EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Noris Rosario	**AND**	**Hellermann Tyton UK Limited**

JUDGMENT OF THE TRIBUNAL

Heard at: Manchester **On: 9-13 January 2023**
Deliberations at: Manchester **On: 3 March 2023**

Before: Employment Judge A M Buchanan
Non-Legal Members: Ms Jackson and Ms Owen

Appearances

For the Claimant: In person
For the Respondent: Mr P Warnes – EEF Limited

JUDGMENT

It is the unanimous Judgment of the Tribunal that:
1. The complaint of automatic unfair constructive dismissal by reason of protected disclosure advanced pursuant to section 103A of the Employment Rights Act 1996 fails and is dismissed.
2. The complaint of victimisation advanced pursuant to sections 27 and 39 of the Equality Act 2010 fails and is dismissed.

REASONS

Preliminary matters

1.1 The claimant instituted these proceedings on 13 July 2019 relying on an early conciliation certificate on which Day A was shown as 7 May 2019 and Day B was shown as 7 June 2019. Complaints were indicated of unfair dismissal, race discrimination, victimisation and for other payments. A claim against a second respondent Vivienne Ryan of Springboard HR was not accepted as the claimant had not entered into early conciliation with her. No application to review that decision was made by the claimant.

1.2 The respondent filed a timely response in which all liability to the claimant was denied.

1.3 It is necessary to set out in some detail the subsequent history of these proceedings in terms of the complaints being advanced and the issues arising in those complaints. The many other matters which have arisen during the time this case has taken to come on for final hearing are not recorded as they have no relevance to the complaints now before us.

1.4 A private preliminary hearing ("PH") took place on 29 October 2019 (pages 21-27) before Employment Judge Ryan. The resulting orders set out that the claimant had sought to expand his claim in a variety of ways including seeking to join 13 further respondents and had also referred to United States legislation, had cited several criminal offences including bribery, fraud and theft, the Computer Misuse Act 1990 and other allegations such as data breaches. The Employment Judge explained in writing why the claimant could not pursue such matters and then set out at paragraphs 13-17 the issues in the complaints which were to be pursued. There were two complaints. First, a complaint of automatic unfair express dismissal by reason of public interest disclosure pursuant to section 103A of the Employment Rights Act 1996 ("the 1996 Act") and secondly, a complaint of victimisation pursuant to section 27 of the Equality Act 2010 ("the 2010 Act"). It was recorded that the claimant's case on victimisation was that a grievance raised by him alleging race and sex discrimination amounted to a protected act and that he had been dismissed because of that protected act. The claimant's case on having made a protected disclosure is recorded as resting on the same grievance. The respondent accepted the grievance was a protected act but denied having dismissed the claimant at all, let alone because of the protected act. On dismissal the claimant's case was recorded as being that he had been dismissed by the respondent when it had purported to accept his resignation when he had not in fact resigned. The respondent's case was that the claimant had resigned his employment. It was noted that any act or omission occurring before 8 February 2019 was potentially out of time. Case management orders were made, and a hearing for three days listed to begin on 18-20 February 2020. Those orders included an order for further information in relation to a putative direct race discrimination complaint.

1.5 In the course of correspondence between the parties pursuant to the above-mentioned orders, the claimant indicated that he did wish to pursue his unfair dismissal claim on the additional basis of a constructive dismissal (page 47). The claimant also indicated a wish to amend his claim to include a complaint of direct race discrimination as regards the difference in pay between himself and two male colleagues. In the event, that last application did not proceed.

1.6 The matter came before Employment Judge Leach and non-legal members on 18-20 February 2020. It is recorded that it became immediately apparent that a number of case management issues needed to be dealt with particularly in relation to identifying the complaints being brought and the issues to be decided on. A full day was taken in discussion with the parties to identify the complaints and the issues and at the end of that day a list of issues was sent to the parties. On 19 February 2020 it was clear that neither party considered that note to be satisfactory and further time was spent on that second day drafting and finalising the terms of the schedule of issues. Paragraph eight of the resulting case management orders states: "*We also have seen for ourselves*

over the past day and a half a shifting of the claimant's case which is unsatisfactory. This is now at an end as the claimant has agreed to the terms of the schedule attached". Comprehensive case management orders were issued, and a final hearing listed before Employment Judge Leach and non-legal members was set for 18 - 22 May 2020 inclusive. The orders provided for the claimant to have leave to provide an update to his witness statement or a newly drafted statement having regard to the issues which by then had been agreed. This explains why we had two witness statements from the claimant before us.

1.7 In the course of that hearing two important matters were clarified. First, Employment Judge Leach decided to allow the claimant to proceed in claiming constructive dismissal or actual dismissal in the alternative both in relation to the alleged protected disclosure and in relation to the alleged protected act. The basis of that decision was that the factual matrix around the termination of the claimant's employment was not straight forward because: "*The claimant indicated his resignation or intention to resign and he was in the process of resigning but during the course of resigning he feels that he was dismissed by a notice being brought forward".*

1.8 Secondly, Employment Judge Leach decided the schedule of issues should record an allegation that there was a second protected act relied on for the victimisation claim on a date between 4 and 15 October 2018 (wrongly referred to as September in the claim form) when the claimant raised an informal grievance with Scott Mayne. This matter had emerged during the morning of the second day of the case management hearing.

1.9 A further case management hearing took place on 18 May 2020 by telephone as the scheduled final hearing could not proceed because of the pandemic. A further public preliminary hearing was set for 6 November 2020 to consider whether the empanelled Tribunal should stand down, whether the claim should be struck out, whether the response should be struck out and whether the list of issues should be amended. A further final hearing was set for 19-23 April 2021.

1.10 On 6 November 2020 an application that Employment Judge Leach should recuse himself was considered and refused. Further discussion took place to clarify the claimant's case. The claimant told Employment Judge Leach that his claim was one of constructive dismissal and that he had never brought a claim of actual dismissal and could not understand the reference to actual dismissal in the February 2020 list of issues. It was explained to the claimant that there was reference in the list of issues to both actual and constructive dismissal because of the relatively complicated circumstances at or shortly before the termination of his employment and that both possibilities were included in the list from the best of intentions. The claimant was asked to consider whether he wished to rely solely on constructive dismissal and he was afforded time to do so. Case management orders were made.

1.11 The orders included detailed orders at paragraph 25 in relation to the preparation of the trial bundle. Those orders were not complied with by either party. At the outset of the hearing before us the claimant came with no bundle at all and the bundle brought by the respondent and placed before us was incomplete. We took time to resolve that matter and set out below the steps we had to take to resolve it.

