health and safety rules himself, that he got angry with factory staff when they did not abide by the rules, that he was not wearing his safety boots and that he shouted at employees. He said that Mr Patel did not wear his hi-vis, that he pressurised the factory staff, that he got into a verbal fight with a driver from Tough Glaze and that he had a drinking problem and came to work drunk on 29 September 2019. It was a very personal attack on Mr Patel. The claimant asserted in his statement and in submissions that Mr Patel was Mrs Halai's cousin. This was not put to Mrs Halai in cross-examination, although it was put to her husband Mr Halai, who denied it.

73. In the List of Issues claimant relied on a paragraph numbered 7.2 at paragraph 4 of his Grounds of Complaint which said: "*Non-compliance of the health and safety rules further to working on the factory floor without the required PPE. Furthermore, refusing to wear the PPE when requested to do so by the Health and Safety & Environmental Assistant. This is a serious health and safety violation*".

74. He also relied upon the words at paragraph 8.2 (bundle page 19-20) "*He extensively explained why he had not worn the helmet on 1 October 2019*

*and whey he could not initially comply with Cornel's request to put the helmet on. He pointed out that other work colleagues in the same or similar situation (eg whilst at work and/or on the factory floor) did not wear PPE that they were treated differently (ie not subjected to any disciplinary sanctions). The respondent acted dishonestly. The claimant also disclosed instances of various breaches of H&S rules and procedures in the workplace, including by Mr Patel (Factory Supervisor) and Mr Hrisca (H&S Assistant). The thread the respondent tried to omit or belittle as allegedly irrelevant."*

75. We could find nothing in paragraph 22 of his statement or in the paragraphs relied upon in his ET1 that tended to show a failure to to comply with any legal obligation or any information tending to show that health and safety matters or a breach of a legal obligation, was being deliberately concealed.

76. We found the claimant's case on his disclosures and the words he used, difficult to follow. No questions were put to Mrs Halai in cross-examination as to the disclosures that were made to her on 10 October 2019.

77. From the evidence before us and based on the claimant's evidence in his witness statement, we find that he complained to Mrs Halai that Mr Patel was constantly failing to wear his PPE, whether it was his boots, helmet or hi-vis and that he shouted at other employees, that he swore at them and other people and that he had a drink problem. We find that the disclosures made on 10 October 2019 only pertained to Mr Patel and we are supported in this by the claimant's submissions paragraph 3, which said: "*On 10th October 2019 the Claimant verbally informed Mrs Indira Halai (HR) of serious and persistent breaches of Health and Safety in the workplace by Mr A. Patel*".

78. The hearing concluded with Mrs Halai stating that she would further investigate the allegations he had made and she would let the claimant have an outcome.

79. Mrs Halai found the claimant's explanation that he had "*forgotten*" to wear his hard hat unconvincing as he had worked for them for 12 years. Her view was that when an employee is reminded to wear their PPE, they normally rectify the position immediately. Instead she thought he had retaliated at Mr Hrsica both verbally and by complaining that Mr Hrisca had failed to wear his hi-vis jacket. The claimant admitted to Mrs Halai that he had lost his temper.

<u>The transfer of the claimant to the larger site</u>

80. By the date of this tribunal hearing it was not dispute that the claimant was transferred to the larger factory site on 11 October 2019. The decision was made by Director Mr Pankaj Gorsia on 11 October 2019 following a conversation with Mrs Halai on the evening of 10 October. They considered that following the incident on 1 October there was tension at the smaller site and it would be commercially unproductive for the claimant to

remain there. They wished to calm the hostilities that had become apparent during the investigation. The claimant had worked for most of his time with the respondent at the larger site. He had last worked there in about June 2018 so it was a familiar workplace for him.

81. What appeared inconsistent on the claimant's case was that in his ET1, Grounds of Complaint, paragraph 6, he said that on 4 October 2019 he was transferred to a different place of work and in his witness statement as drafted and signed on 25 January 2021, at paragraph 13, he said that it was on the 5 October 2019 that he was "*suddenly transferred*" to a different place of work.

82. The claimant corrected this date before he gave his sworn evidence, to 11 October 2019. The respondent submitted that reason for these inconsistencies was because the claimant initially made no link between his transfer and any disclosures made to Ms Halai. The claimant also told the appeal officer Mr Self that he was transferred on 4 October 2019 – see findings below – which came from the transcript of his own covert recording of the appeal hearing. The fact that the claimant said that he was "s*uddenly transferred*" and that he made the error as to the date on at least three occasions, leads us to find on a balance of probabilities, that he linked his transfer to the incident on 1 October, rather than anything he said to Mrs Halai on 10 October 2019.

83. Mr Gorsia made the decision to transfer the claimant partly to protect him from the friction that had resulted and in the hope of improving working relationships. He and Mrs Halai were also of the view that the claimant's productivity had declined since the 1 October incident. Mr Gorsia considered that there was a stronger management system at the larger site with added resources, so it would be easier to "*maintain a good structure*" around the claimant (Mr Gorsia's statement paragraph 8). Mr Gorsia himself is based at the larger site. The factory manager at the larger site was Mr Vascile Ascinte.

84. It was put to Mr Gorsia that his legal representative Mr Mehta, who was brought in to hear the claimant's grievance appeal, had said that the reason for the transfer was the claimant's performance. This was taken from the claimant's covert recording of the grievance appeal hearing on 9 December 2019 chaired by Mr Mehta – transcript page 473 – at which Mr Mehta said that the claimant's productivity went down and his ability to deliver on his work objectives fell.

85. Mr Gorsia said that as there was conflict at the smaller site the claimant's performance "*was not great, it was deteriorating*" and he was "*not hitting some of the deadlines*" for their products to go out and that was causing problems with production. He decided, in view of the conflict, that it would be better to transfer the claimant to the other site. We find these two explanations to be compatible because we find that conflict at work can affect productivity. It was not put to Mr Gorsia that he transferred the claimant because of any disclosures that he made on 10 October 2019 to

Mrs Halai.

86. Mr Gorsia was asked whether he was aware that the claimant had complained to Mrs Halai on 10 October that other employees were not wearing their PPE and that he also told Mrs Halai that Mr Patel had a drink problem. Mr Gorsia said he was not aware of this. We find that the claimant was not transferred because of any disclosure made to Ms Halia on 10 October 2019. We accepted Mr Gorsia's reasons at face value, including that he was not aware of any disclosures made on 10 October 2019. It was not put to him that he transferred the claimant because of any such disclosures and we find that he did not.

87. Although employees at the larger site are on a lower hourly rate, the respondent maintained the claimant's hourly rate when he transferred. Mrs Halai admitted that there was less overtime available at the larger site because there were more employees. To the extent that the claimant's working time was reduced, this was consequent upon the transfer which we find was not because of any disclosures he made.

88. Mr Gorsia's evidence was that the transfer did not have the outcome he had hoped for as in his view the claimant's attitude and approach to his work deteriorated. He found the claimant became more confrontational and he started to wear more PPE than was necessary for particular tasks. In his view the claimant was "*making a point".*

Investigation into the allegations against Mr Patel

89. Mrs Halai investigated the claimant's complaints against Mr Patel. We saw a letter dated 14 November 2019 (page 247) from Tough Glaze who said they had carried out an investigation and none of their drivers could recall the incident described by the claimant.

