EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr S Nwagbara **Edible Oils Ltd**

Heard at: **London South Employment Tribunal**

On: **26- 30 September 2022**

Before: **EJ Webster**
Ms L Grayson
Mr K Murphy

Appearances
For the Claimant: **Ms S Dervin (Counsel)**
For the Respondent: **Ms R Levene (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not upheld.
2. The Claimant's claim for automatic unfair dismissal is not upheld.
3. The Claimant's claim for Trade Union detriments is not upheld.
4. The Claimant's claim for unauthorised deduction from wages is dismissed upon withdrawal.
5. The Claimant's claim for racial harassment is partially upheld.

REASONS

The Hearing

6. The hearing occurred wholly in person. We were provided with hard copy and digital copies of the following:
   (i) Bundle numbering 371 pages
   (ii) Witness statements for:
   - Adeel Abbas
   - Robert Burrows
   - Edward Poska
   - Justina Kanceviciute

The Claimant
Jim McDermott

(iii) Agreed supplementary pages for the bundle
(iv) Agreed chronology and cast list
(v) Copy of CCTV of the 'Canteen Incident'

7. We heard oral evidence from all the above witnesses.

The Issues

8. The List of Issues was set out in the Case Management Orders dated 11 January 2022. These are replicated below with additional clarification that was discussed and agreed with the parties at the outset of the hearing.

9. By a claim form received by the tribunal on 19 November 2020 the Claimant brings the following claims:

a. Unfair dismissal
b. Race discrimination
c. Unpaid wages
d. Unpaid notice
e. Detriment for trade union membership and activities

10. The Claimant was employed by the Respondent between 1 June 2015 and 20 August 2020. At the time of his dismissal he was employed as a Production Team Manager.

11. In broad terms, this claim arises from the Claimant's dismissal, which he claims discriminated against him on the grounds of race and was motivated because of his trade union activities. The Respondent's case is that it fairly dismissed the Claimant for gross misconduct.

12. Unfair Dismissal

12.1 Was the Claimant dismissed for a potentially fair reason as under s.98(2) of the Employment Rights Act 1996 ("ERA")? The Respondent contends that the Claimant was dismissed for a reason relating to his conduct.

12.2 If so, was the Respondent's decision to dismiss the Claimant fair and reasonable in all the circumstances, in particular:

(i) Did the Respondent undertake a reasonable investigation into the alleged misconduct?
(ii) Did the Respondent hold a genuine belief that the Claimant was guilty of the alleged misconduct? If so, did the Respondent have reasonable grounds to hold that belief?
(iii) Did dismissal fall within the band of reasonable responses?
(iv) Did the Respondent follow a fair disciplinary process before dismissing the Claimant?

13. Automatic Unfair Dismissal

13.1 Was the reason (or principal reason) for the Claimant's dismissal that the Claimant:

(i) was a member of an independent trade union; and/or

(ii) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

14. Detriment

14.1 Did the alleged acts set out at paragraph 67 of the Grounds of Claim occur as described by the Claimant?

(i) The dismissal was as a result of the hostile attitude the Respondent's management had towards the Claimant and other union members over the preceding months;
(ii) The investigation leading to his dismissal was done so one sided;
(iii) Most of the details in the Statements used against the Claimant were either highly exaggerations or untrue;
(iv) The short period of time between recognition at Belvedere and the rejection of the Respondent's pay proposals indicate a link between the Claimant's continued membership of the Union and/or his effective participation and the union activities and his summary dismissal; **Claimant's counsel agreed that this was background information as opposed to a detriment and the Tribunal will treat it as such.**
(v) The fact that the Respondents decision to suspend the Claimant's was made ahead of the actual meeting with the Claimant and he was given a letter pre dated; and
(vi) The fact the dismissal letter was written ahead of the Respondent receiving and acknowledging the Claimant comments on the minutes, therefore the decision to dismiss the Claimant was a foregone conclusion.

14.2 Did the Claimant suffer any detriment whilst employed by the Respondent as a result of act, or any deliberate failure to act, by the Respondent?

14.3 If so, did one or more of the acts amount to detrimental treatment?

14.4 If so, was the sole or main purpose of the relevant act or acts to:

(i) prevent or deter the Claimant from being a member of an independent trade union, or penalise him for doing so; or
(ii) prevent or deter the Claimant from taking part in the activities of an independent trade union at an appropriate time, or penalise him for doing so.
(iii) Prevent or deter the Claimant from making use of trade union services at an appropriate time, or penalising him for doing so?

15. Harassment

15.1 Did the conduct of Daveidas Susinka described in the Grounds of Claim between paragraphs 22 and 28 occur as described by the Claimant?
During the course of the hearing the Claimant withdraw his claim that the words and behaviour at paragraph 24 was related to race. He also withdrew the allegation that DS using the word 'snitch' was related to race.

15.2 Was the conduct unwanted?

15.3 Was the conduct related to a race?

15.4 If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

15.5 If so, did the Respondent take all reasonable steps to prevent Mr Susinka from doing the alleged discriminatory act?

16. Jurisdiction

16.1 Were the Claimant's claims brought in time? The Respondent's grounds of resistance paragraphs 2 – 7 set out the Respondent's case.

17. Unlawful Deduction from Wages

17.1 Was the Claimant entitled to receive a 3 per cent increase in his pay from 5 April 2021? If so, did he receive the payments to which he was entitled?

The Claimant withdrew this claim on Day 4 before the conclusion of evidence.

Facts

18. We have only made findings of fact where it was relevant to our conclusions. If we do not mention facts or evidence that were before us during the hearing that does not mean that we did not consider them, it means that we have determined that they were not relevant to our conclusions.

19. All our findings are made on the balance of probabilities.

Background

20. The Respondent is a supplier of branded and customer owned brand bottled oils and fats. The Claimant was employed from 1 June 2015 until his dismissal on 20 August 2020. He was promoted to Production Team leader on 2 March 2020.

Trade Union Relations

21. We address this issue first because it was put forward as an important backdrop to the subsequent incident and the investigation and disciplinary processes.

22. The Claimant was an active member of the GMB Trade Union. He had become a trade union representative in January 2017. As part of his role he undertook to support his colleagues in various ways including speaking up over health and safety matters and conducting pay negotiations. He had also been key in getting the Union recognized at the Belvedere site.

23. It was the Claimant's case that there were bad relations between the management and the union. He said that his activities with the union meant that management viewed him negatively and that in particular, he had fallen out with the then Factory Manager, Trevor Barr ('TB').

24. The Claimant asserts that his health and safety officer duties were removed in around May 2018 because of his refusal to step down as a union representative. The Respondent stated that the timing was due to the fact that a colleague returned from sick leave to take the role back again and that the claimant had only been asked to take them on temporarily. There was no evidence to substantiate the Claimant's allegations that Andrew Wilson had told him that to stay in the role he needed to step down from the Trade Union role. We note that JM, who was, we believe, the full time officer for the GMB responsible for that site at that time, does not given any evidence on this point in his statement. We find it implausible that had such a threat been made that the claimant would not have raised it with the union or complained about it to the managers at the time. There is an absence of any such evidence and therefore on balance we find that the Claimant did not have his Health and Safety role removed because of his trade union activities.

25. He asserted that he had not been promoted until March 2020 because of his union involvement. He provided us with no evidence to substantiate that beyond his assertion. The Respondent witnesses stated that he was promoted when he was ready. We were provided with no evidence from the Claimant that his experience or qualifications did surpass others that had been promoted ahead of him. He pointed only to time in the role, not experience or performance.