1.12 On 19 April 2021 the matter came before Employment Judge Phil Allen for case management. Further proceedings were stayed as appeals were outstanding at the Employment Appeal Tribunal. The claimant did not pursue an application he had made on 15 April 2021 to amend his claim to include a complaint of age discrimination. After discussion it was noted that the following amendment to the list of issues had been specifically agreed with the claimant: "***the claim for unfair dismissal is for constructive unfair dismissal only and not actual dismissal. It includes a claim for automatic constructive unfair dismissal".*** A further application by the claimant to add other respondents was refused. It was determined that the scheduled final hearing should deal with liability only. Further case management orders in relation to documents were made including providing for the claimant to prepare a separate bundle of any additional documents on which he wished to rely and obtained by him from the Information Commissioner in response to a subject access request.

1.13 By the end of September 2022 outstanding appeals had been dealt with. On 10 October 2022 Regional Employment Judge Franey lifted the stay on these proceedings and listed the final hearing which came before this Tribunal in January 2023.

The Hearing

2.1 At the outset of the hearing the claimant advised that he had hoped to have representation for the hearing but in the event would be representing himself. The claimant appeared with no papers at all in terms of the witness statements or the bundle as these were still held by his erstwhile advisers. There was no application to adjourn the final hearing. We made arrangements for our clerk to copy the witness statements and the bundle and hand them to the claimant.

2.2 The claimant explained at the outset that he may appear from time to time angry and frustrated but that was not what he felt inside. We had noted from previous Orders that the claimant had stated that his concentration was affected when he was dealing with important issues and that he was prone to become agitated. The Tribunal accepted that the claimant suffered at least from anxiety and that adjustments should be made to the procedure being followed at the hearing to take account of the claimant's condition. We did not determine whether the claimant was disabled for the purposes of section 6 of the 2010 Act as it was not relevant for us to do so. We proceeded as if the claimant suffered with an impairment which made him anxious and which affected his concentration and adjusted our procedure in order to minimise the stress on the claimant and so enable the hearing to proceed without difficulty. We had regard to the provisions of the Equal Treatment Bench Book.

2.3 A full explanation was given to the claimant at the outset on the first day of the procedure which would be followed, about the reading of witness statements, about the purpose and form of cross examination, about the right to make final submissions and about the legal issues which appeared to arise in the complaints being advanced. It was clear that the claimant was not well prepared for the final hearing and various adjustments were made, within the obligation to conduct a hearing fair to both parties, to enable the claimant to prepare properly for the hearing and in particular for cross examination of the respondent's witnesses.

2.4 It became clear at the outset of the hearing that the bundle produced for the hearing by the respondent was not complete in that additional documents, which had been handed up and added to the trial bundle at the outset of the hearing in February 2020, had not been included in the bundle placed before us. The missing pages were identified (pages 223-376) and were added to the bundle. The claimant came to the hearing without a bundle and so a full bundle was copied and provided to the claimant at the outset of the hearing as referred to at 2.1 above.

2.5 The claimant wished to add some further documents to the bundle and handed up 46 further pages. We had those pages copied and added to the bundles used by ourselves and the parties. In the event those additional documents were not referred to. During the hearing it was noted that the respondent's grievance procedure was not in the trial bundle. A copy was obtained and added to the bundle at pages 378-382. There was no objection from either party to this document being added.

2.6 It became apparent when discussing a timetable for the hearing that one of the respondent's witnesses Vivienne Ryan ("VR") proposed to attend by video from her home in France. The Employment Judge enquired whether the respondent had followed the Presidential Guidance on Taking Oral Evidence by Video or Telephone from Persons Located Abroad dated April 2022. That guidance had not been followed. Enquiries were made of the Administration, and we were informed that consent from the French Government for witnesses to give evidence from France before the Tribunal had not been given. We considered how to proceed. We considered whether we should allow evidence from VR at all or whether we should read her witness statement and give less weight to it than might have been the case had she appeared in person. Enquiries were also made as to whether VR could fly from France to Manchester in order to give evidence but that proved impossible within the time available. The views of the parties were sought.

2.7 The claimant was clear that he wished to ask some, but not many, questions of VR. Equally the respondent wished to advance her as a witness and rely on her evidence. Given the time available it was suggested and agreed by both parties that the claimant should prepare written questions for this witness which would be sent by the respondent to the witness for her to reply to in writing. The claimant was given until the opening of the third day of the hearing to prepare these questions. On the third day of the hearing, the claimant appeared with a list of some 77 questions. The Tribunal spent time going through that list to ensure the questions were relevant and not duplicated. That process resulted in a list of questions being sent by the respondent to VR who duly responded in writing on 12 January 2023 and the parties were told they were able to review her replies and to comment on them in their submissions. It was made plain to the respondent that the weight which would be given by the Tribunal to the evidence of VR would not be as great as it would have been had she been present in person. Both parties agreed this course of action as being in the interests of justice and in accordance with the overriding objective to make the best use of Tribunal time and to save time and expense. There was no objection to this course of action from either party.

2.8 The concept of final submissions was explained to the claimant, and he was given the opportunity to make his submissions orally. In the event both the respondent and the claimant filed written submissions and supplemented those by brief oral

submissions. Due to some difficulty with the IT systems on the final afternoon of the hearing with the parties, neither party was able to send their written submission to the Tribunal by the time submissions were due. The Tribunal listened to oral submissions. Written submissions were sent through on 16 January 2023 and the Tribunal considered them fully during its deliberations and read them in conjunction with its notes of the oral submissions. The procedure adopted in this regard was one agreed by both parties.

2.9 Regular breaks were offered and taken as the hearing progressed in particular at times when the claimant became emotional. The hearing was taken at a measured pace and the times when the claimant needed a break were in fact few and generally coincided with the times when the Tribunal was taking a break in any event.

2.10 A detailed timetable was agreed at the outset with the parties and time was built in for the claimant to complete his preparation for cross examination of the witnesses for the respondent particularly giving him an opportunity to do so overnight. After a full discussion on the first day, which took us to lunchtime, we adjourned until the second day in order to allow us to read into the case and to give the claimant time to prepare. The claimant had not prepared fully for the hearing when it began on the first day for the reasons we allude to at 2.1 above.

2.11 A running order for the respondent's witnesses was agreed at the outset on the first day. A subsequent application from the respondent to vary that running order was refused in order not to confuse or unsettle the claimant given that he was acting in person.