90. On 11 October 2019 Mrs Halai held an investigatory meeting with Mr Patel (notes page 172). This was to investigate the claimant's allegations that he had not been wearing his PPE boots as well as other matters. Mr Patel explained that he had a medical problem with his foot and back heel that required surgery, so that it was painful for him to wear the boots. He had taken to wearing his trainers.

91. Mrs Halai explained that this was not an option and he needed to have his foot seen by a doctor "*ASAP*". In the meantime he should use insoles in the PPE boots or do anything else to ease the pain.

92. Mr Patel denied drinking alcohol at work, he admitted that he had asked a colleague to drive him to the shop to purchase alcohol at the end of the working day. Mrs Halai discussed with Mr Patel all of the claimant's allegations.

93. Mrs Halai also investigated the allegations against Mr Patel with employee Mr Marcin Watly on 11 October 2019 (page 175). The note of that meeting

showed that Mr Watly denied that Mr Patel was drinking at work. He said "*no one is drinking we all work like normal*". Mr Watly's changed his position in his witness statement for these proceedings. At paragraph 19 he said that the notes of his meeting with Mrs Halai were incorrect due to his poor English and "*I certainly did not say that Mr Patel was not drunk at work and that if I said so it was a joke*". He is no longer employed by the respondent having left on 24 July 2020. His revised version of events was not in front of Ms Halai for her consideration in October 2019.

94. We find that Ms Halai investigated the allegations with the witnesses and with an external company. The claimant's allegations about Mr Patel drinking at work were not supported at the time by Mr Watly. Mr Patel explained the medical reason behind not wearing his PPE boots and she told him that this was not an option and that he needed to address it. We find that she carried out a reasonable investigation into the allegations against Mr Patel.

<u>The final written warning</u>

95. On 22 October 2019 the claimant was issued with a final written warning (page 181). The warning was to stay on his file for 12 months. He was given a right of appeal.

96. Mrs Halai found the disciplinary charges proven. She said that in addition to not wearing his PPE, the claimant had continued to carry out serious misconduct by using abusive language and inappropriate hand gestures towards Mr Hrsica. She told the claimant that harassment in the workplace was unacceptable, against company policy and was considered as gross misconduct (page 182).

97. The claimant submitted that he was issued with the final written warning because on 1 October 2019 he forgot to put on his hard hat on, an occurrence which lasted only around five minutes. It was submitted that he did not harass anyone and that "*if*" he used swear words, it was not discriminatory harassment. Thus we were invited to find that the warning was imposed because of his disclosures to Mrs Halai on 10 October 2019.

98. It was not put to Mrs Halai in cross-examination that she imposed the warning because of any disclosure made on 10 October. Mrs Halai was not questioned about the disclosures at all. It was put to Mrs Halai that all the claimant did was to fail to wear his hard hat for a few minutes, thus the warning was unjustified. The warning was not just about the hard hat. It was also because the claimant used abusive language towards Mr Hrisca and used inappropriate hand gestures at him.

99. The claimant was reminded of the instructions in the email of 5 June 2019. The claimant did not deny making a hand/eye gesture towards Mr Hrisca. There was a photograph of him doing so which Mrs Halai had seen and it was referred to in the outcome letter (page 182).

100. The claimant was told in the outcome letter that if there were further complaints about his behaviour, his refusal to wear PPE or his attitude towards work, management or colleagues, it would lead to his dismissal.

101. We have considered whether Ms Halai imposed a final written warning because of any disclosures made on 10 October. It was not put to Ms Halai that this was why she imposed the warning. We find that she imposed the warning because of the claimant's conduct, which following a reasonable investigation and a disciplinary hearing, she found proven. The invitation to the disciplinary hearing was given on 4 October 2019, thus the disciplinary process was in train prior to any such disclosures.

102. The claimant appeared to be of the view that he had been given a final written warning for failing to wear his PPE. This was not the only proven disciplinary charge and the warning was also given for his abusive language and inappropriate conduct towards Mr Hrisca. The respondent had made clear that this sort of behaviour could amount to gross misconduct and result in dismissal. This was set out both in the Employee Handbook (page 141-142) and the email of 5 June 2019 (page 98). The claimant did not deny receipt of this email.

103. Mrs Halai's view on the evidence before her, including an admission from the claimant that he had lost his temper with Mr Hrisca, was that Mr Hrisca had rightly reminded the claimant to wear his PPE and instead of accepting the instruction, he had responded with abuse. She accepted the claimant's point that Mr Hrisca should have been wearing his hi-vis jacket, but this was less of an urgent concern to her than not wearing a hard hat when operating an overhead crane to lift a large sheet of glass.

104. Mrs Halai took into account the relatively recent email of 5 June 2019 reminding employees about the respondent's intolerance towards harassment in the workplace. We find that she had a reasonable belief in the misconduct, particularly with the admission that the claimant had lost his temper and the company's rules on harassment had been brought to their employees' attention in recent months. Her belief was based on a reasonable investigation. This warning was not "*manifestly inappropriate*" and we say more about this in our conclusions below.

<u>Mobile phone use on the factory floor</u>

105. On Friday 25 October 2019 the factory manager Mr Vasile Ascinte gave the claimant a verbal warning regarding his use of his mobile phone on the factory on 24 October 2019. It was confirmed in writing (page 184). The claimant agreed that he was given this warning. There was no evidence to show that Mr Ascinte knew about any disclosures made by the claimant to Ms Halai at the 10 October 2019 and we find that he did not know about this. We find that the warning was because the claimant had been using his phone on the factory floor and for no other reason.

106. The claimant's initial evidence to the tribunal was that he only used his

phone on the factory floor on 24 October to take 2 photographs for health and safety reasons. It was put to the claimant that he used his phone on at least 16 October and 1 November to record conversations and to take a video and to take numerous photographs that were in the bundle at page 600 onwards. He said that as he was never caught "*red-handed"* with his phone, he could not understand why these allegations had been made against him. He told the tribunal he had used a different type of device for these recordings and photographs, called a "*spy-cam".* This was not something that he had ever mentioned before in these proceedings.

107. In answer to further cross-examination on day 2 of the hearing the claimant said: "*I had a phone on my person every day but it doesn't mean I was using it and on that day I used it to take photos for health and safety purposes".* We find that the claimant knew this was in breach of the rules which stated that they were not to have the phone *"in your possession".* The instruction given on 2 August 2019 (page 100) said that "*possession*" of phones was prohibited in the factory and the yard.

108. Mr Gorsia's evidence was that he could not understand why the claimant was making covert recordings and taking photographs around the factory, which he did not disclose to the respondent. He said that the correct procedure when an employee saw a health and safety breach, was to raise it immediately with a manager or HR, so that it could be dealt with and rectified. We find that this was the correct process and the claimant did not follow it.

<u>The letter of 28 October 2019</u>

109. On 28 October 2019 the claimant's solicitors sent two letters to the respondent: (i) a "disclosure" and grievance letter and (ii) an appeal against the final written warning. Both letters were sent by post.