26. He said that from the point at which he had raised issues regarding there being no water at the Erith site on 18 November 2019, TB had blanked him. He stated that TB had made it clear that he was not happy with the Claimant's 'interference' with the situation.

27. The Claimant also relied on the fact that just after the incident in the canteen, but before he was suspended, the Claimant had been involved in the annual pay negotiations. He attended a meeting on 12 June 2020 with JM. At that meeting he was not told that he had been suspended (something which we deal with later).

28. Subsequently, on 7 September 2020, the pay negotiations were ultimately successful and the Union accepted, on behalf of its members, a 3% pay increase that would be back dated from 5 April 2020. JM confirmed in evidence that they had had constructive successful pay negotiations on this occasion. JK gave evidence, which we accept, that the relationship between the company and the union was professional and positive throughout.

29. The Respondent's witnesses disagreed. They pointed to the fact that the Claimant had been promoted since he his alleged disagreement with TB over the water incident. That had occurred whilst TB was still the Factory manager. Further, they evidenced that the pay negotiations were successful on the part of the union and that there were no bad feelings as a result.

30. In evidence, the Claimant's union representative, Jim McDermott ('JM'), confirmed that relations with middle management had been fine but that it had been TB that was the main problem. He also confirmed that the pay negotiations had ultimately been productive and successful. He did not give any evidence about historical difficulties the Claimant alleges he faced, nor does he give evidence in his statement that industrial relations between the GMB and the company were hostile or negative during the Claimant's employment there.

31. On balance, we find that the general relationship between the company and the Union was positive. We accept that perhaps TB was not particularly positive about the Union because the Respondent witnesses, when asked about TB's attitude towards the union, gave equivocal answers. However, we were provided with no evidence that this meant that he singled the Claimant out for bad treatment and it is clear that the Claimant was promoted despite this supposed negative view by TB. There were no other incidents or examples provided of union members or representatives being treated harshly or badly or dissuaded from taking part in union activities. It is also noteworthy that TB did not make the decision to suspend, discipline or dismiss the Claimant. He did oversee the appeal but there was no suggestion by the Claimant that TB had somehow sought to influence the other decision makers earlier in the process.

<u>Incident in the canteen</u>

32. There was an argument between the Claimant and Daveidas Susinka (DS) on 5 June 2020. Some of it was captured by CCTV but not all.

33. There is no audio to the recording so what is said was in dispute between the parties. Various witnesses were present including:

    (i) The Claimant
    (ii) Davedias Susinka (DS)
    (iii) Sylwia Szubzzda (SS)
    (iv) Dave Potts (DP)
    (v) Ivanna Gordey (IG)
    (vi) Handley Pratt (HP)

(vii) Ceasar Monumbele (CM)
(viii) Paul Tadd (PT)

34. As a result of the incident, both DS and the Claimant separately went to see Adeel Abbas and reported it later that day. It is not in dispute that the Claimant reported that DS had used racial slurs against him and DS reported that he was scared of the Claimant.

35. It is clear to us on observing the video that there was clearly an altercation and that the atmosphere in the canteen became hostile and unpleasant to the point that most other people chose to leave the room quickly. In very brief summary, the Claimant and his friend/colleague HP were discussing football. The room was relatively small with tables and chairs. It most closely resembles a common room or similar as opposed to a large institutional canteen. Most people seem to agree that the Claimant and HP were talking and their voices were quite loud. DS told them to be quiet and there ensued an argument. Some witnesses alleged that the argument spilled over into the hallway outside the canteen. That was disputed by the Claimant.

36. We accept that DS was the first to be rude and told the Claimant and HP to be quiet. We accept it is more likely than not that he said something along the lines of 'Hey fucking shut up! What the hell man?'. The argument followed from there and both DS and the Claimant called each other 'snitches.'

37. We find, on balance, that DS either said "you're acting like a gangster" or called the Claimant a gangster. We see no difference between the two in terms of the meaning intended and the effect on the Claimant and will explain that later. We also find that DS used this phrase after DS had been antagonizing the Claimant by asking him and his colleague to be quiet.

38. The CCTV footage also shows that HP tried to usher the Claimant away from the altercation on several occasions but the Claimant kept returning to the argument.

39. The Respondent accepts that during the argument, DS also said that the Claimant was 'no one' whilst gesturing to the floor. We find it more likely than not that DS also said that the Claimant was 'nobody' in this context.

40. It is also agreed that the Claimant said something along the lines of 'I'll educate you or 'show you the meaning of' gangster. It is also agreed that the Claimant said something along the lines that if he had not been at work he would have dealt with the situation differently.

41. We consider that in this context the comments made by DS were related to the Claimant's race and understood to be related to race by the Claimant and DS at the time. We base this conclusion on the Respondent's dismissal letter to DS dated 20.8. 20 (pg 211 - 213).

"It is clear that Samuel interpreted the reference to 'gangster' as a race-related comment (Samuel is African) and this significantly provoked him."

…

As set out above, you accept that you used the word "gangster" towards Samuel although you claim you did not do so because of his race, but because of the threatening way in which he was behaving. However, I do not accept that this was the case.

I believe that in using this term you did not know that it would be interpreted as an unconscious racism and that it was reasonable for Samuel to interpret it as being related to his race. I do not accept your evidence that if Samuel had told you he was upset, that you would have apologised. Samuel made it clear that he was unhappy with the fact you had used the term and that he felt it was directed at him because of his race and instead of apologising you continued to argue with him.
I also note that there was a previous incident between you and Samuel in August 2017 where you were warned after using language related to Samuel's race.

I therefore have a reasonable belief that you used racist language towards Samuel on this date."

42. We don't accept the Respondent's attempts during these proceedings to derogate from the conclusion that its own managers made at the time. The Respondent witnesses and representatives state that they only recognised that the Claimant had reasonably interpreted it as a race related comment. Not that it was actually race -related. We can see that there is this distinction within the language of both DS' dismissal letter quoted above and the Claimant's dismissal letter. However, we conclude, on balance, that the Claimant's interpretation and the Respondent's subsequent understanding and interpretation of the situation was that by saying 'gangster' DS had made a comment related to the race of the Claimant.

43. We reach our conclusion against the context that it is clear that there was a racist comment from DS to the Claimant in 2017 and whilst that was only dealt with informally, it is not in dispute that it occurred. We also accept the Claimant's evidence that whilst he had not been directly racially harassed by DS since 2017, DS was in the habit of making racist comments about others. The Claimant's evidence on this point and why he had not reported it was credible as it did not appear exaggerated, and the Claimant did not attempt to suggest that it was particularly serious or hurtful to his working life. Instead he presented it as background information relevant to DS' behaviour in the canteen on that day and by way of explanation for the Claimant's response to that behaviour.

44. We find that on balance of probabilities the comments 'nobody' and 'no one' were not related to the Claimant's race. We base this conclusion primarily on the evidence provided of the Claimant's narrative of the incident at pages 79-80 of the bundle. The comments were said in the context of an argument between two people that started when DS asked them to be quiet. That

argument escalated firstly to the two trading insults and calling each other snitch and referring to names that DS had used about a colleague and then moving on to DS using, the word gangster about the Claimant. The narrative provided by the Claimant was detailed. He is also very clear that once they had traded these insults,

"I warned him to mind the words he used on me or I'll go upstairs and make a report about you. We were just having a conversation this place is not a library. Deividas then called me a gangster. I said "how dare you call me a gangster is it because of the colour of my skin? I said "how dare you call me a gangster, you must be stupid you are an arsehole for calling me a gangster". <u>This is the second time he has been racist and my head spun at this comment."</u>

45. This last sentence (our underlining) in our mind demonstrates that it was only the 'gangster' comment that the Claimant considered racist. It is the second time he alleges DS made a race related comment, the first one being a reference to the incident in 2017. The insults and argument that had gone before had not had the same impact or been interpreted in the same way. That phrase changed things for the Claimant.