2.12 As a result of the adjustments made to the procedure, the five days allotted for this hearing were taken up by evidence and submissions until late in the afternoon of the fifth day. The Tribunal therefore reserved its judgement and met in chambers on 3 March 2023 to deliberate. Accordingly, this judgement is issued with full reasons in writing to comply with the provisions of rule 62(2) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. There has been a slight delay in our being able to issue this final Judgment. Any consequent inconvenience to the parties is much regretted.

2.13 On several occasions it became clear that the claimant had not used the time allowed him to properly prepare. On the morning of 10 January 2023, the claimant sent to the Tribunal an e-mail running to 21 numbered paragraphs which amounted to an application to have the respondent’s response struck out and asserting the respondent had no defence particularly to the allegations of discrimination. The Tribunal refused to deal with an application to strike out on the second day of the final hearing and pressed on. Such applications had been made previously and rejected and there was simply no basis to consider them afresh. A further attempt was made to do so on the final morning but not permitted.

2.14 On several occasions during the hearing the claimant made it plain that he considered the adjustments being made for his condition to be very fair and that the hearing was being conducted fairly. Neither party raised any complaint at any time about the conduct of the hearing.

The claim

3. The claimant advances the following complaints to the Tribunal:-

3.1 A complaint of automatic unfair constructive dismissal by reason of having made a protected disclosure relying on the provisions of Part IVA of the Employment Rights Act 1996 ("the 1996 Act"), section 103A of the 1996 Act and section 95(1)(c) of the 1996 Act.

3.2 A complaint of victimisation relying on the provisions of sections 27 and 39 of the Equality Act 2010 ("the 2010 Act").

4 The Issues

The issues in the two complaints were clarified and set out in the February 2020 Orders of Employment Judge Leach and were amended as set out by Employment Judge Phil Allen in the Orders of April 2021. The issues were therefore defined as follows:

1. Has the claimant made one or more protected disclosures as defined?

2. Were any such disclosures in the reasonable belief of the claimant made in the public interest and did any such disclosures in the reasonable belief of the claimant tend to show one or more of the circumstances set out in section 43B(1)(a)-(f) of the 1996 Act?

3. Were any such disclosures made to his employer pursuant to the provisions of section 43(c)(1)(a) and/or 43(C)2?

4. Were any such disclosures the principal reason for the claimant's constructive dismissal?

5. Was there a protected act carried out by the claimant as defined in section 27 of the 2010 Act between 4 and 15 October 2018? For the avoidance of doubt the respondent accepts that there was a protected act on 8 February 2019.

6. Was the claimant subjected to a detriment by being constructively dismissed by the respondent on the grounds that he had carried out a protected act as identified above?

In addressing the above issues, the Tribunal has had regard to the full contents of the schedule set out to the February 2020 Orders. In particular Section C which defines the protected acts alleged and Section D which defines the protected disclosure alleged. The above-mentioned issues are succinctly set out. There are various legal questions to be considered in relation to each issue and we consider each question in our conclusions which follow.

5. Witnesses

In the course of the hearing, the Tribunal heard from the following witnesses:

Claimant

5.1 The claimant gave evidence and called no other witnesses.

Respondent

5.2 For the respondent evidence was heard from:

5.2.1 Clare Charlton ("CC") – HR Manager of the respondent at the material time.

5.2.2 Jayne Baker ("JB") – UK Head of HR for the respondent at the material time.

5.2.3 Scott Mayne ("SM") – Respondent's Operations Manager

5.2.4 James Chapman ("JC") – Cell team leader.

5.2.5 Daniel Araujo ("DA") – Cell team leader.

5.2.6 Vivienne Ryan ("VR") (written questions and answers) – self-employed HR Consultant.

Comment on witnesses

5.3 As this is a case in which we are required to make detailed findings of fact as a result of our assessment of the witnesses before us, we consider it appropriate to make some brief comment on the manner in which each witness gave evidence before us and what if anything we take from that assessment.

5.4 The claimant. We had two lengthy witness statements from the claimant which required repeated reading and analysis. In cross examination the claimant became confused more than once. We assessed that the claimant was not a reliable historian and we concluded that a study of contemporaneous documents was likely to provide a more reliable narrative.

5.5 Clare Charlton. This witness gave evidence in a straightforward way. She was not damaged in cross examination. She had very little involvement with the claimant's grievance which lies at the heart of this case.

5.6 Jayne Baker. This witness was an important witness. We found her to be an impressive witness who was on top of the details of this case.

5.7 Scott Mayne. This witness gave evidence in a straightforward way in respect of his dealings with the claimant from October 2018 onwards.

5.8 James Chapman. We assessed the evidence from this witness and concluded that when he said he was upset by the letter left on his desk by the claimant in February 2019 that he meant what he said and was not exaggerating. Whilst some managers might have taken the letter with a pinch of salt, this witness did not and we accepted his upset was genuine.

5.9 Daniel Araujo. This witness gave his evidence in a calm and measured way. He described his dealings with the claimant in March 2021 and we were able to accept his evidence as truthful and not exaggerated in any way.

5.10 Vivienne Ryan. This was an important witness from whom we did not hear for the reasons set out at paragraphs 2.6 and 2.7 above. The manner in which we dealt with her evidence was agreed by both parties in all respects. Much of what this witness would have told us is evidenced in the correspondence which passed between her and the claimant and the claimant and JB. That correspondence is detailed in our findings of fact.

6. **Documents**

We had an agreed bundle comprising one lever arch file before us running to some 382 numbered pages. The claimant filed an additional bundle at the outset of the hearing running to 46 pages. Any reference to a page number in these reasons is a reference to the corresponding page in the agreed bundle. Any reference to the additional bundle bears the prefix "C". In addition, we had before us a lengthy document prepared by the claimant in advance of the hearing before Employment Judge Ryan in October 2019 and to which Employment Judge Ryan refers in his resulting Orders dated 29 October 2019. As the claimant requested, we treated this document as part of his written submissions to us.

Findings of Fact

7. Having considered all the evidence both oral and documentary placed before us and in particular the way the oral evidence was given, we make the following findings of fact on the balance of probabilities:

Background.

7.1 The claimant was born on 22 October 1964. He has lived in Britain all his life. English is his first language. When asked to describe his ethnic origin he does so as "Black British".

7.2 On 21 October 2017 the claimant was placed with the respondent as an agency worker working in a section known as "Heads One Way" in the Packing Department of the respondent's factory in Manchester. The agency which had placed the claimant with the respondent was called "Proman" and he was employed by that agency. The claimant remained an agency worker employed by Proman until he became employed by the respondent on a fixed term contract effective from 5 November 2018. The claimant's employment ended during the currency of that contract.