110. The letters were sent to two addresses: the larger factory site and to the respondent's accountants' office which is the company's registered office. The appeal against the final written warning was also sent by email to Mrs Halai and Ms Varsani. The appeal letter was received by email on 29 October 2019 at 12:24. The "disclosure"/grievance letter was only sent by post. We find as a fact that the respondent received the "disclosure" / grievance letter on 30 October 2019.

111. Mr Halai who was the grievance officer could not remember exactly when he saw that letter but said that he thought it was in "*early November*".

112. Set out below is the part of the letter that made disclosures. It is not the entire letter:

Alpesh Patel, CUIN factory supervisor failed to obey the H&S rules in the workplace.

Alpesh Patel on many occasions failed to wear his "safety boots" in the factory.

On 19 September 2019 Alpesh Patel refused to wear his hi-viz when expressly requested to do so by H&S Inspector. Mr Patel argued that it was a family business and he need not to comply with the requirement. The Inspector said that he would not continue with Alpesh until he wore the requested PPE, which he eventually but reluctantly did.

Alpesh Patel, has a drinking problem in the workplace. He has drunk alcohol during shifts, often requested other employees (particularly Cornel Hrisca, Health and Safety Assistant) to buy him alcohol or they both went out to the shop for alcohol. However only Mr Patel drank, particularly during weekends at work. For example, on 29 September 2019 Mt Patel came in drunk, which was witnessed by Marcin Watly. Mr Patel could barely walk and then he went and slept it off in the room upstairs at the factory. Our client explained that he had not reported these issues before for he was scared to go to management. The employer confirmed that they would investigate the matter properly.

Further disclosure

1. Our client advised that he was transferred from his previous place of work with an effect from 11 October 2019, i.e. after the date of the disciplinary meeting into the allegation of him failing to wear a hard hat whilst at work.
   - On 11 October 2019 our client noticed that many employees in the factory failed to wear their protective vests, shoes or helmets. None of those employees suffered any disciplinary actions/sanctions for the above.
   - Electric cables were dipped in the water.
   - Machines' sensors were blocked to speed the production. Also, yellow safety doors of the pressing machines were/are kept open during production/pressing (which had caused at least two accidents at work in the past).
   - People from the office attended the factory floor without any PPE, walking among stillages with glasses and harp racks without any protection. All the above is evidenced.
   - At this juncture it is to be noted that on 24 October 2019 our client made two photos showing that electric cables were in the water. It was spotted by his supervisor, Vasile, who shortly after reported it to Jalpa Varsani who then sent out an email advising that it would be a disciplinary matter to use mobile phones on the factory floor. However, you would appreciate that there is a difference between using the phone for private purposes and using it in the public interest (H&S reasons). Our client never used his phone in the workplace, but on 24 October 2019. If our client would be subjected to any disciplinary action for this reason he would consider the employer acted inter alia in breach of s. 47B and/or 44 of the Employment Rights Act 1996.

2. The employer fails to deal with their customers fairly. They sell glasses not meeting the norms. E.g. glass not filed with argon is sold as argon glass or single-tempered glass is sold as double-tempered one. All this can be objectively verified.

3. The employer taking advantage of the fact that many employees are foreigners with little English. Those employees do not understand the language, are not advised of their rights, often asked to sign documents without knowing and understanding its contents (and their effects), often dismissed instantly e.g. following accidents at work which were to be concealed (e.g. by fraudulently confirming that the accident took place outside the workplace). This our client considers unfair employment practices in violation of various employment rights. Further particulars of various incidents would be provided at the grievance meeting.

4. At CRUN depo, red emergency-stop buttons of a main large machine do not work at all (never worked).

5. One of the employees of the factory, Mr Kiran drinks alcohol every day during his work shifts, including whilst operating a machine. As far as our client is aware, it is a well- known fact, witnessed by many employees, including Vasile, a supervisor. It is a serious breach of the company's rules, but no action has so far been undertaken in relation to this.

6. On 11 October 2019 our client's supervisor, Vasile was operating the overhead crane without wearing the hard hat (evidenced). For the same breach our client was issued with a final written warning (currently under appeal). Our client is not aware of any disciplinary action undertaken against his supervisor. Our client has a photographic evidence showing other employees on the factory floor without an appropriate PPE. Our client would show through this evidence that H&S policy is not complied with in the workplace by many employees, including supervisors. It is assumed that the employer is fully aware of this practice endorsing it through inaction.

Appeal investigation

113. Ms Varsani carried out an investigation into the appeal. Mr Watly's interview note was at page 194. She interviewed factory worker Mr Catalin Iurascu (note page 195) and factory worker Mr Daniel Panocha (page 195). The meeting with Mr Iurascu took place at 4:30pm on 29 October 2019 and the claimant agrees and we find that the respondent had not received the disclosure letter by this date.

114. Mr Iurascu was not questioned for the disciplinary hearing, but for the appeal. In his interview he told Ms Varsani that Mr Hrisca twice asked the claimant to put on his hard hat and the claimant got "*very angry*". Mr Iuracsu also told Ms Varsani that he heard the claimant call Mr Hrisca a "*f**king idiot*" and also that the claimant spat on the floor next to him twice and called Mr Hrsica "*a stupid gypsy*" in Romanian. The allegations about spitting and calling Mr Hrscia a gypsy were new pieces of information which Mrs Halai did not know about when she held the disciplinary hearing.

115. As part of that investigation, Mr Hrisca produced a further statement on 30 October 2019, both in Romanian and English (197-200). He wanted to make another statement because English is not his first language and he could not put across all his concerns. In that statement he alleged amongst other things that the claimant called him a "*gypsy"* when challenged about failing to wear his hard hat on 1 October 2019.

Suspension 4 November 2019

116. On 4 November 2019 the claimant was informed in a letter from Director Mr Pankaj Gorsia that his appeal hearing against the warning, would take place on 11 November 2019. It was to be chaired by the respondent's legal representative Mr Vikas Mehta (page 208).

117. On 6 November 2018 the claimant was sent the investigation material for the appeal hearing (page 210). It included the verbal written confirmation of the verbal warning of 25 October 2019, investigatory interview notes and photographs of the claimant using his mobile phone and without PPE when using a crane.

118. As well as being an invitation to the appeal hearing, the letter of 4 November suspended the claimant from work on new disciplinary allegations. The allegations were set out as being *"very abusive towards another member of staff and obstructive in your work duties as well as failing to follow and be compliant with company rules".*

119. During the latest investigation further allegations had come to light and we find that the respondent could not ignore these allegations; they had to investigate.

120. Mr Gorsia made the decision to suspend. He took advice from Mr Mehta before doing so. It was not put to Mr Gorsia or Mr Mehta that the decision to suspend was because of any disclosures made by the claimant. We find that the reason for the suspension and thus the reason for commencing new disciplinary proceedings, was the serious allegations about the claimant's behaviour.

121. Mr Gorsia asked the claimant to come to see him on 4 November but the claimant refused. Mr Gorsia handed him the suspension letter on the factory floor and escorted him off site. Mr Gorsia would have preferred not to have done it this way and to have handled the matter more confidentially in his office, but the claimant did not allow this to happen.

122. The suspension letter at page 208 said that the claimant was being suspended on an allegation that he used racial slurs against another member of staff and that he had been obstructive in his work duties as well as failing to follow and be compliant with company rules.