46. We have carefully considered the context of this situation. We accept the Claimant's evidence that DS had previously made racist comments and that DS had made racist comments about others. However that does not mean that everything DS said to the Claimant was related to the Claimant's race or even (though no direct discrimination claim is brought) said because of Claimant's race. We accept that DS started an argument and was being rude but that does not mean that the use of the words 'nobody' and 'no one' on either a plain reading or with the benefit of an understanding of this context, mean that the words were related to race.

47. Further we refer to the Claimant's own grievance which states that he did not consider that DS started to make a negative comment relating to his race until he said 'gangster'.

48. The Claimant accepts he was very angry and upset. He considers that his anger was justified because of DS's use of the word 'gangster'. We find however that in light of that anger the comments he is alleged to have made along the lines of "I will educate you' or 'show you the meaning' of gangster were said and they were said passionately and in the heat of the moment. The same is true of the comment that if we were not in work I would deal with this differently. In that context it was reasonable for DS and subsequently the Respondent to interpret those comments as being indications that the Claimant was going to behave in the way a gangster might and was a thinly veiled threat of bad behaviour towards DS and possibly violence.

<u>The Investigation</u>

49. Both DS and the Claimant approached Adeel Abbas ('AA'), their then line manager to complain about the incident. DS put that complaint in writing on 8 June and AA first saw it on 10 June.

50. On receiving the reports from both DS and the Claimant, AA began to investigate what had happened.

51. The first set of statements were taken on 9 June before AA had received a written grievance from either DS or the Claimant and therefore we accept that at this point in time AA was simply investigating the incident. We note that DS's grievance is dated 8 June but it was not challenged before us that he said he received the grievance on or around 10 June and after these interviews had been conducted.

52. We do not it was an unreasonable step for AA to speak to the witnesses, for HR to take a note and for the witnesses to then be asked to sign the note. We do not consider that this demonstrates an inherently unreliable process simply because a transcript of the conversation was not taken. Such note taking is common place in such investigations. The length of any delay between the notes being taken and then signed by the relevant individuals is unclear but we do not accept that it was so significant that the overall impressions and versions of events reflected in the statements is undermined. The reliability of the notes is confirmed in the more detailed interview notes taken by EP the decision maker. The overall impression of events and what happened are broadly similar for all witnesses in both sets of notes. We recognise however that there are some discrepancies and we deal with them properly below.

53. The Claimant was at work the day after the incident but thereafter was off sick for a week returning on 15th June.

54. There seems to have been little occurring with regard to an investigation either into the incident or into DS' grievance until 15 June. On that day the Claimant had a return to work meeting and worked 3 hours of his shift. At the same time AA interviewed DS about his grievance. This was the first time that DS had been interviewed about the incident and it is apparent to us from the notes of the meeting that this was done as a grievance meeting as opposed to a neutral investigation meeting. It is noteworthy that Bundle index for this claim calls it a grievance meeting and DS is simply asked to explain his grievance. It is this meeting that is used to inform AA's investigation that then results in the Claimant's suspension. It is also clear that it is this grievance meeting that leads AA and HR to speak to SS who reports to them that the Claimant was threatening to kill DS and had to be physically held back by HP.

<u>Suspension</u>

55. AA says that it was SS's evidence that was the catalyst for suspending the Claimant. We consider that SS's evidence and DS's grievance/ grievance meeting are inextricably linked. The Respondent had had lots of information about the Claimant being angry, swearing and potentially being aggressive from other witnesses prior to this date but had declined to suspend the Claimant. The statements of evidence collected on 8 June provide that information. The two interviews with DS and SS were clearly very close

together and we find, on balance, that both informed the Respondent's decision to suspend the Claimant.

56. AA then called the Claimant to a meeting later on in his shift on 15 June. They were joined at the meeting by KP who had a letter dated 11 June which suspended the Claimant with immediate effect. He was given the letter and told that they believed he was the aggressor and that was why they were suspending him and not DS.

57. It was accepted by AA that he had not, at this stage, spoken to the Claimant at all about what he said happened that day beyond the initial report to him on 5 June. No attempt was made to find out the Claimant's version of the incident prior to his suspension.

58. We consider it more likely than not that the use of the date 11 June on the suspension letter was a mistake by the Respondent. The Claimant suggests that it shows that they had made the decision to suspend on 11 June. We disagree. Had the Respondent made that decision prior to 15 June we conclude that they would have communicated it to him beforehand. They would not have allowed him to attend the pay negotiation meeting with JM on 12 June had he been suspended. We conclude that had they made the decision to suspend him they would have communicated it to him at that point, whilst he was off sick, or at the latest when he first reported for his shift that day. They would not have waited for him to work for 3 hours and then suspended him. We conclude that the cause for the suspension was DS' and SS's interviews that day.

59. Absolutely no process was followed prior to suspending the Claimant, he was not spoken to about what had happened and no conversation occurred despite what is said in the letter. This was in breach of their suspension policy. **[pg].** The Respondent based their decision solely on DS and SS's versions of the Canteen Incident. AA did not consider the Claimant's allegations of racist comments made to him made on the day of the incident as being as serious as the threats of violence that were now being alleged. AA was unable to account for why he took DS' and SS' version of events so much more seriously than he took either the Claimant's or the other witnesses who had already suggested aggression on the part of the Claimant. We believe that it comes down to the fact that DS had put his grievance in writing and AA therefore turned the process into a grievance investigation as opposed to a neutral investigation.

60. It was agreed in evidence that this suspension meeting was the first time the Claimant had been aware that there was any sort of investigation into him or that DS had brought a grievance against him.

61. The Claimant then attended a meeting on 19 June. The purpose of that meeting was not clearly defined. It was, as admitted by AA as both an investigation meeting into the disciplinary allegations against the Claimant and an investigation into DS's grievance. AA admitted in evidence to the Tribunal

that the two processes became merged at this point and he no longer distinguished between the two.

62. The Claimant, on the same day as this meeting (19 June) raised his own grievance alleging that DS had used racist language against him and also complaining about the one sided nature of the investigation process to date and in particular the fact that he was suspended unfairly given that DS had not been.

Grievance investigation

63. RB conducted the grievance meeting with the Claimant on 30 June. Following that meeting, he upheld part of the Claimant's grievance which was that the disciplinary investigation had been started without his knowledge.

64. We conclude that had the Claimant not brought his grievance, the Respondent would not have suspended DS. Up until that point we accept that the process was one-sided. AA had not taken the Claimant's verbal complaints regarding the racist comments as seriously as he took DS's complaint of threats of physical violence. AA as good as admitted in evidence to this Tribunal that it was the threats of physical violence only that persuaded him to suspend thus demonstrating that he took the alleged racist comments less seriously.

65. However we also conclude that because RB upheld the Claimant's grievance, EP took a different approach to the disciplinary process and his subsequent investigation and consideration of the entire incident corrected the one-sided nature of the investigation and process that had occurred prior to the Claimant's grievance.