7.3 The respondent company has some 350 employees. It manufactures cable ties for the automotive industries. The Production Department in Manchester works on a 24-hour pattern with 2 days shift and 2 night shifts. In addition to the production and packing departments, there is a warehouse function, tool room, maintenance and the usual administrative functions. At the material time, the head of HR at the Manchester site was CC who lead a team of two employees including Paul Nicholson ("PN"). The respondent company has other sites in the United Kingdom at Cannock and Plymouth. The UK Head of HR was JB who worked in Manchester but in a different building to CC and her team. The respondent company is part of a global company Aptiv and one feature of that structure is that employees of the respondent company have the right to use a facility known as "Driveline" to report issues of concern about the respondent company including whistleblowing concerns. If an employee used that facility, it would

be reported to JB as UK Head of HR and she would decide how best to deal with the issue. That is what happened in this case.

7.4 In addition to his normal work in the packing department, which was always as an agency worker, the claimant would be invited from time to time as from December 2017 to work "downstairs" in the production department. It was the claimant's evidence that, if and when invited, he generally agreed to do that work and when he worked downstairs he did so on a series of Temporary Worker Machine Moulding Operative Contracts which lasted for 6 weeks each and would apply at any time in that period during which he covered work in the production department. We did not see any such contract.

7.5 The claimant subsequently wrote an email ("the Grievance Email") dated 8 February 2019 to SM entitled "*Do hear me now*". This was treated as a grievance and the claimant expanded on this grievance in a lengthy document ("the Grievance Statement") (pages 97 -182) given to VR who was to investigate the Grievance. We deal with this matter in more detail below but allude to it now in order to put the matters complained of in the Grievance Email and the Grievance Statement in context.

Applications for posts July 2018 onwards

7.6 In late July or early August 2018 the respondent advertised three moulding operator roles in the production department The claimant contacted PN of Human Resources ("HR") to apply for those roles. There was on offer one permanent day position on Team A managed by JC and two permanent positions on Team C managed by Andy Gibney ("AG"). On 10 August 2018 before leaving for a period of annual leave the claimant was told by PN that the shortlisting process was ongoing.

7.7 On 25 August 2018 the claimant together with his friend and colleague Peter went to speak to PN to enquire about the claimant's application. PN told the claimant that the three positions had been turned into internal transfers. By this we find that PN meant the three posts had been given to employees transferring from elsewhere. We did not hear from PN. We accept the claimant's evidence to the effect that three female employees Mona, Maria and Natalia had been appointed to JC's team to join their colleague supervisor Paula Araujo. PN mentioned to the claimant that a temporary night shift vacancy was coming up on Team D and the claimant's application would be carried over to that vacancy if he wished. The claimant agreed.

7.8 In the Grievance Statement, the claimant alleged that this action by the respondent was an act of sex and race discrimination against him and evinced an attitude that he was not welcome to join the permanent employee workforce. The claimant questioned that if the three females had been internally transferred, what had happened to the two vacancies on the AG team. The claimant asserted that at least one of the females transferred was not eligible to internally transfer as she had not completed her probationary period as an employee.

7.9 On 11 September 2018 the claimant received an email from Dernica Garner of HR telling him that his application had been unsuccessful. The claimant was unsure whether this related to the July application or the application which was then ongoing.

We find that it related to the application for the July vacancies and was evidence of lax administration in the respondent's HR department.

7.10 On 17 September 2018 the claimant was contacted by PN and told that he would be offered an interview for the Team D night shift vacancy. That interview took place shortly after that date. The first stage in the process was for candidates to take a test on their ability to understand English. It was a prerequisite of a successful application to pass that test. We find that the claimant gave up on the test as he set out at paragraph 12 of his first witness statement. He did so because he had difficulty in handling a poster which he had to look at before transcribing his answers on a smaller sheet of paper. Having given up on the test, the claimant failed it and his application went no further. English is the claimant's first language and he felt insulted to have to take the test in the first place but that was the system employed by the respondent.

7.11 In the Grievance Statement the claimant complained about the process used by the respondent to fill this vacancy and asserted that a person named Steve was eventually appointed to the role on a permanent basis even though the vacancy was for a temporary role. The claimant asserted this process was an act of race discrimination against him.

7.12 The claimant was told by PN that his application was not successful and that three candidates had been chosen to go forward for second interview but that the claimant was not amongst them. The claimant was greatly upset by the news that his application was unsuccessful and decided to contact SM.

7.13 On 4 October 2018 the claimant contacted SM by e-mail (page 49) in which he alleged gross misconduct by the HR department and by managers in the production department and the packing department where he worked. The claimant asked to meet SM. SM is a senior manager of the respondent and it was unusual for him to be contacted by an agency worker. In the course of his e-mail the claimant said: *"… I work upstairs in HOW and occasionally on production….. This matter involves alleged gross misconduct by HR and equally important management in HOW and production….. This is something you ought to know about..".*

7.14 SM replied promptly (page 49) saying: "*Thanks for getting in touch. I am obviously keen to understand the source of your concern and will be happy to speak to you when you arrive on site later today….. if this is not possible I can meet with you tomorrow..".*

7.15 On 5 October 2018 the claimant, accompanied by his colleague Peter, met with SM. The meeting was not minuted by either party. SM listened to the claimant's concerns about the process being adopted in relation to applications to fill vacancies in the respondent's workforce particularly with regard to agency workers. SM agreed to look into the claimant's concerns and meet him again. It is at this meeting that the claimant asserts he referred to conscious or unconscious bias (or both) and that his words amounted to a protected act for the purposes of section 27 of the 2010 Act. We have considered that allegation in detail by assessing the documents before us, the evidence of the claimant and the evidence of SM. We conclude on balance that the claimant made no such reference and that no protected act for the purposes of the 2010 Act occurred at this meeting.

7.16 Given the importance of this finding in respect of the victimisation complaint, we set out the basis for this conclusion.
7.16.1 We did not hear from the claimant's friend "Peter" who was present at the meeting.
7.16.2 The claimant does not refer to bias of any kind in his email of 4 October 2018. More tellingly, he does not refer to bias in the emails he wrote to SM after the meeting on 5 October 2018 (page 50) or the later email (undated but clearly written after 15 October 2018 – page 51/52) when it could be expected he would re-iterate his claimed allegation.
7.16.3 Even when raising a new issue of complaint (page 52), the claimant opines that the reason SM's recommendation had still not been followed was that "*Paul and Wayne wish to prove a point".*
7.16.4 The claimant accepted in cross examination that he was being "diplomatic" in his meeting with SM.
7.16.5 The claimant accepted in cross examination that he did not know in October 2018 what conscious bias or unconscious bias meant – and still did not. Why then would he refer to something of which he had no understanding?
7.16.6 The assertion of this protected act surfaced very late in the day – not until the second morning of the long hearing in February 2020 before Employment Judge Leach.
7.16.7 SM was a senior manager. He was experienced. He knew to be alert for such matters. In his witness statement he told us: "*had he used such a phrase I believe I would have asked him why he felt there was unconscious bias and against whom".*
7.16.8 SM accepted that the e-mail of 8 February 2019 does make reference to unconscious bias and the respondent treated that email as a grievance when that allegation was made and we conclude that SM would have acted in the same way had those words been said to him in October 2018.
7.16.9 The claimant's evidence about what was said in October 2018 was confused, contradictory and in the final analysis not compelling.
7.16.10 The email set out at 7.18 below does not in its tone suggest any serious allegations of discrimination had been made at the meeting as the claimant now asserts.