123. The claimant was told in the letter not to come to site or to contact other members of staff (page 209).

<u>The investigation on disciplinary no. 2</u>

124. The respondent carried out an investigation into the new disciplinary allegations. Ms Darshana Gorsia was the investigating officer.

125. On 9 November 2019 at 13:56 hours a call was made from the claimant's mobile phone to Mr Hrisca's mobile phone. As part of her investigation Ms Gorsia saw a screenshot from Mr Hrisica's phone showing the claimant's number, establishing that a call was placed. A copy of screenshot was in the bundle at page 243. The claimant accepted in cross-examination that it was reasonable for the respondent to ask him about it and that if they were not satisfied with the answer then disciplinary action could follow.

126. Ms Gorsia also investigated the claimant's use of his mobile phone on the factory floor and spoke with the manager Mr Ascinte and other employees who told her that they saw the claimant on the factory floor taking photos on his phone.

127. Part of the terms of the claimant's suspension was that he was not to contact other members of staff. Ms Gorsia was of the view, having seen the screen shot that the claimant had deliberately dialled Mr Hrisca in breach of the terms of the suspension. The claimant's case was that it was a mistake and a misdial.

128. Ms Gorsai held an investigatory meeting with Mr Asciente (page 204). She also spoke to factory workers Mr Christian Astribe and Mr Ionel Hrisca who said they saw the claimant taking photos on his phone while trying to conceal himself behind machinery. She reviewed CCTV of the factory floor which showed the claimant making gestures towards Mr Asciente.

129. In her investigatory meeting with the claimant, he admitted making covert recordings of colleagues including of Mr Asciente.

130. As we set out below there was a further investigatory meeting with the claimant on 3 December 2019, conducted by Mr Mehta.

<u>The claimant's grievance investigation and outcome</u>

131. On 18 November 2019 Mrs Halai investigated the claimant's grievance allegations and complaints against Mr Patel with the following employees: Mr Adrian Precop, Mr Panocha, Mr Watly and Mr Iurascu (pages 249-254).

132. Mr Halai sent the claimant a grievance outcome letter on 19 November 2019 (page 258-261). Mr Halai upheld some of the claimant's grievances. He upheld the complaint that many employees failed to wear PPE and told him that persistent culprits were being provided with warnings. Mr Patel had provided a doctor's note about his situation and they had done a risk assessment. Mr Halai upheld the complaint that electric cables were being dipped in water and told him what was being done about it. Mr Halai said that the three employees with whom they had carried out investigatory interviews had said that alcohol was only consumed on site after the shift had ended and that Mr Hrisca had only taken Mr Patel to buy alcohol after work. He said that they had investigated with Tough Glaze the allegation that Mr Patel had been rude to one of their drivers, but Tough Glaze could find no such incident. He upheld the complaint that Mr Ascinte operated a crane without wearing a hard hat and told him that Mr Ascinte had been given a formal warning for this. This evidence was not challenged so we find that Mr Ascinte was given a warning as were other "*persistent culprits*".

133. This is not a full record of the grievance outcome in which some of the complaints were upheld and others were not.

Appeal hearing 11 November 2019 – appeal against the final written warning

134. The appeal hearing against the final written warning took place on 11 November 2019 with Mr Mehta as the chair. He was not the decision maker, he conducted the hearing and made recommendations to Mr Gorsia. Mrs Halai was the notetaker. The claimant attended with his partner Ms Kuras and an interpreter also attended (notes page 211).

135. The claimant agreed that he was reluctant to share all his evidence at this hearing. He said that it was because he had some "*objections*" to Mr Mehta. At the appeal hearing Ms Kuras disclosed that they had a transcript of a conversation between the claimant and Mr Ascinte made on 1 November 2019. The claimant went to Mr Ascinte's office ostensibly to put a question to him. He did not disclose to Mr Ascinte that he was covertly recording him. The claimant agreed in evidence that this was a breach of Mr Ascinte's human rights but said he did it to "*protect himself*" because he wanted to show that Mr Ascinte was "*lying*".

136. The claimant did not accept that it was appropriate for the respondent to discipline him for that.

**137.** It is not in dispute that Mr Mehta asked to listen to the recording and that the claimant refused to produce it. The claimant said he could only have it for "*court purposes*" and said he did not trust Mr Mehta, despite the fact that he had never met him before.

138. The claimant said more than once in evidence to this tribunal that he did not expect this case to go this far. We find that this conflicts with what he said to Mr Mehta on 11 November 2019 because he made the recording with "*court proceedings*" in mind.

139. The claimant agreed that he had asked for someone other than Ms Varsani and Mrs Halai to hear this appeal. The claimant was concerned about all the family connections at the respondent – it is a family run business. The respondent brought in Mr Mehta to address the claimant's concerns. The claimant did not accept Mr Mehta's independence. The claimant did not wish to introduce his evidence even though he thought it was helpful to him. Mr Mehta on the other hand was prepared to listen to it, despite the covert way in which it had been obtained.

140. At this appeal hearing the claimant's partner Ms Kuras said that at the respondent it was "*more like the Mafia*" (page 235), they were "*fraudsters"* and that the statements they had obtained were "*fabricated*". The claimant agreed with this. Ms Kuras said that they had a "*perfect picture*" and "*loads of evidence*". These were photographs that appeared in this hearing bundle but which the claimant was not prepared to disclose at his appeal hearing. We were not told when the claimant took the photographs that he disclosed in the bundle for this hearing.

141. The claimant agreed and we find, that he did not trust the respondent, he

did not wish to disclose his evidence and that he preferred to keep it and "*build a case*" against the respondent for possible court proceedings. He only disclosed it for the purposes of the bundle for these proceedings.

28 November 2019 – appeal outcome from final written warning and further suspension

142. On 28 November 2019, having been briefed by Mr Mehta, Mr Gorsia sent the claimant the outcome of his appeal against the final written warning (page 264). The letter was drafted by Mr Mehta for Mr Gorsia's approval. Mr Gorsia confirmed in evidence that he had read it and that he approved it and it was his decision. The final written warning was upheld. The conclusion was (page 267): "*We therefore conclude that you have used abusive language and acted inappropriately which amounts to serious misconduct".*

*143.* It was not put to Mr Mehta that he took any action because of any disclosures made by the claimant and we find that he did not. Mr Gorsia acknowledged in the outcome letter that the claimant said he was a whistleblower (page 265) so we find that both Mr Mehta and Mr Gorsia were aware of the 28 October 2019 letter. It was not put to Mr Gorsia that he upheld the final written warning because of any disclosures made in that letter. We find that the focus of the decision making and the reason for the decision was as set out in the outcome letter. This was the claimant's misconduct and it was unconnected with anything disclosed in the 28 October letter.

144. Also on 28 November 2019 Mr Halai sent the claimant a letter suspending him from work pending investigation into further allegations of gross misconduct (page 268). Mr Halai's evidence (statement paragraph 6) was that he suspended the claimant because he had potentially committed misconduct that needed to be investigated and not because of any health and safety disclosures that he had made.

145. By a further letter dated 28 November 2019 (page 273) the claimant was invited to an investigatory meeting on 3 December 2019. The investigating officer was Ms Darshana Gorsia.