66. The fact that DS ought also to have been subjected to a disciplinary process from the outset, does not, in of itself, mean that the Claimant ought not to have been.

Disciplinary Process

67. DS was suspended soon after RB's investigation was concluded. EP was then asked to carry out the disciplinary process for both individuals. Having reviewed the investigation undertaken by AA, and having considered RB's grievance outcome, EP determined that further investigation was necessary and that he would do this prior to the disciplinary meetings so that the Claimant and DS could consider the evidence prior to the disciplinary meetings.

68. EP reinvestigated the matter from the ground up by interviewing all the witnesses. Transcripts of those interviews were sent to the Claimant in advance of his disciplinary hearing. He was informed of his right to be accompanied at the meeting and his TU rep attended via video link due to the pandemic.

69. At that meeting The Claimant was given an opportunity to tell EP what had happened in full. He was also given the opportunity to view the CCTV footage. The Claimant disputes this and says that he was not shown the footage at the meeting. We do not accept that.

70. We conclude that the Claimant was given the opportunity to comment on all of the evidence during the disciplinary hearing as evidenced by the notes. We reach that conclusion based on the notes of that meeting which say that the Claimant watched the footage. The Claimant had the chance to comment on these notes and his amendments did not cover this point. We understand that his amendments did not reach EP before he made his decision but that does not change the fact that neither the Claimant nor his representative amended these notes to say that he had not watched the CCTV footage. The Claimant relies on a comment he made in the appeal hearing that he was expecting to have the CCTV footage to view – we suggest that in this he was referring to having it at the appeal hearing, not that he had not had it at the disciplinary.

71. In addition we find that although the Claimant may have had the expectation that he would be able to review the notes of the disciplinary meeting and amend them before a decision was reached because of the earlier stages of the process, that did not mean that the failure to do this at this stage was unreasonable. The Claimant knew when the decision was being made and did not return the notes before that. Further, and more importantly, the changes to the notes were relatively minor and the Claimant has not set out for us during this hearing how those changes would have or ought to have in any way changed EP's conclusions. As stated above it is notable that he did not seek to change the note that stated he had watched the CCTV for example.

72. We accept EP's evidence that having reviewed the grievance brought by the Claimant and partially upheld by RB, EP effectively started the investigation again by re-interviewing all of the witnesses plus identifying a further witness, Sean Markey. The notes of those interviews were provided to us and the Claimant accepts that they were a more thorough and reasonable note of the individuals' accounts than those taken by AA.

73. Nevertheless the Claimant challenges the accuracy of the accounts given for various reason. Firstly because there were differences between the two sets of statements given to AA and then EP and secondly because they were taken so much later than the incident he asserts that this made them inherently unreliable.

74. Some of the inaccuracies relied upon by the Claimant were as follows:

    (i) SS's statements (pg 93 and p 133) give different versions of how angry and aggressive the Claimant was with her second statement suggesting far less aggression
    (ii) The discrepancies between Ivanna and DS's statements regarding where the threats to kill took place

(iii) Dave Potts says he heard what was said at the beginning despite having his earbuds in which EP disregards meaning that his whole statement ought to be disregarded.

(iv) Ceasar says that he could not hear properly but gave an impression of what he thought was said. (p143)

75. The Claimant also states that by suspending him first without suspending DS for a considerable period of time, the witnesses would be influenced into thinking that he was guilty one. Further he stated that it gave DS the chance to speak to the witnesses in order to give them his version of what happened which would change their evidence.

76. In light of these issues the Claimant says that it was unreasonable for EP to take any of this evidence or much of this evidence into account.

77. We do not think it was unreasonable for EP to do as he did which was to weigh the various conflicting versions of events and come to a general, overall conclusion about the incident. He does not universally accept any one version of what happened which was reasonable in circumstances where he had no consistent explanation. It was clearly an emotional and fast moving situation and he took that into account and concluded that there were common themes amongst all of the versions including that various things were said (as discussed above) and that there was a hostile and threatening environment created for everyone in the room during the incident.

78. We do not think that the Claimant's assertion that DS had influenced the witnesses is born out by the statements they give. For example, SS's account to EP describes far less aggression from the Claimant than her first account did. That would suggest that DS was not influencing them in his favour.

79. Having read the Claimant's outcome letter and DS's outcome letter, we conclude that the summary of the factual situation set out by EP is a reasonable interpretation of the evidence that he had before him at the time. He does not ignore discrepancies but weighs up the evidence that he had. His conclusions are not unreasonable given the number of differing accounts.

80. Although he sets out different comments made by different witnesses in the outcome letters, he does not reach a conclusion as to what was exactly said and the different letters do not conflict with each other. In the Claimant's outcome letter he concludes that he had a "reasonable belief that your behaviour on 5 June was disorderly and aggressive and that you did make threats of violence towards DS". He does not seek to try and define exactly what happened or exactly what was said because he recognised that it was difficult to pinpoint that beyond what he says which is that he found the Claimant to have been hostile and aggressive in response to provocation by DS.

81. We conclude that before reaching a decision as to which sanction he would impose, EP took into account the fact that the Claimant had been provoked. We base this on the sentence:

" I understand that you felt provoked by D and in particular by the fact that he used the word 'gangster' which you were felt was related to your race." The fact that he does not set out explicitly that he found that he had concluded that Dav had used racist language towards the C (as per Dav's outcome letter p 213) or that the Claimant had been 'reasonably provoked.' This does not alter, in our view, whether he took it into account or not. We find that he clearly did.

82. We also consider that he took into account a lesser sanction as set out in the dismissal letter on pg 208.

"I have considered whether a sanction less than dismissal would be appropriate. In doing so, I have also considered your length of service (5 years) and your clean disciplinary record.

In the circumstances and having considered all these factors, I feel that dismissal is the appropriate sanction. As a Team Leader and someone who has only recently been promoted into this role, my expectation is that you would be the person setting an example for other staff members about how to resolve disputes and work professionally with others."

83. The failure to specifically mention the provocation in this paragraph does not mean that he did not consider it all – it is clearly referenced in the earlier paragraphs as being something he bore in mind during his assessment of the Claimant's behaviour. He also took into account the Claimant's position as a Team leader and his length of service.

84. EP concluded that he would summarily dismiss the Claimant for gross misconduct with immediate effect from 20 August 2020.EP concluded that the Claimant had breached the Respondent's Disciplinary procedure, in particular that he had been involved in '"Disorderly or indecent conduct, assault, fighting on Company premises or threatening physical violence" because he had made threats of violence towards DS. He recognized that the Claimant felt provoked by the use of the word gangster but EP concluded that the Claimant's response to that provocation was "completely unacceptable" particularly as a team leader.

85. <u>Appeal</u>

86. The Claimant appealed against his dismissal by letter dated 26 August 2020. In the letter he asked for an independent person to hear the appeal. The basis for requesting an independent person was that 'blacks are threatened with the least consideration'. He does not mention his Trade Union activities or any aspect of the Respondent's attitude towards the union in the letter.

87. TB was appointed to hear the appeal. He was the General Manager at the time. Further a separate HR person was appointed; Simon Creasy. The Claimant was represented at the meeting by his union representative. During the meeting he did not raise any concerns regarding the fact that TB was conducting the meeting. Although we accept that it had been mentioned in the appeal letter, the Claimant did not object to TB either at the point at which he

is notified that TB would be carrying out the meeting nor during the meeting itself. Neither does his Trade Union representative.