7.17 SM carried out an investigation and had a subsequent meeting with the claimant at which he sought to demonstrate the interview process had been handled fairly and the reasons why two candidates had been appointed. In his subsequent witness statement, the claimant stated: "*Prior to that meeting I thought Scott had some integrity but I was mistaken. Although I was happy with many of the things Scott claimed he was going to commit to do, it would appear that he doesn't have any action behind his words".*

7.18 The claimant responded to SM after the meeting (page 49) thanking SM for all he had done and for the changes he had implemented.

7.19 On 8 October 2018 SM replied to the claimant to the effect that the claimant had made no enemies and that if he chose to apply for a post as an employee of the respondent the recent discussions would have no negative influence.

7.20 In the Grievance Statement, the claimant raised complaints that the process in October 2018 continued to show race discrimination by the respondent against him

and that the information provided by SM was incorrect in respect of the identity of those appointed and the process which had been followed. It was asserted that SM was effectively covering up wrongdoing.

7.21 Shortly afterwards, another vacancy arose for a temporary moulding operator role in the production department on night shift D. The claimant applied. He took the English test and was successful. He was selected for interview. He was interviewed. Present at the interview were the claimant, shift manager Andy Gibney, PN and Dernica Garnier to take notes. The claimant was told that he would hear the outcome on 22 October 2018 which he commented was his birthday.

7.22 On a date subsequent to 15 October 2018, the claimant wrote again to SM (page 52) complaining that he had been overlooked for another vacancy which had become available unexpectedly and was filled by someone who had not scored as highly as he had in the interview process. The claimant stated: "*Scott you have assured me that you have a robust selection process, that I have made no enemies and I presume I still have your support. The interviews were very close and I had justification for my concern, and now someone leaves the position and I'm still not considered, really? ideally for me and only if you think it's worthy I would like a meeting with you and Paul to get to the bottom of this".*

7.23 On 22 October 2018 the claimant was told to go to the interview room to meet JC the manager of A shift in the production department. JC told the claimant that there was a vacancy on his shift and it was available if the claimant wanted it. The vacancy was to cover an employee who had gone away from work due to a serious illness and which urgently needed to be filled. The claimant told JC that he was expecting to hear the outcome of his application on shift D and would like to do so before deciding on the offer being made by JC. JC told the claimant that the offer on A shift was of a fixed term contract for nine months to cover the period of the illness. JC went away to find out the outcome of the earlier application and returned with the news that the claimant had not been successful. The claimant accepted the offer made by JC.

7.24 On 24 October 2018 the claimant was issued with a contract of employment (pages 56-64) and signed it on 28 October 2018. The contract was for a fixed term from 5 November 2018 until 31 July 2019.The notice period for termination by the claimant was one week. The only reference to the Grievance Procedure is on page 64.The grievance procedure does not form part of the claimant's contract of employment. The relevant paragraph (page 62) reads:
"If you are seeking redress of a grievance relating to your employment then you should set this out in writing to your department manager or, if your complaint relates to your department manager, the HR department. Procedures relating to grievances are set out in the company's grievance procedure which is available for inspection from the HR department. The Grievance Procedure does not form part of your contract of employment. If you have a complaint relating to harassment or bullying, then you should contact your department manager or if you wish to make a public interest disclosure then you should set this out in writing to a director. The procedures relating to harassment and bullying are set out in the Company's Dignity at Work Policy which are available for inspection from the HR department".

7.25 On 5 November 2018 the claimant began induction as an employee of the respondent and ceased to be employed by Proman.

Events from November 2018 after the claimant becomes an employee

7.26 In November 2018 the respondent advertised another vacancy in the production department. The claimant did not apply for the role as he was concentrating on the induction into his new fixed term role. The claimant encouraged his white British friend Peter to apply and he did so. Peter was not successful but was offered a 6 month fixed term contract role on another shift. An unsuccessful candidate for this role was Jack Bray ("Jack").

7.27 In late January 2019 the claimant became aware that Jack was in the workplace and discovered that he had been appointed to a permanent contract the vacancy for which had not been advertised and about which the claimant had not been made aware. The explanation for this situation from the respondent was that a vacancy had arisen which urgently needed to be filled and rather than advertise again, the respondent went back to the pool of candidates interviewed in November 2018 and offered the role to Jack who accepted it. The claimant was angry when he discovered this situation and approached PN and complained about the appointment of Jack to a vacancy of which he had not been aware. This matter featured as a complaint in the Grievance Statement.

7.28 On or around Friday 1 February 2019, the claimant had a meeting with PN and JC who told him the employee whose post he had been covering was coming back to work and that two options were available to him. First, he was offered a fixed term contract to cover a pregnant employee's absence on maternity leave through to February 2020 or another moulding operator role was coming up for which the claimant could apply. No mention was made in the meeting of the position which Jack was by then filling and this upset the claimant. The claimant went on to raise issues about his training in his then current role being inadequate and the fact that he had had a planned two-month review meeting on progress in his probation in the third month rather than the second.

7.29 On 2 February 2019 the claimant sent an email (page 76) to SM which reads:
"Hi Scott,
I don't want to get into a long debate, but I know that you are fully aware of what happened on the 01/02/19.
Furthermore, Mr Jason Chapman seems to have taken it upon himself to be my negotiator to Claire HR. I believe Claire is in the process of composing a goodwill letter offering me another fixed term contract which will extend my fixed term contract through to February 2020.
With all due respect I don't want a letter confirming another fixed term. I don't want a letter confirming a permanent moulding operator's position. But I do want a letter confirming Andy Gibb - shift manager's position and or any other managerial position available at HT.
This is my demands which I have put in place to protect myself from HR and management alternatively I will be left with no option but to open full formal (APTIV) or (ACAS) investigation putting job and investment at risk.