146. The disciplinary charges for the second disciplinary hearing were as follows (page 273):

> *a) On 9 November at 1356 you attempted to contact Cornel Hrisca despite having been suspended to allow an investigation into abusive behaviour and harassment of him despite having been instructed on 4 November 2019 not to contact any staff during the investigation;*
>
> *b) In breach of company rules you used your mobile phone in the workplace on 24 October 2019 at roughly 11/11.30 and 9/9.30 am on the same day. At the start of your shift on 25 October at 7.30 am you*

*received a verbal warning from Vasile Ascinte. It is also alleged on 1 November 2019 that you used a recording device to record a discussion with Vasile Ascinte in a premediated attempt to aggravate and question him on matters which were not your concern;*

*c) Using threatening / undermining behaviour towards Vasile Acsinte, your line manager by gesturing to him in a threatening way as if to say "I am watching you" by pointing at your eyes and then at his, that you intended to be threatening (sic). You also inferred that "you know what he is about" and wanted him to know that you know people that he used to work with.*

147. On 2 December 2019 the claimant appealed the appeal outcome on his final written warning (page 275). On 3 December 2019 he was told by Mr Halai that there was no further right of appeal (page 278).

Further investigation - second disciplinary

148. On 2 December 2019 Ms Gorsia produced an investigation report (page 282). The claimant had this report before he attended his own investigatory meeting on 3 December 2019.

149. The investigation report was prepared by Ms Gorsia based on investigatory meetings with others but she was unable to complete her investigation with the claimant, so a further investigatory meeting was conducted by Mr Mehta.

150. It is not in dispute that this meeting with Mr Mehta on 3 December did not get off to a good start. The claimant's partner, despite being told that she was not allowed to speak for the claimant, declared the meeting "*illegal"* (page 287). The meeting lasted about 1.75 hours (timings on the notes page 310-316).

151. At the end of the meeting Mr Mehta concluded that there should be a disciplinary hearing. It was not put to Mr Mehta at any point during his evidence, that he acted as he did because of any disclosures made by the claimant. We find that he made the decision to move to a disciplinary hearing based on the evidence obtained during the investigation.

152. We have considered whether the investigation carried out by Ms Gorsia and Mr Mehta was a reasonable investigation. We find it was a thorough investigation. They interviewed relevant personnel, took statements, viewed CCTV footage, viewed Mr Hrisca's phone and interviewed the claimant. It was not suggested to any of the respondent's witnesses that more should have been done or that anyone else should have been interviewed. We find that it was a reasonable investigation.

Second disciplinary hearing 5 December 2019 and 9 December 2019

153. On 5 December 2019 the claimant attended his second disciplinary

hearing. It was chaired by Mr Gorsia who was the decision maker. The claimant again attended with Ms Kuras. Mr Mehta attended as the investigating officer, to present his investigation and Mrs Halai attended at the notetaker. An interpreter in the Polish language also attended.

154. Mr Gorsia asked the claimant at the outset what he would like to achieve from the meeting. We saw this from page 336 which was the claimant's transcript of his covert recording. The claimant told Mr Gorsia that he wanted to get to the truth and put it behind him. He agreed that he did not make any apology for any of the matters. He was also not sorry for covertly recording Mr Ascinte. The claimant did not deny covertly recording Mr Ascinte.

155. Mr Gorsia asked the claimant what he meant by the truth but the claimant was not forthcoming. Mr Gorsia found that many of the answers came not from the claimant, but from his partner Ms Kuras. The claimant and his partner spoke together during the hearing in Polish, which Mr Gorsia did not understand and the claimant frequently referred back to his partner for answers.

156. Mr Gorsia's oral evidence was that they valued the claimant "*so much*". He had worked for them for about 12 years, he had a wealth of experience, they put him on courses and they trusted him. He genuinely wanted to find out what the claimant wanted because he wanted to see if they could resolve matters. We accepted that evidence.

157. The claimant said in evidence that he linked his transfer to the larger site with what had happened on 1 October. We also saw the claimant's transcript of his covert recording of the disciplinary hearing, page 340. The position of the claimant at that hearing was that the transfer happened "*within an hour*" of the incident on 1 October 2019. It has since been agreed between the parties that the transfer happened on 11 October 2019. At the disciplinary hearing the claimant linked the transfer directly to the incident on 1 October and not to any disclosure. This supports our finding that the claimant did not believe that his transfer had anything to do with anything he said to Mrs Halai on 10 October 2019.

158. The claimant was told by Mrs Halai (notes page 350) that Mr Hrisca received a letter for use of his phone for photographing the claimant without his hat and gloves. She told the claimant that Mr Hrisca "*got a letter for it"* and we were told that supervisors could be given permission for this. We find based on these notes, that Mr Hrisca had been given permission to have his phone on him whilst on shift.

159. The claimant had photographic evidence on his phone when he attended the second disciplinary hearing. He would only agree to show it to the interpreter and not to the respondent, notwithstanding that the interpreter was not in a position to do anything about it. There were two photos taken on 24 October 2019 of cables in water. Mr Gorsia asked the claimant whether he had any other photographs other than those two (claimant's

transcript page 359). The claimant told Mr Gorsia on a number of occasions that there were no more photographs, only those two.

160. Later in the disciplinary hearing the claimant admitted taking other photos "*since the accusations came along*" to "*protect himself*" (367).

161. The claimant had taken many more photographs which were included in the bundle for this tribunal hearing. He explained that the reason he said he had only taken 2 photographs was because he only took 2 photos on his phone and the others were taken on "*another device*" which he described as a "*spy-cam"*.

162. The claimant and his partner walked out of the hearing before it had concluded telling them to carry on in his absence and make a decision. Mr Gorsia chose to reconvene the hearing on Monday 9 December 2019 before making his decision. The claimant was told that if he did not attend, or if he attended and left, the decision may be made in his absence. The claimant accepted in evidence that it was fair to him to set up a further date to conclude the hearing, given that he had decided to walk out on 5 December.

163. The claimant admitted to Mr Gorsia that he had made a call to Mr Hrsica whilst suspended but said it was by accident.

164. The claimant also accepted that he had used his phone on the factory floor. He gave different explanations which Mr Gorsia found unconvincing.

165. The claimant attended the reconvened hearing on 9 December with his partner. On a number of occasions he refused to answer questions put to him. The claimant said he had got a recording which he was going to give to "*higher instan[c]e people*" (page 488). We find that he was building a case against the respondent and this was his primary aim at this stage. In his witness statement at paragraph 127 the claimant said that his understanding was that his secret recording was not considered by the respondent at the time of dismissal. We find it was impossible for them to consider it because he refused to disclose it.

166. We find that it was fair to the claimant to reconvene the hearing on 9 December when he had walked out on 5 December 2019 so that he could be given a further opportunity to state his case before a decision was made.

<u>Grievance appeal – also held on 9 December 2019</u>

167. The claimant's grievance appeal was also held on 9 December 2019 chaired by Mr Mehta. The outcome letter was sent on 10 December 2019 (page 494).

168. Mr Gorsia was the decision maker. He found that Mr Patel had medical reasons relating to the safety boots, that any consumption of alcohol was

after working hours, the investigation into Mr Patel being rude and abusive to a Tough Glaze driver was not supported through their enquires with that company, that any employee found not to be wearing PPE was spoken to and where necessary given a formal warning. All the complaints were considered and acted upon where necessary.