88. The Claimant states in his appeal letter at at pg 237 as follows:

"I strongly believe that a conspiracy has occurred here because of my race and union activities."

However, he had not raised his union activities at all during the disciplinary process up until that point and during the appeal meeting he did not expand upon it. We base this conclusion on the notes of that meeting which do not mention the topic and the outcome letter from TB dated 30 September (p262) where TB says:

"You did not elaborate during the appeal meeting why you felt that the business would want to conspire against you because of your union activities, in fact you did not mention this at all. In any event, you have not presented any evidence or suggested any motivation that would support such an allegation and nor am I aware of anything that would indicate this. This ground of your appeal is not upheld."

89. In any event, in his letter asking for an independent person to hear the appeal the Claimant does not say that he is concerned about TB's approach because of the Claimant's union activities. He asks for an independent person 'because blacks are threatened with the least consideration'. Trade Union activities and membership are not mentioned.

90. The only time that the Claimant's Trade Union activities are raised as something that might be influencing the disciplinary process (apart from the one sentence in the appeal letter) is in a letter sent by JM dated 16 June 2020 (p76). That letter states as follows;

"The question I have to ask is. Why is this so one-sided'? Is it because he is a union rep or the colour of his skin?"

91. JM also criticises the Respondent because of the failure to notify them that they were going to suspend a union representative. This is not the same thing as suggesting that it was the fact that he was a trade union representative or his actions or feared actions as a trade union representative that was the cause of any of the negative treatment alleged.

92. The Claimant states that the appeal meeting was pointless because TB had already made up his mind and kept asking why the witnesses would lie when the Claimant acknowledged that he had no difficulties in his relationships with any of them prior to this point (apart from DS). The Claimant asserts that this was unreasonable and demonstrated that TB was unwilling to consider his points and did not conduct a fair appeal process. We do not think it was unreasonable for TB to question why so many witnesses to the event should have said negative things about the Claimant's behaviour during the incident in the canteen when they had previously had a good relationship with the

Claimant. In essence he was suggesting that they did not have reason to lie about someone they liked. To ask such a question does not render the appeal pointless or predetermined. IT shows that he was considering the Claimant's questions as to the reliability of the witness evidence.

93. TB did not uphold the Claimant's appeal and he upheld EP's decision to dismiss the Claimant for gross misconduct.

The overall process

94. The Claimant's concerns about the process have been dealt with as they arose in the relevant sections above. However, we note that the Claimant was informed of his right to be, and was, accompanied at every relevant meeting by a Trade Union representative albeit this was sometimes via video link due to the pandemic. Where his representative could not attend the meetings were rearranged.

95. He was sent all relevant evidence and policies in good time before the disciplinary hearing. He was told what the allegations were against him and was informed of his right to appeal once the decision was made.

The Law

96. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
    (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
        (a) The reason (or if more than one, the principal reason) for the dismissal, and
        (b) That it is either a reason falling within subsection (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
    (2) A reason falls within this subsection if it –
        (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
        (b) Relates to the conduct of the employee,
        (c) Is that the employee was redundant, or
        (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
    (3) In subsection (2)(a)
        (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
        (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
    (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

97. The Respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the Respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis of whether the Respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the Respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

98. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). We have reminded ourselves of the fact that we must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

99. We have also reminded ourselves that this test and the requirement that we must not substitute our own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the Claimant Chubb Fire Security Ltd v Harper [1983] IRLR 311). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

100. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

101. The EHRC Employment Code states that 'a Claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the Respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

102. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

103. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the Claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the Respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

104. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the Claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. If the Claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the Respondent has treated the Claimant less favourably on a protected ground, the burden of proof moves to the Respondent

(ix) it is then for the Respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever on the protected ground

(xi) not only must the Respondent provide an explanation for the facts proved by the Claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the Respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Harassment – s26 Equality Act 2010

105. (1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

- race;

106. s123 Equality Act 2010 - Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Automatic Unfair Dismissal

107. s152.Trade Union and Labour Relations (Consolidation) Act 1992— Dismissal of employee on grounds related to union membership or activities.

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—
(a) was, or proposed to become, a member of an independent trade union, [...]3
(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time,
…

108. The Respondent's submissions helpfully summarised as follows:

> *"The burden of proof is on the Claimant. In Serco Ltd v Dahou KEAT/0027/14/1408, the EAT found that the burden of proof mechanism for automatically unfair dismissals is similar to that which applies to discrimination claims under the Equality Act 2010. In Maund v Penwith District Council [1984] IRLR 24, the EAT found that it is for the employee to show only that there is an issue warranting investigation. Once this has been shown, the onus shifts to the employer to prove which reason unconnected to the trade union activities was the principal reason for dismissal."*

Detriment on Trade Union Grounds – s146 Trade Union and Labour Relations (Consolidation) Act 1992

109. s146.— Detriment on grounds related to union membership or activities.

(1) A worker has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place]3 for [the sole or main purpose] of—
(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

….

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

(5A) This section does not apply where–
(a) the worker is an employee; and
(b) the detriment in question amounts to dismissal.

Conclusions

Unfair dismissal

110. We conclude that the reason for the Claimant's dismissal was gross misconduct which is a potentially fair reason under s98(4) ERA 1996. Although the Claimant has put forward the arguments that his trade union activities were the reason for his dismissal we had no evidence to support that contention. Industiral relations were broadly positive and professional. The union's full time officer only gave evidence that TB had been a negative influence, not that the company overall was hostile. That assertion was not backed up by any concrete examples of detrimental treatment either towards the claimant himself or to union representatives or members in general.

111. In contrast, we had clear evidence that the Respondent was considering a serious altercation between two members of staff that involved disorderly behaviour by both members of staff. We accept that this was the genuine reason for the Claimant's dismissal.

112. We accept that the initial investigation by AA was one-sided and has given us several reasons for concern. That investigation, in isolation, was unreasonably carried out. Far from being a neutral investigation into what happened, tt became an investigation into DS' grievance without the Claimant having an opportunity to explain what had happened before being suspended. It resulted in the Claimant's suspension being carried out in breach of the Respondent's policy.

113. Firstly we accept the Claimant's argument that when the Claimant told AA about the incident, he clearly indicated that he felt he had been racially discriminated against and yet AA appears to have considered that unless it was in writing this was not something he was going to take into account or investigate.

114. Although we accept that the initial interviews on 9 June were undertaken as part of a general 'investigation' it did occur without the Claimant's knowledge and it was the start of a disciplinary investigation albeit at this stage it was neutral in that he had had complaints of bad behaviour by both sides.

115. However from the point at which he received DS's grievance we conclude that AA changed the process into an investigation into DS's grievance or at the very least merged the disciplinary investigation with the grievance investigation. He did this without having spoken to the Claimant at all. He therefore was no longer acting neutrally as he was not taking into

account one of the individuals' account of circumstances before reaching decision.

116. The decision to suspend therefore was one-sided and was influenced by the fact that AA had not spoken to the Claimant as part of any investigation under any label or taken into account his version of events. He did this despite knowing that the Claimant had alleged that racist language had been used against him and despite knowing that in effect the Claimant had raised an allegation of potential gross misconduct against DS.

117. To compound this, at the suspension meeting KP stated that the Claimant was being viewed as the aggressor and this was the reason for his suspension. Such a statement, which it is not disputed was said, strongly suggests that KP and AA had a already formed a view of the incident and this was despite not having spoken to the Claimant. However we do not accept that they had decided to suspend the Claimant before the day of his suspension. The suspension letter's date was just an error, it was not indicative of when the decision was reached.