I wish to make it clear that this is not to be interpreted as blackmail but a means of protecting myself under the most difficult and disagreeable circumstances between HR and management.
If I'm put in any other role other than managerial, I will be a sitting duck waiting to be attacked by the vultures you have working for you. However a managerial position would make it difficult for your staff to manipulate me or my position I expect to hear from you before Tuesday the start of my next block..".

7.30 On Tuesday 5 February 2019 the claimant was called to a meeting with SM and CC. The meeting was minuted (pages 65-70). We accept the minutes as broadly accurate. There was reference in the meeting from the claimant that he was not paranoid. SM told the claimant he had a job and should move on. The claimant raised the issue about Jack. SM repeated the explanation which the claimant had already been given. SM agreed that there were lessons to learn from the way Jack had been appointed and he would look in future to all temporary or fixed term workers being given the nudge to apply for vacancies. The claimant referred to referring matters to Aptiv or ACAS. The claimant was told he could not just be given a managerial role and that any such appointment would require a business need and a successful recruitment process. The same options were repeated for the claimant as had been given to him by PN and JC on 1 February 2019. The claimant asserted that he had been previously told that if a vacancy for a permanent contract arose that he would not need to be interviewed. We find that the claimant had never been told that and that he had misunderstood what had been said to him. The meeting ended with the claimant walking out of the meeting clearly upset.

7.31 SM and CC were reluctant to leave matters like that and so about an hour later asked to see the claimant again. Again, the meeting was minuted by CC (pages 71-73). JC attended with the claimant at his request to support him but not as his representative as such. The options available to the claimant were again explained. SM told the claimant that as he was now fully trained the respondent did not want to lose him from its workforce. The minutes record SM telling the claimant: *"Hand on heart, no one has it in for you. No one is out to get you".* The claimant indicated that he had made up his mind and that he wanted his concerns investigated. He was told that that was his prerogative.

7.32 On the next day, 6 February 2019 the claimant was working on shift in Bay 2 in the Production Department with JC as his shift manager. The claimant reported to JC that he had a "part box" of product and sought instructions what to do with it. JC instructed him to send it to scrap. Shortly after the conversation, JC reconsidered and went to look at the amount of product which was being scrapped and, when he saw how much it was, he told the claimant that he should not scrap it but send the box of product to Logistics for despatch. The claimant became agitated with this instruction and was reluctant to do as JC instructed because he knew Logistics would not accept a part box and there were small pieces of metal in the box known as "sprues". JC told the claimant that he had made a reasonable request and asked him to remove the sprues from the box and then send the product to Logistics marked as a part box. The claimant obeyed the instruction reluctantly. Later that day Logistics returned the box as they were unable to accept a part box. The following morning 7 February 2019, the claimant asked JC what he should do with the box which had been returned and JC told him that he should scrap the product. When JC later returned from lunch, he found

a note on his desk from the claimant. JC found the note to be of a threatening nature and took it to PN of HR as no senior manager was on site.

7.33 The note from the claimant read: *"Following yesterday's "reasonable request" I believe you owe me an apology. If you are not man enough to apologise then I would like to make it clear that I will not be bullied by you or anyone. If you attempt to try the reasonable request scenario again you will have a big problem on your hands do I make myself clear?".* The note was signed by the claimant.

Grievance – February 2019

7.34 8 February 2019 (Friday) the claimant sent the Grievance Email (pages 75/76) to SM headed "*Do hear me now".* This message is accepted by the respondent as a protected act for the purposes of section 27 of the 2010 Act. That concession was correctly made.
The claimant wrote:
"You and Claire are out of your depth I'm not sure if this is ethical but I will give you the opportunity to keep the situation private and speak to your legal representation.
I strongly recommend you send this e-mail and HR case file to your legal representation and have them evaluate the evidence and your explanations from the beginning of the "gross misconduct" incidents.
I strongly recommend you consider this offer to save time money and embarrassment to the business. I also insist that you have HR and your managers trained by ACAS on unconscious and conscious bias, equality in the work etc.
It is unethical and unlawful to advertise a number of vacancies in the workplace and automatically decide to change the opportunity to internal transfers simply because a male decides to apply, all three females apply and all three females are automatically given the vacancies (sex discrimination).
Even if it is acceptable to randomly transfer staff in your establishment I know that all three transferred would have to complete their probationary period before attempting internal transfer and this was not the case.
I have had friends and family selected ahead of me for a number of permanent vacancies and it would appear that you have no issue giving me a fixed contract but you will do everything in your power to prevent me from getting a permanent vacancy (race and bias discrimination).
Your legal representation will see that I have a "prima facie" case of discrimination both conscious and unconscious bias, involving both sex and race related discrimination.
You know I can prove that I have been a victim of both sex (family bias) and race discrimination on at least three to four occasions.
You have no valid explanation for your gross misconduct and you have failed in your "duty of care" to your employee. All you have is mistakes, clerical errors and frivolous apologies.
Your pitiful explanations will not hold up under scrutiny in an Employment Tribunal nor will any of the inadmissible notes Claire decided (to) take during meetings.
HR can change documents and files but unless you eradicate or falsify files of all friend and family members who have been selected in place of me or provide valid explanation for all cases you have no way of fighting this.
In terms of the number of incidents you might win one but I have at least three prima facie claims against you.

Conciliation with ACAS and APTIV may help but serious retribution and consequences will follow.
If you do not take my advice you will be facing an Employment Tribunal claim (under the Equality Act 2010 it is unlawful to subconsciously discriminate against another person).
if you are not involved you will be implicating yourself to some very serious offences.
I expect to hear from your legal representation by Monday close of business or I commence proceedings.
You have left yourself wide open and I urge you to consider the reputation of the business the cost involved and for once make the right decision for the business and positive change.
The onus of proof is on me to prove what happened but you have to prove it didn't happen, you couldn't prove it didn't happen to me and you stand no chance of proving your innocence in a Tribunal.
You once asked me where's my proof, I now ask you what's your explanation".

7.35 On 11 February 2019 JC wrote a report (pages 78-79) on the letter he had received from the claimant and the events leading up to it. He included: "*I find the content of Noris's letter very concerning. This is only the second threat I have received in a workplace during the last 26 years in management. During the weekend I have reflected upon my approach towards Noris during his time on the shift and strongly believe that I have taken an approach consistent with that towards other operators. Obviously, I am very concerned regarding the threat within Noris's letter and aware of other communications to senior management question his, arguably, irrational thoughts and behaviour".*

7.36 On 11 February 2019 CC wrote to the claimant to say that given the serious issues raised by the Grievance Email of 8 February 2019, it was appropriate to address the matters through the formal grievance procedure. The claimant was invited to attend a meeting on 25 February 2019 to be chaired by Alex Gibbons Quality Manager accompanied by Claire Charlton HR manager. In the Grievance Statement (page 175) the claimant noted: "*Although I did not request to open a formal grievance procedure it appears to be the best way forward".* The claimant spent some time in the hearing before this Tribunal seeking to assert that the grievance invitation letter at page 80 when compared to what is clearly a template at page 81 had been falsified in some way. We reject any such assertion.