169. In his summary at the end of the letter (page 497) Mr Gorsia said that he considered the that claimant's allegations were made in bad faith and his complaints were only brought after he had been subjected to disciplinary action. Mr Gorsia noted that the claimant had been reluctant to provide the information that he had and this had hampered their investigations. We find that this was all part of the claimant's efforts to build a case against the respondent.

The dismissal

170. On 10 December 2019 Mr Gorsia sent the claimant an outcome letter for the second disciplinary (page 499). He made the decision to dismiss the claimant for gross misconduct (page 500).

171. The reasons he gave for dismissal were set out in his witness statement at paragraph 30. Mr Gorsia considered whether the claimant had committed gross misconduct and concluded that he had. He found that the claimant had admitted that he had attempted to contact Mr Hrisca. He found that the claimant had used his phone on the factory floor to take photos and had covertly record conversations including of Mr Ascinte.

172. Mr Gorsia concluded that the claimant had used threatening language and behaviour to Mr Ascinte and decided that this was gross misconduct. He did not accept the claimant's contentions that he was being victimised for raising concerns, he considered that the claimant made his allegations because he was facing disciplinary action. He believed Mr Ascinte in preference to the claimant. He considered that despite the claimant's long service, the appropriate sanction was dismissal. It was a difficult decision for Mr Gorsia because the claimant was a very good worker.

173. Mr Gorsia took account of the final written warning in making his decision (outcome letter page 500). He considered that despite that warning, the claimant had continued to be abusive and threatening and he continued to breach company rules "*despite a stark warning as to your behaviour*". He also took account of the matters raised by the claimant in his grievance and grievance appeal.

174. It was not put to Mr Gorsia that he dismissed the claimant because of any of his disclosures. Mr Gorsia was not challenged in cross-examination on his reasons for dismissing the claimant. We find that the reason for dismissal was as given by Mr Gorsia in the outcome letter and was for gross misconduct. We find that he based this decision upon a reasonable investigation carried out by Ms Gorsia and Mr Mehta and having heard from the claimant on two dates, 5 and 9 December 2019.

175. The claimant had 12 complete years of service as at the date of his dismissal which Mr Gorsia took into account. As we have found above, Mr Gorsia and the respondent's managers valued the claimant because he had long service and a wealth of experience. They had invested in him. We find it was a decision not made lightly.

The appeal against dismissal

176. On 16 December 2019 the claimant appealed against dismissal (pages 504-515).

177. On 20 December 2019 Mr Halai sent the claimant an invitation to the appeal hearing on 8 January 2020 (page 520). This was to be chaired by a barrister instructed by the respondent, Mr Gary Self. The claimant does not complain about Mr Self being biased at that hearing. The claimant said that the meeting was "*very normal*" and he does not complain about the conduct of that appeal hearing. We find that the appeal hearing was conducted fairly and properly and to the extent that there was any procedural unfairness in the earlier disciplinary proceedings, this was corrected on appeal.

178. The notes of the appeal hearing were at page 522. The claimant again attended with his partner and Mr Mehta attended as the notetaker. There was an interpreter.

179. The appeal hearing was recorded by the respondent – this was known to everyone involved. It was also covertly recorded by the claimant and his partner and this was only discovered by Mr Self at the end of the appeal hearing (see appeal outcome, bundle page 579).

180. Mr Self's note of the appeal hearing dated 9 January 2020 was at page 578-589. Mr Self concluded that the secret recordings and insubordination, both individually and collectively, amounted to gross misconduct and that summary dismissal was open to the respondent, subject to mitigation. Mr Self took the view that prior to October 2019 the working relationship between the claimant and respondent had been good but that it had "*collapsed catastrophically"* and in Mr Self's view it had completely broken down. Mr Self could not see any mitigation that would "*militate against a finding of summary dismissal*". He saw it as inconceivable that the claimant could make a successful return to work, whatever the outcome of the appeal. By the date of the appeal hearing the claimant was working at Perfect Crystal.

181. In relation to the 1 October 2019 incident, Mr Self considered that the claimant was the aggressor and that the claimant was not being honest and straightforward in many of the answers that he gave at the appeal hearing. Mr Self did not consider him a credible witness. He said that whenever the claimant could not answer a question, he sought the answer from his partner. They spoke in Polish which was translated, so Mr Self could follow

what was being said. That led, in Mr Self's view, to the claimant's answers being highly inconsistent with previous answers. He formed the view that the claimant said whatever he thought Mr Self would like to hear, as opposed to the truth. Where there was a conflict of evidence, Mr Self preferred other accounts of events.

182. Although Mr Self took a different view on appeal on the allegation relating the 9 November call to Mr Hrisca, as a result of the other disciplinary matters he saw no reason to uphold the appeal. He upheld the decision to summarily dismiss the claimant (page 589).

183. The outcome was sent to the claimant on 10 January 2020 (page 573). The claimant complained that he did not receive an outcome letter from the respondent. He received Mr Self's report under cover of an email from Mr Mehta saying "*please find attached the outcome of appeal letter as drafted by the independent chairman"* so we find that he knew the outcome.

Covert recordings

184. The claimant's case was that he began to make covert recordings at work from 11 October 2019. We had transcripts of some of his recordings in the bundle. He recorded all his formal meetings. He told the tribunal in evidence that he made more recordings, which he had not disclosed in these proceedings.

185. It was put to the claimant that he started to make covert recordings from 4 October 2019. In the transcript of his covert recording of the appeal hearig (bundle page 541) it shows that he told Mr Self that he began to make the recordings from 4 October 2019. The claimant said in evidence that this was a mistake. The exchange with Mr Self was (the initial *"I"* stands for what the claimant said, through a Polish interpreter):

> *"GS: When was he transferred again?*
> *I: On the 4th of October. So I felt that I had to record everything that happened after the 4th of October to protect myself and make myself credible."*

186. We find that he began making recordings form 4 October 2019.

187. To the extent that the claimant complained that the was not given enough notice to prepare for internal hearings, for example his appeal hearing, our finding is that these were not matters he raised at the time. He did not ask for more time to prepare and could have done. The respondent had accommodated him when they offered him an appeal hearing on 18 December 2019 (pages 517-519) and he said he could not come. He had access to legal representation as is clear from the disclosure letter of 28 October 2019 sent by his legal representatives. We find that if he had asked for more time he would have been given it.

The claimant's credibility

188. We make the following findings about the claimant's credibility. He denied in his witness statement that he met with Mrs Halai on 8 October 2019 but admitted it in cross-examination and tried to explain it by saying it was not a "*formal meeting*".

189. He initially said he had no friends at his new workplace at Perfect Crystal, but when his remedy witness statement was put to him, he admitted that he did have friends at Perfect Crystal.

190. He suggested that he could not speak English and sought to discredit the English course that he had passed. Our finding is that he had a sufficient understanding of English to do his job, where the discussions took place in English in a multi-national workforce.

191. The claimant was asked by Mr Gorsia at his disciplinary hearing on 5 December 2019, whether he had taken any more than the two photographs taken on the factory floor. He denied this more than once, but later admitted that he had taken substantially more photographs.

192. He initially denied having his mobile phone on him at work and then admitted that he had his phone on him every day.