118. The Claimant's grievance, which was considered by RB raised these points. Although RB does not uphold every aspect of the Claimant's grievance and where he does, his reasons are equivocal, he takes steps that mean that the inequity of the process to that point is rectified from then onwards. He suspends DS as well, taking the Claimant's complaint against him seriously and then, EP effectively starts the investigation process afresh when the disciplinary process is passed to him to conduct. The fact that DS ought probably to have been suspended at the same time as the Claimant does not mean that the Claimant ought not properly to have been suspended too. We recognise that suspension is not always a neutral act and in the context we have given about the Claimant being told that he was seen as the aggressor, we suggest that this suspension demonstrates that AA and KP were not neutral when they took those steps. However we accept that EP took over the process from then on so as to conduct a proper process and he was not tainted by the earlier steps taken by AA and his HR adviser. Further the only parts of AA's investigation to that point that was tainted by DS's grievance were DS' interview, SS's interview and the suspension. All other parts of the investigation had taken place before DS brought his written grievance and were therefore not skewed at that point.

119. We do not accept that the gap between the suspensions rendered the witness evidence considered by the Respondent inherently unreliable nor that the Respondent placed undue emphasis on the witness evidence. The Claimant asserted that because he had been suspended first this afforded DS time to speak to witnesses and influence them and that the witnesses would be influenced by him being suspended earlier as he would be viewed as more guilty. We do not accept those submissions.

120. The gap of the one month before the new witness statements were taken led to a reduction in the severity of the witnesses' view of C's actions not an increase. This detracts from the argument that they were influenced by the

order of suspensions and/or influenced by DS. We also do not consider that the Respondent placed too much emphasis on the witness evidence. As discussed above, we find that EP weighed the various versions of the incident given by witnesses and decided what aspects of which versions he could trust or not and came to an overall conclusion. The evidence of the witnesses was really the only evidence, apart from that of DL and the Claimant that EP could analyse. The CCTV footage shows very little and had no audio. Whilst it was taken into account it adds very little.

121. Despite the unfair part of the initial investigation process we do not consider that it taints the next stage of the process as conducted by EP. Firstly the majority of the evidence collected and relied upon by AA was collected prior to the grievance merging with the process. Secondly, EP clearly recognized that there were gaps and flaws in the investigation and rectified them by speaking to all the witnesses again and viewing the CCTV footage himself. He also, crucially, speaks to the Claimant who was given the opportunity to comment on all the evidence including the CCTV footage. We do not accept the Claimant's assertion that he was denied this opportunity. EP based his decision on the entire investigation, not the flawed parts of the investigation. There was no evidence to suggest that he had prejudged the decision. The Claimant did not put forward any further steps that the Respondent ought to have taken in the investigation that he did not then take. The Claimant's concerns are around the subsequent interpretation of the evidence by EP.

122. Therefore, taking an overall view, whilst there are flaws at the early stage of the investigation, the investigation as a whole was not unreasonable or outside the bands of a reasonable investigation for an employer in all the circumstances. We have been careful not to substitute our view for what ought to have been done for those of a reasonable employer in the circumstances.

123. We then consider whether EP's decision to dismiss falls within the range of reasonable responses for an employer in all the circumstances. The Claimant states that he relied on an unreasonable investigation. We disagree as stated above. We conclude that EP did take into account the mitigating factors that the Claimant was provoked. His decision was not that the Claimant was unreasonable in being upset or objecting to the fact that he had been subject to a racist comment. EP's conclusion was that the Claimant's response was disproportionate to the comment particularly as a Team leader. Throughout this process, in evidence before us, and in his conduct of the proceedings, the Claimant has not accepted that there is a distinction between the fact that he was reasonable in finding the gangster comment provocative and racist and the fact that his response was inappropriate.

124. It was clear that the Claimant was incredibly emotional during the hearing about the comments made to him and we accept that this was a justifiable response to the situation. He was justified and reasonable for objecting to DS's comments. However we accept that it was reasonable for the Respondent, based on the evidence they had before them, to consider that the Claimant had made threats of violence against DS and that this was not a reasonable response to DS's comments in all the circumstances. That

conclusion was based on several witness accounts which all said that they felt that the Claimant had made some sort of threat. That coupled with the fact that he was a team leader and had had training on managing difficult situations at work and should have been leading by example were the reasons for the Respondent's decision. They did not decide that the Claimant was not allowed to object to DS' comments nor did they dismiss him because he found the comment offensive or objected to it. They decided that the way in which he objected was a breach of their Code of Conduct because he threatened violence against DS and that was capable of being gross misconduct. We have found as a finding of fact that it was reasonable, in the context, for DS to believe that the Claimant's comments of showing him or explaining to him what a gangster was an implicit threat of violence. We have also concluded that the comment that the Claimant would have handled things differently if they were not at work could reasonably be interpreted as a threat against DS.

125. EP also found that the Claimant's lack of remorse was a factor in prompting him to decide to dismiss. The Claimant became very emotional during evidence on this point. He felt that he ought not to have to be remorseful for objecting to a racist comment. As stated above, we accept that the Respondent reasonably believed that the Claimant had made a threat of violence, as a Team leader, in response to the racist comment and it was that threat of violence that they considered gross misconduct and worth of remorse, not the decision to object to a racist comment.

126. EP did take into account of his length of service and considered an alternative sanction but decided that they were not sufficient reasons not to dismiss in all the circumstances.

127. The process, save for the suspension which we have dealt with above and the initial flaws in the investigation, was fair. Although we have accepted that the suspension ought not to have happened in the way that it did, we do not consider that it materially affected the investigation or the subsequent decisions. As concluded above we do not think that the suspension somehow affected the evidence given by the witnesses or allowed DS an unfair advantage in interfering with the witness evidence gained. Nor did it mean that the Claimant was prevented from taking part in the process once EP took over. Any inequity or unfairness caused by the initial flaws were rectified by EP's investigation and subsequent disciplinary process. AA did not play a role in the subsequent investigation or decision making process. EP approached it afresh and made an independent decision.

128. The Claimant was given the right to be accompanied by a union representative at all meetings and was. He was given a proper opportunity to consider and comment on all the evidence. We do not consider that the failure to wait for him to return the meeting minutes rendered the dismissal unfair. The Claimant's amendments were minor and we accept EP's evidence that the changes he has now seen would not have changed his mind in any way as they were not material to his decision. The Claimant has also failed to explain to us how the changes he made were material in all the circumstances.

129. Subsequently the Claimant was given the right to appeal and this was considered by TB. We do not accept that the appeal was pointless and rendered the dismissal or the process unfair. The Claimant relies on the fact that TB was asking why the witnesses would lie about the situation. This was a valid and reasonable question in all the circumstances as TB was trying to ascertain on what basis the Claimant was challenging the witness evidence. We also do not accept that TB did not consider the appeal properly because of the Claimant's Trade Union membership or activities. We will address this in full below but insofar as it might affect the ERA 1996 Unfair Dismissal claim we address it here. We were provided with no evidence that TB had a vendetta against the Claimant because of the 'water incident' or at all. The Claimant said that thereafter TB had blanked him but during that period the Claimant was promoted and continued to have a clean record and take part in union activities. The Claimant put forward no evidence whatsoever that his participation in the pay negotiations affected any aspect of the disciplinary process or the appeal in particular despite TB's apparent animosity towards the Claimant. As stated above, we have found that the Claimant did not raise any objection to TB holding the appeal meeting because of his alleged dislike of the union. It was not raised in the Claimant's appeal letter or during the meeting and it is implausible that if the union or the Claimant genuinely believed at the time that TB was unable to fairly consider the Claimant's appeal, that they would not have raised it at some point. Instead they raised the fact that they did not feel that the Claimant could get a fair consideration of his claim because he was black – something that has not been pursued before us at all.