7.37 On 11 February 2019 the claimant was also called to a meeting which turned out to be a disciplinary investigation meeting. The meeting was taken by Richard Bradford who was the technical manager with CC present to represent HR. The claimant attended alone. The claimant did not know the purpose of the meeting until it began. The meeting was minuted by CC (pages 82-96). The meeting lasted one hour. The meeting discussed the incident with JC on 6 February 2019. The claimant accepted he was "*huffing and puffing*" but asserted that he had followed the instruction. The claimant described how the part box of product was still there the next day. He described himself as infuriated and was not having JC tell him it was a reasonable request when he (the claimant) knew that it was not a reasonable request. He felt JC owed him an apology, so he had written the letter. He felt the tone which JC had used towards him was uncalled for. He complained that JC spoke to female members of his team in a friendly manner whilst he spoke sternly to male members of the team. The

claimant was asked what had triggered the writing of the letter and he is recorded as replying (page 86): "*I thought that situation owed me an apology. I thought he would be man enough. I thought he would say sorry as I should have scrapped it. I didn't want him to come up with another reasonable request and thought I'd nip it in the bud"*. The claimant asserted being asked to do what he was by JC was an act of bullying. The claimant stated that JC would get himself into serious legal issues if he attempted to bully the claimant again and that is what he meant by "serous implications" in the letter. The claimant did not perceive what he had written as a threat and saw the situation as being started by JC. The claimant would not have written the letter if he had thought it would come this. This matter was not progressed any further as the respondent allowed the grievance investigation to take precedence. In the event the claimant's employment ended before any further action could be taken on this matter by the respondent. This incident features as a complaint in the Grievance Statement.

Contact with Aptiv Driveline

7.38 On 13 February 2019 the claimant contacted the Aptiv Driveline for the first time to voice his concerns about the events he claimed to have experienced in the respondent's workplace. The claimant made this report because he had been spoken to on 11 February 2019 in relation to the alleged disciplinary incident involving JC. The note (page 223) made on the Aptiv system for that day records:
"X has been investigating my current manager. I was told that because I am on a fixed contract, I would be able to get a permanent contract. There is another individual that is working there with a fixed contract as well, but he has a family member at the plant and I believe that is why he is getting a permanent contract. When I first turned in my application, I believe they thought I am Portuguese because of my last name. My application process was a big drama. They might of thought I did not know how things worked. I would like to provide emails that might help with the case".

7.39 The report to Aptiv was acknowledged on 26 February 2019 (page 223). The next substantive report to Aptiv by the claimant was on 21 March 2019 (page 224). On this occasion the note taken records the claimant's concern that the person appointed to investigate the Grievance "*is not satisfactory to me, she is the representative for the organisation, not an independent person….I just wanted to get someone from your end to check the website and clarify this for me and confirm that the meeting person is actually independent person…".*

7.40 On 23 March 2019 the claimant called Aptiv again (page 224) to voice his concern that the investigation was not being conducted as a formal investigation as it should be.

7.41 On 25 March 2019 the claimant called Aptiv again (page 225) to complain that the investigation process had been changed and was taking a long time. The claimant stated that the investigator was not capable of doing the investigation because of a conflict of interest.

7.42 On 26 March 2019 the claimant called Aptiv again to ask if the same investigator would be continuing and asserted that the matter was now one of institutional racism and that his grievance had been changed to an informal grievance.

7.43 On 26 March 2019 the claimant called Aptiv again to confirm the formal grievance procedure would be used and the Grievance Statement. He made reference to the investigator being sick and there being some question that the investigator was going to use an incomplete grievance document in the investigation.

7.44 On 27 March 2019 the claimant made two separate contacts with Aptiv (page 226). The claimant again raised issues about alleged confusion between a formal and an informal process of grievance investigation and made allegations that the investigator did not recognise the difference between an informal and a formal procedure. The second contact that day related to the termination of his contract and the entry reads:
"Yesterday I expressed to the manager that I'd being forced to turn in my notice. X actually took it literally and processed it. I was under the impression that a month notice is required. X mentioned that only a week's notice is required. I told her I didn't want to process anything I just wanted to have the information and X processed the termination of my contract. I feel like I'm being forced to terminate my contract. X was really insistent on the dates I could not accept what X did. I would like someone to talk to the person in question. It was the way that the investigation was being conducted. I had sent X an e-mail and she didn't answer but I sent an e-mail about the termination and X responds immediately. I'm the victim in the situation and I'm being treated like I'm the perpetrator".

7.45 On 28 March 2019 the claimant called again (page 227) complaining that the termination of his contract was being processed without him being notified. On 30 March 2019 he complained that the contract had been terminated and asked if Aptiv could do anything about the problem. The claimant stated his belief that this was retaliation against him making the report.

7.46 Contact between the claimant and Aptiv continued from 2 April 2019 at least through to 7 May 2019. On 2 April 2019 the claimant again spoke of a resolution which would be for him to be put into a senior managerial position to enable him to monitor progress and eliminate the recurrence of a grievance such as the one that he had raised. On 4 April 2019 the claimant spoke of having had his contract terminated but still being willing to show good faith by seeking a solution for all concerned by reference to a document entitled Community Race at Work Charter. On 11 April 2019 the claimant raised a suggestion of being employed by Aptiv to roll out a joint minority charter for the respondent across the UK and the European Union.