193. He also revealed during evidence a matter that he had never previously disclosed, which was that he used a device at work called a "spy-cam". The claimant appeared to take the position that if an employee was not allowed to use a mobile phone at work, then he could use a "spy-cam" because this was a different type of device. We found this wholly unconvincing. We find that this was the claimant seeking to build a case against the respondent, including with the covert recording of conversations with his colleagues.

194. His view was that if he was not caught "*red-handed*" then allegations should not have been put to him.

195. He admitted in evidence that he used the words "*f**ing idiot* on 1 October 2019, but had denied this in the 28 October 2019 letter.

196. Mr Self, an external barrister who heard the appeal against dismissal, did not consider the claimant a truthful witness.

197. For these reasons, where there was a conflict of evidence between the claimant and the respondent's witnesses, we preferred the evidence of the respondent's witnesses throughout.

The wrongful dismissal claim

198. On a claim for wrongful dismissal it is for the respondent to prove on a balance of probabilities that the claimant actually committed the gross

misconduct. We find that the claimant did commit the acts of gross misconduct in particular in that he was found to have acted in a threatening and undermining way to Mr Ascinte, plus he had covertly recorded him and taken covert photographs and recordings with a view to "*building a case*" against the respondent.

199. As we have set out above, we found the claimant to be a less credible witness than the respondent's witnesses. There were admissions in respect of some of his conduct – such as the covert recording. We find that this was undermining of the employment relationship as its purpose was not to "*protect*" himself but to "*build a case*" against the respondent. The disciplinary rules were clear and we find for the same reasons as the respondent, that the claimant acted in breach of those rules towards Mr Ascinte. We find the gross misconduct proven on a balance of probabilities.

**The relevant law**

200. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

201. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure as follows and as relevant to this case.

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered.*
>
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

202. Under section 43C qualifying disclosure is made if the worker makes the disclosure to his employer.

203. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly. In ***Kilraine v London Borough of Wandsworth 2018 ICR 185*** the CA said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

204. In terms of the reasonableness of the belief, the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026*** said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information he/she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

205. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731.*** The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "*in the public interest"* were introduced in 2013 to prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

206. In ***Chesterton*** whilst the employee was found to be most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. The claimant believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

207. The Court of Appeal (CA) held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

- The numbers in the group whose interests the disclosure served
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
- The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

208. The Court of Appeal also sounded a note of caution (paragraph 36) that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

209. The term "public interest" is not defined in the legislation. There is a two

stage test according to the Court of Appeal in ***Ibrahim v HCA International 2020 IRLR 224*** (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest and (ii) if so, did he have reasonable grounds for so believing? The claimant's motivation for making the disclosure is not part of this test. The tribunal must look at the claimant's subjective belief at the time he made the disclosure (Judgment paragraph 25 Underhill LJ).

210. It is for the tribunal to rule as a question of fact on whether there was a *sufficient* public interest to qualify under the legislation. The term "public interest" has not been defined in the legislation. In ***Parsons v Airplus International Ltd EAT/0111/17*** the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does *not* prevent a tribunal from finding on the facts that it was actually only one of those. In that case the claimant made a series of disclosures that in principle could have been protected but were found to be made as part of a disciplinary dispute with the employer which led to her dismissal for other reasons. The EAT found that the tribunal was entitled to find that the disclosures were made in her self-interest and not in the public interest.

211. Section 103A provides that an employee who is dismissed shall be regarded …. as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

212. Section 47B(1) provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

213. Misconduct is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996.

214. Section 98(4) of the Employment Rights Act 1996 provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be determined in accordance with equity and the substantial merits of the case.

215. As is well known, the leading case of ***British Home Stores Ltd v Burchell 1978 IRLR 379*** sets out three elements for a fair conduct dismissal. First, there must be established by the employer the fact of the belief by the employer in the guilt of the employee in relation to that misconduct. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

216. In ***Stein v Associated Dairies Ltd 1982 IRLR 447,*** the EAT held that the test to be satisfied before it would be appropriate for a tribunal to look behind a previous warning was deliberately couched in more exacting terms than the test for unfairness in respect of a dismissal. It was held that provided the warning was issued in good faith and there were prima facie grounds for it, or, to put it another way, provided the warning was not issued for an oblique motive or was not manifestly inappropriately issued, the employer and the tribunal are entitled to regard the warning as valid for the purposes of any dismissal arising from subsequent misconduct, provided that the subsequent misconduct is such that, when taken together with the warning, the dismissal or the decision to dismiss is a reasonable one (see judgment paragraphs 6 and 8 in particular)

217. In ***Vaughan v London Borough of Lewisham EAT/0534/12*** Underhill J (as he then was) described the making of covert recordings as "*very distasteful*" (judgment paragraph 12) although they are not inadmissible if relevant. In ***Phoenix House Ltd v Stockman 2019*** the EAT said at paragraph 78:

> *We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances. The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation.*

## Conclusions

Did the claimant make protected disclosures

10 October 2019

218. We have found above that on 10 October 2019 the claimant made no disclosures to Mrs Halai under section 43B(1)(b) or (f) ERA 1996.

219. We have found above that the claimant complained to Mrs Halai that Mr Patel was constantly failing to wear his PPE, whether it was his boots, helmet or hi-vis and that he shouted at other employees, that he swore at them and other people and that he had a drink problem. We have found that these disclosures only related to Mr Patel.

220. We have considered whether these complaints about Mr Patel were made in the public interest and tended to show that the health or safety of any individual had been, was being or was likely to be endangered. We find that the disclosures showed that Mr Patel's health and safety was likely to be endangered by a failure to wear his PPE, but it did not disclose that anyone else's health and safety was likely to be endangered by this. The only person whose health and safety was endangered by failing to wear Personal Protective Equipment was his own. It was a disclosure that related only to Mr Patel as an individual and not to any wider section of the public. This disclosure was not in the public interest.

221. We find that the complaints about shouting or swearing did not tend to show that anyone's health or safety was likely to be endangered. The words relied upon were (statement paragraph 22): that Mr Patel was "*Often shouting at other employees and acting in a manipulative way"* and *"Swearing all the time at factory workers and other people."* We had no submission from the claimant as to how we should find that these words tended to show that anyone's health and safety was likely to be endangered. We accept that it is possible for people to be affected if they are shouted or sworn at, but the disclosure relied upon did not say as much.

222. Even if we are wrong about this, we had no submission as to why any such disclosure was made in the public interest or any submission as to who and how many people this affected and how. We find that this was not a protected disclosure.

223. The final disclosure relied upon by the claimant in paragraph 22 of his statement was that he told Mrs Halai that Mr Patel had "*a drinking problem".*

224. In the List of Issues for our determination, there was no wording relied upon either as to shouting, swearing or drinking. We had to go to the words relied upon in the claimant's witness statement at paragraph 22. Also, the words he said he used, were not put to the witness to whom he made the disclosure – Mrs Halai.