130. We conclude that taken as a whole this was not an unreasonable conclusion in all the circumstances and that their decision did not fall outside the range of reasonable responses for an employer in all the circumstances. British Home Stores v Burchell (1978) IRLR 379. It was based on a reasonable investigation, followed a fair process and the decision itself was not outside the range of reasonable responses in the circumstances.

131. We therefore do not uphold the Claimant's claim for unfair dismissal.

ACAS Code

132. We do not consider that the Respondent breached the ACAS Code as it followed a fair procedure which complied with the Code as outlined above.

Automatic unfair dismissal and trade union detriment claims

133. We were provided with no evidence to link the Claimant's dismissal or the conduct of his appeal to his union membership or activities. We have taken into account the Claimant's concerns regarding the overall context at the company in terms of industrial relations. However we prefer the Respondent's evidence on these matters that the relations were broadly positive. Had the Claimant truly believed that he was being punished because of his trade union

activities we consider this would have been robustly raised by the union representative during the disciplinary and appeal meetings and his grievance. Instead there was one speculative letter near the beginning by JM and one line in his appeal letter which was not expanded on or mentioned in the appeal hearing. We have in any event found that the backdrop he painted regarding negative historic relations or detriments to be unfounded.

134. We consider EP has convincingly set out his reasons for dismissal in the dismissal letter where he clearly outlines the reasons for the Claimant's dismissal which as set out above we found to be a reasonable conclusion in all the circumstances. There is no suggestion or evidence that it was tainted by the Claimant's trade union activities. Rather the evidence is clearly that EP felt the Claimant had reacted inappropriately and it was his behaviour on the day that motivated the dismissal.

135. We therefore do not uphold the Claimant's claim for automatic unfair dismissal.

136. Turning to the detriments relied upon by the Claimant.

137. The dismissal was as a result of the hostile attitude the Respondent's management had towards the Claimant and other union members over the preceding months;

We have found no evidence of a hostile attitude at the Respondent either towards the Claimant or other union members. There was no mention of other members being treated badly given to us at all. The fact that JM gave no evidence of any such issues was, on our view, indicative of the fact that there was no such attitude or mistreatment. We find that although EP knew of the Claimant's trade union activities he did not have anything to do with the 'no water' incident and had no negative feelings towards the Claimant arising out of his trade union activities or otherwise.

138. The investigation leading to his suspension was done so one sided;

We accept that the original investigation, prior to the Claimant's grievance and conducted by AA, was one-sided because it effectively merged with DS's grievance and failed to give weight to the Claimant's allegations and failed to give the Claimant the opportunity to explain his side of the story. However we have been provided with no evidence to suggest that AA or KP made their flawed decisions because of the Claimant's union membership or activities. We find that there was no evidence of a hidden agenda, simply that there was a poor, badly thought out process that became confused by overtaking events such as DS's grievance.

139. Most of the details in the statements used against the Claimant were either highly exaggerations or untrue;

We don't accept this analysis of the statements. It is correct to say that there were discrepancies between people's accounts and there were probably minor inaccuracies. However the inaccuracies were caused by the fact that this was a

fast moving, stressful situation for all involved including the witnesses. There was nothing to suggest that any of the witnesses or indeed DS (who was also a union member) were motivated to make false statements because of the Claimant's union membership, status or activities.

Further we do not accept that the Respondent decision makers placed undue reliance on the inaccuracies or discrepancies. They considered any discrepancies and the points put forward by the Claimant and based their decisions on the overall picture painted by the evidence. Based on that overall picture, they reasonably concluded that the Claimant reacted inappropriately to the racist comment and other provocative behaviour from DS. They did not to come that conclusion because of the Claimant's trade union membership, status or activities. They came to that conclusion because of the nature of the incident and the evidence they had before them.

140. The fact that the Respondents decision to suspend the Claimant's was made ahead of the actual meeting with the Claimant and he was given a letter pre dated;

We find that the decision to suspend the Claimant was not made ahead of the meeting with him but on the same day (15 June) as the meeting with him. The catalyst for his suspension was a combination between DS's grievance meeting and SS's evidence suggesting a violent threat from the Claimant to DS. There is no link between SS's and DS's evidence and the Claimant's trade union activities.

141. The fact the dismissal letter was written ahead of the Respondent receiving and acknowledging the Claimant comments on the minutes, therefore the decision to dismiss the Claimant was a foregone conclusion.

We were provided with no evidence to suggest that the decision was made to go ahead without waiting for the minute amendments due to the claimant's trade union membership or activities. Whilst we appreciate that at the time the Respondent would not have known the possible significance of any changes, we do not conclude that the Respondent was motivated to somehow speed up the process simply to avoid the notes for any reason and certainly not because of the Claimant's union membership. Any such flaws could have been raised in the appeal (and indeed were) so the Respondent gained nothing by going ahead without them.

142. We therefore do not uphold any of the Claimant's claims for Trade Union Detriments.

<u>Harassment</u>

143. During the course of the hearing the Claimant clarified which of the comments he said amounted to harassment. Those are that DS said the Claimant was a 'nobody' and a 'nothing' and that he used the word gangster to in some way describe the Claimant. All other aspects of paragraphs 22-28

of the Grounds of Claim were not relied upon and therefore have not addressed them.

144. We have found that the words 'nobody' and 'no one' were not related to race due to the context of the situation. Rather we found that the Claimant only considered the word 'gangster' as being related to race. We accept that this conduct was clearly unwanted. This was not disputed by the Respondent and was evident by the Claimant's reaction to the comment.

145. We consider that DS did intend the use of the word gangster to create an intimidating hostile degrading humiliating or offensive environment for the Claimant. The Claimant told him immediately that he found it racially offensive by asking if he was calling him a gangster because of the colour of his skin. Yet DS did not apologise but continued to antagonise the Claimant and engage in an argument with him. Even if DS did not have the deliberate intention of creating a hostile, degrading humiliating or offensive environment we conclude that it had that effect on the Claimant and that it was objectively reasonable for it to have had that effect on the Claimant.

146. The Respondent's submissions asked us to disregard EP's dismissal letter as it was a decision for us to make. We agree that we must make the decision but we can have regard to the evidence which is that in EP's dismissal letter to DS, he concludes that it was reasonable for the Claimant to believe that the comment was related to his race and it was reasonable for the Claimant to be provoked by it. Subjectively the Claimant found it offensive and objectively it was reasonable for the Claimant to interpret the comment in this way.

147. The Respondent summarised the Reasonable Steps defence in its submissions:

*"As to the liability of employers for employees, anything done by an employee in the course of their employment is treated as having also been done by the employer (*section 109(1)*). An employer can be liable for harassment, whether or not the harassment is done with the employer's knowledge or approval (*section 109(3)*). However, there is a defence available to an employer or principal if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description (*section 109(4)*).*

Tribunals should take a two-stage approach, looking first at what steps the employer took and then considering whether there were other reasonable steps that it could have taken (Canniffe v East Riding of Yorkshire Council [2000] IRLR 555). In considering what steps are reasonable in the circumstances, the EAT in Allay (UK) Ltd v Gehlen UKEAT/0031/20 held that a tribunal should consider:

- *The likelihood of steps being effective in preventing discrimination (which does not need to be more likely than not).*

- *Cost.*
- *Practicality*

The EHRC Code gives an example of where the reasonable steps defence might succeed.