225. The respondent made a concession that the disclosure in relation to Mr Patel in the letter of 28 October 2019 was a protected disclosure. The letter is much more specific because we could read the words set out and see exactly what was relied upon. When it comes to the verbal disclosure, our finding is that the claimant disclosed that Mr Patel had "*a drinking problem".*

226. The verbal disclosure went no further, on the case advanced by the claimant, to say that Mr Patel was drinking alcohol whilst on shift It is set out in terms in the 28 October 2019 letter (pages 191-192). It is not for us to read more into the case actually advanced by the claimant and we find that simply disclosing that another employee has a "*drinking problem*" does not disclose that this problem in turn, was likely to endanger the health and safety of others. We find that this was not a protected disclosure.

227. Even if we are wrong about this, we have found that the disclosures made by the claimant were not causative of any of the detriments he relied upon or his dismissal.

<u>The letter of 28 October 2019</u>

228. The respondent accepted that the 28 October letter was a protected disclosure under section 43B(1)(d) on health and safety grounds. The

respondent accepted what they described as a "*generous*" interpretation of public interest, in that they accept that it is in the interests of the respondent's employees who could be impacted if a person is operating machinery or working whilst under the influence of alcohol. However, the respondent did not accept that the disclosure was made in good faith - which only went to potential remedy. They submitted that it was the claimant acting in retaliation to being challenged about the 1 October 2019 incident.

229. So far as any reference to PPE is concerned, the respondent submitted that the very word "Personal" in Personal Protective Equipment, shows it relates to the individual. The respondent submitted that when an employee does not wear his or her PPE, the only person they are endangering is themselves; it only affects the individual and not any wider section of the public. We agreed with this submission.

230. At no time were we told in relation to either 10 October 2019 disclosures or 28 October 2019 letter, the legal obligation said to have been breached or what was being deliberately concealed. We find that the 28 October letter was only a protected disclosure under section 43B(1)(d) and not under section 43B(1)(b) or (f).

Whistleblowing detriment

231. We have found as a fact that the claimant was not transferred to the larger factory site because of any disclosure made to Mrs Halai on 10 October 2019.

232. We have found above that Mrs Halai did not impose the final written warning because of any disclosures made by the claimant on 10 October 2019.

233. The claimant relied on being subjected to further disciplinary proceedings as whistleblowing detriment. The claimant was given a verbal warning on 24 October 2019 relating to using his mobile phone at work. This predated the 28 October 2019 disclosure letter. We have found above that this warning was not because of any disclosures made on 10 October 2019.

234. We have found above that the reason the respondent commenced further disciplinary proceedings was because of the serious allegations made against the claimant in the course of investigating his appeal against the final written warning and the new matters that arose in relation to covert recordings, abusive behaviour towards Mr Ascinte and contacting Mr Hrisca whilst on suspension. We have found that it was not because of any disclosures.

235. We have also found that upholding the final written warning was unconnected with the disclosure letter of 28 October 2019.

236. For the above reasons the claim for whistleblowing detriment fails and is

dismissed.

Was the warning imposed by Mrs Halai "*manifestly inappropriate*"

237. The task for the tribunal in an unfair dismissal claim is to consider each aspect of the employer's actions and conclusions and in conduct case this includes looking at the employer's investigation, disciplinary process, findings and sanction. If the employer takes into account a final written warning, we have to consider that as part of our evaluation. We must also be careful to apply the standard of a reasonable employer and not substitute our own conclusions. Where the employer has taken into account a previous written warning, it is legitimate to do so provided that it was issued in good faith and there were at least prima facie grounds for imposing it. It must not have been manifestly inappropriate to issue it.

238. The claimant relied upon the decision of the EAT in ***Bandara v BBC 2016 WLUK 271***. In that case the tribunal found that a warning was manifestly inappropriate. We find that the ***Bandara*** case is distinguishable on the facts from the present case. In ***Bandara*** there were two disciplinary issues that led to the final written warning. They were: the claimant shouting at a manager and breaching editorial guidelines. In respect of shouting at the manager, the claimant in that case issued an unforced apology very promptly, the following day. Although the manager in question had informed HR, they took no action and the matter laid dormant for many months. The situation in the present case is different in that there was no apology coming from the claimant to Mr Hrisca and the matter was dealt with internally almost immediately. It was not left to lie.

239. In this case we have found that Mr Gorsia took into account the final written warning imposed by Mrs Halai.

240. The claimant submitted that the warning imposed by Mrs Halai on 22 October 2019 was "*manifestly inappropriate*". We have found that it was appropriate and the ***Bandara*** case can be distinguished for the reasons given.

The unfair dismissal claim

241. We have found above that the reason for dismissal was the claimant's gross misconduct and not for any disclosure that he made. The claim for automatically unfair dismissal therefore fails and is dismissed.

242. We find that Mr Gorsia had a reasonable belief that the claimant had committed gross misconduct. On some aspects the claimant had admitted his conduct, such as the making of covert recordings and having his phone on him on the factory floor.

243. We have found that the respondent carried out a reasonable investigation into the disciplinary charges. As we have found above, it was not suggested to any of the respondent's witnesses that more should have

been done or that anyone else should have been interviewed.

244. For the reasons set out above, we find that Mr Gorsia formed a reasonable belief in the claimant's misconduct based on the evidence and information before him. He had some admissions from the claimant and he considered that the allegations made by the claimant were by way of retaliation for being subjected to disciplinary proceedings. Where there was a conflict in the accounts of events, he preferred Mr Ascinte's evidence and found that the claimant used threatening and undermining behaviour towards him.

245. We have gone on to consider whether the decision to dismiss fell within the band of reasonable responses open to the respondent. We have reminded ourselves that it is not for use to substitute our own decision. We find that it did fall within band of reasonable responses. There had been a final written warning for abusive behaviour and Mr Gorsia made a finding that the claimant had engaged in threatening and undermining behaviour towards Mr Ascinte. The disciplinary rules were clear and a reminder had been given in the 5 June 2019 email. The respondent had made clear their intolerance towards harassing behaviour in the workplace.

246. We have considered whether the dismissal was procedurally fair. We have found that reasonable investigations were carried out within both disciplinary processes, the claimant was informed of the disciplinary charges, he was given every opportunity to state his case, he had the benefit of an interpreter at all hearings from 11 November 2019. He was accompanied by his partner which went over and above his statutory and contractual rights. He was given a right of appeal which he exercised. We found no material substance in the procedural challenges set out in the claimant's submissions at paragraph 9.

247. We find that the dismissal was procedurally fair.

248. We find that the dismissal of the claimant was fair and the claim for unfair dismissal fails and is dismissed.

Wrongful dismissal for notice pay

249. In a claim for wrongful dismissal it is for the respondent prove that it was entitled to dismiss the claimant without notice because he had committed gross misconduct. This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed gross misconduct and we have to make our own findings in relation to this. Our finding above is that the gross misconduct is proven and as such the claim for wrongful dismissal for notice pay fails and is dismissed.

Good faith

250. Had we been required to make a finding for remedy purposes, as to whether the claimant had made his disclosures in good faith, we would have found that he did not. We find that his disclosures were made in

retaliation for being disciplined and that he wished to build a case against the respondent to take it to higher authorities.

The interpreter

251. We expressed our gratitude to the interpreter Ms Broka whose considerable skills greatly assisted with the smooth running of this hearing.

_____

**Employment Judge Elliott**
**Date: 26 February 2021**

Judgment sent to the parties and entered in the Register on: 1 March 2021
_____ for the Tribunal