An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act (Paragraph 10.50, EHRC Code.)"

148. We do not consider that the Respondent demonstrated to us that it had taken all reasonable steps to prevent DS from carrying out the harassment. We accept that it had dealt with the 2017 incident between DS and the Claimant in an informal manner at the request of the Claimant and therefore had dealt with that appropriately and taken it seriously.

149. However it did not initially take steps when racist behaviour was reported to AA. AA initially appeared to view the use of racist language as a relatively minor offence. This suggests a lack of awareness amongst relatively senior staff members albeit we accept that AA was new to the company at the time. Nevertheless he was being advised by an HR adviser who also did not appear to take the complaint particularly seriously until the Claimant brought a grievance.

150. The Respondent was unable to show us that DS had attended the mandatory training they had in place that covered training on discrimination. JK told us in her witness statement that everyone was trained on the Company's Code of Conduct using an interactive training module that is completed annually. This includes training on acceptable standards of conduct that covers discrimination and harassment.

151. The Respondent's evidence to the Tribunal was that DS must have attended it that year because it was mandatory; yet they were unable to produce the records of him attending that training. The Claimant's training record on the other hand was produced and shows what training he completed. Given that this was an online interactive course, we find it implausible that DS had in fact attended the online training as suggested and it had simply not been logged or recorded that he had attended.

152. We therefore conclude that unlike the example given in the EHRC Code, the Respondent had not taken all reasonable steps to prevent such behaviour. Yes they had taken action against DS in the past, but they had not continued to remind him of acceptable behaviour at work by making him complete the

annual training. Such training would have been particularly important for someone who had previously been found to have used discriminatory language towards the Claimant and yet we were provided with no evidence that steps were taken to ensure that he completed the training. We consider it implausible that no such evidence would exist had he undertaken the training.

153. We have carefully considered whether any such training would have been effective. It is clear that between 2017 and the Canteen Incident, DS had not engaged in racist behaviour or used racist language towards the Claimant. However we accept the Claimant's evidence that DS had done so towards others albeit it had not been reported.

154. On balance, applying the steps set out in *Allay (UK) Ltd v Gehlen UKEAT/0031/20* we conclude that the likelihood of DS undertaking the training being effective would be quite high. The course is interactive and presumably designed to be effective in reminding people of acceptable behaviour and language in the workplace. The Respondent made much of the fact that it was an ethnically diverse workplace and that management had a 'sub zero' approach to racism. That would imply that they wanted their training to be meaningful and effective as opposed to a tick box exercise.

155. The training was already offered and in place and it would therefore not have cost much to make DS complete the training and it was presumably practically straightforward.

156. In addition, the Respondent had not taken preventative steps by ensuring that DS undertook the annual online training course, something it could easily have done.

157. In all those circumstances then we consider that the Respondent has failed to establish that it took all reasonable steps to ensure that the harassment did not occur and we uphold the Claimant's claim that DS calling him a gangster was an act of racial harassment.

Time

158. The Respondent submits that the harassment claim is out of time. Their submissions on this point were as follows:

"The claims in relation to the aforesaid comments are also out of time. The comments were made on 5th June 2020. 3 months less a day is 4th September 2020. Adding on the 6 weeks for EC takes the Claimant to 16th October 2020. This is less than 1 month after Day B so the Claimant benefits from the 1-month extension. 16th November 2020 is the time limit, which is 3 days out of time."

159. The Claimant notified ACAS on 11 August 2020 and Early Conciliation finished on 24 September. The Early Conciliation period was therefore 45 days long. The ET1 was accepted on 19 November 2020.

160. As clarified by Luton Borough Council v Haque 2018 ICR 1388, EAT, *S.207B(3)* ought to be applied in every case. S.207B(4) only applies 'where a time limit set by a relevant provision' — including S.207B(3) — would expire 'during the period beginning with Day A and ending one month after Day B'. If, determined in accordance with S.207B(3), the expiry date would fall within the period specified in S.207B(4), the latter subsection operates to extend the time limit as provided. The time limit set by s123 Equality Act 2010 encompasses the application of S.207B(3). If that modified time limit would expire within the period specified by S.207B(4), then it is modified again by S.207B(4). The purpose of S.207B(4) is to ensure that a prospective claimant should always have at least one month from the end of the EC period in which to bring a claim not to deny them of a potentially more beneficial extension of time under s207B(3).

161. Applying s 207B(3), the EC period in this case was in fact 45 days. That period of time ought to be applied to the original limitation date of 4 September. Adding 45 days to 4 September takes us to 19 October 2020. This is a later date than if we applied s207B(4) in which case the new limitation date would have been 4 October. The new limitation date is therefore 19 October 2020 not, as submitted by the Respondent, 16 November 2020. The claim is therefore in fact more out of time than the Respondent thought or put to us.

162. We have taken into account that the exercise of our discretion to extend time is the exception and not the rule. However that does not mean the exceptional circumstances are required to enable us to exercise our discretion.

163. We have had regard to the guidance set out in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*) and considered the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

164. We do not agree with the respondent's submission that the lack of any explanation from the Claimant means we cannot consider the possibility of extending time at all. We must consider if it is just and equitable to do so in all the circumstances. Further the Claimant's representative dealt with the point albeit in submissions. In Szmidt v AC Produce Imports Ltd EAT 0291/14 it was held that an employment tribunal had erred in refusing to extend time in respect of a claim for a single act of race discrimination by failing to balance the prejudice to the Claimant of the loss of a valid claim with the prejudice to the Respondent. Although the Tribunal was entitled to take into account a lack of explanation for the delay that does not mean that a Tribunal must not carry out the balance of prejudice exercise (Pathan v South London Islamic Centre EAT 0312/13).

165. We do not accept that this is a situation where there was a continuing act of discrimination or harassment. This was a one off incident of harassment even by the Claimant's evidence and case to us.

166. The prejudice to the Claimant is significant in that he would not be able to pursue his claim for harassment in circumstances where it is a well made out claim on the facts. The length of the delay was comparatively short. The evidence has in no way become less cogent because of the delay. The facts of the case are such that the Respondent is fully aware of the allegations and has been since the incident ' occurred. They are in Tribunal in any event having to deal with an 'in time' case for unfair dismissal based on exactly the same facts. Whilst the incident itself is a one off incident, its repercussions and the subsequent process continued over a longer period of time and the Claimant wanted to complete the entire process. The Claimant's claim is brought within the relevant time limits from the date of the dismissal.

167. Against that, we have the fact that the Claimant was represented and advised by the union throughout and he has not explained the delay so we cannot guess as to why the claimant did not put the claim in earlier. The Respondent is also in a position where it is having to defend a claim that it would not otherwise have to deal with.

168. Taking all of the above into account, we consider that the prejudice to the Claimant outweighs the prejudice to the Respondent. . For those reasons therefore it is just and equitable to extend time and for us to consider the Claimant's claim for harassment.

169. The Claimant's claim for harassment related to race is therefore upheld in respect of him being called a 'gangster'. The remaining allegations of harassment are not upheld.

170. A remedy hearing will be listed shortly.

Employment Judge Webster

Date: 17 November2022