The Grievance Investigation

7.47 On 14 February 2019 the claimant began to prepare the Grievance Statement (pages 97-181) which he sent by email to VR at the meeting on 15 March 2019. The matters raised in that document included:
1. The events of the last 7 months should be the focus namely from July 2018 to February 2019.
2. HR and managers did all in their power to stop him getting a permanent contract.
3. The rate of pay when he worked downstairs in Production Department.
4. The events around his application for one of the three vacancies in August 2018 and allegations of sex/race discrimination.
5. Files having been changed by HR to cover up illegal processes and being given details of allegedly fictitious applicants for jobs by SM together with fictitious scores of

other candidates in an attempt to convince the claimant that appointment processes were fair and non-discriminatory.
6. An email received dated 11 September 2018 about an upcoming interview demonstrated predetermination and was to prevent him attending an interview for a night shift vacancy. The interview of himself and "Steve" for the temporary position was for a fictitious vacancy. Steve (white British) was eventually given a permanent position. This demonstrated race discrimination.
7. The fact that the claimant only had one day to prepare for the interview on 18 September 2018.
8. Institutional racism being present at the respondent. Disproportionate disciplinary action being taken against "black employees" particularly by DA.
9. No candidate appointed in September 2018 as a moulding operator left within one month of appointment as SM had stated to the claimant.
10. The arrangements for the English test taken by the claimant in September 2018.
11. Inferior contracts being changed to permanent contracts once preferred Caucasian candidates were in position.
12. The claimant being forced to accept the fixed term contract offer before he knew the outcome of the interview in October 2018.
13. Being cheated out of a permanent position so that other Caucasian employees could be offered a job on Wayne's shift and could convert temporary contracts to permanent contracts and there being a conspiracy by three shift managers, HR and SM to achieve that outcome.
14. Being given inadequate training during his probationary period for the fixed term contract role.
15. Not being offered the position given to Jack.
16. There being an illegitimate investigation into disciplinary allegations against the claimant in February 2019.
17. Being told not to communicate with his manager JC after the investigatory meeting in February 2019.

7.48 At page 179 the claimant wrote:
" I am a victim of repeated systematic discrimination which is at an unacceptable level beyond that of which any reasonable employer should practice. I am currently on annual leave and following this investigation I don't realistically see myself returning to HT Manchester unless all named offenders are made accountable for their actions and the bias discriminative epidemic is removed. This would cause a huge amount of disruption to the business which I presume it would be easier for all concerned if I were to go. I suspect that what I have uncovered is just the tip of the iceberg and we have only touched HT Manchester discriminatory surface. In order to protect myself and/or if I am to continue working at HT this condition will help to protect me from some of the hostility. I expect a permanent senior managerial position to be created specifically for me. If this position puts me in charge of HR or minority recruitment or gives me the ability to oversee HR, reporting directly to the company director I will make changes to improve the recruitment process in the interests of the business. Failing this I will accept a senior managerial position in NPD or sale account management would be ideal. I see no reason why these conditions cannot be met simply because I have witnessed many employees in senior managerial position with no concept of what their duties and responsibilities are. I expect the position to commence ASAP and or settlement for loss of permanent contract earning, esteem, stress pain and suffering etc".

7.49 On 25 February 2019 the grievance meeting took place with the claimant and Alex Gibbons and CC. The claimant sought an adjournment of the meeting because he stated he had contacted Aptiv who were investigating the matter. CC agreed immediately to postpone the meeting to await further information from Aptiv. The meeting lasted 5 minutes and was minuted (page 183).

7.50 When the claimant made contact with Aptiv, a report was made to JB as head of HR in the UK. Whilst not a frequent occurrence, it was far from unknown for employees to use the Aptiv Driveline to report concerns and JB dealt with this referral as she did others by reviewing the papers. The expectation was that JB would investigate the referral herself probably with a director of the respondent company. In this case JB took the view on reviewing matters, that the email of 8 February 2019 from the claimant was so wide ranging that it was better to ask an external consultant to carry out the investigation. JB had used the services of VR previously and we find that JB respected the knowledge and experience which VR could bring to an investigation. We accept the evidence of JB that she hoped unlawful discrimination of any kind was not taking place within the respondent's workplaces, but that if it was, she wanted to know about it in order to rectify it and not to cover it up. She had nothing to gain by doing so. Accordingly, JB appointed VR to carry out the investigation into the claimant's grievance and wrote to the claimant on 8 March 2019 to advise the claimant of the position.

7.51 On 8 March 2019 the claimant was invited by JB (page 184) to attend a grievance investigation meeting with VR an external HR consultant on 15 March 2019. The opening paragraph refers to the meeting on 25 February 2019 having been adjourned "*following your explanation confirming you had escalated your grievance to APTIV driveline".* The letter continued: "*I am therefore writing to invite you to attend a meeting for you to discuss your points of grievance with an external HR consultant……Viv Ryan from Springboard HR….The purpose of the meeting is to allow you to explain your grievance and discuss how it can be resolved. If you wish to rely on any written material or documents, you may simply bring them to the meeting…should you have any queries about this process or questions about what the grievance meeting will involve, please let me know and I will be happy to discuss the arrangements in detail with you".*

7.52 On 15 March 2019 the claimant met with VR. The meeting was minuted (pages 186-190). The claimant sent the Grievance Statement to VR by email during the meeting and this is referred to in the fourth paragraph of the minutes. The claimant asked that the Grievance Statement not be shared with the respondent and we find that VR complied with that request. VR sought to understand the matters about which the claimant was complaining and then adjourned in order to carry out her investigations. The minutes are not as detailed as the Grievance Statement but do refer to the internal transfers of September 2018, family and friends being selected ahead of the claimant, being prevented from obtaining a permanent contract, the candidate named Steve being appointed to a permanent vacancy on D shift, the lack of feedback in relation to the interview in October 2018, the circumstances around the offer of a fixed terms contract in October 2018, the confusing email from Dernica Garnier in September 2018, the short notice for the interview on 18 September 2018, being subjected to race discrimination because of his colour and as an agency worker,

the incident with JC in February 2019 in respect of the alleged "*reasonable request"* and the subsequent disciplinary interview The final paragraph of the minutes reads: *"The interview ended at this point. VR thanked Noris for answering the questions and confirmed that the investigation may take two or more weeks. VR also asked Noris what he would see as a resolution for his grievance and to think about it. VR will contact Noris to confirm receipt of e-mail with the document attached".* That was a reference to the Grievance Statement.

Meeting with DA and Richard Bradford – March 2019

7.53 On 20 March 2019 the claimant asked DA if he could work on bay 3 that day to be with a colleague Andre Duckett. DA refused permission and told the claimant he had been allocated to bay 1. The claimant repeated his request on the next day and DA gave the same response. The claimant told DA that he was going to work in bay 3 and accused DA of having preferred operators. Rather than have an argument DA walked away and sought the assistance of Richard Bradford ("RB"). The claimant was asked to meet DA and RB to discuss the issue and a meeting began at 9.25am. The claimant refused to engage in the meeting saying it was break time and asked to meet later or after his holiday. Arrangements were made for the meeting to take place later that day.

7.54 The meeting took place later that day and was minuted by RB (page 190C and 190D). An explanation was given to the claimant that employees were allocated to different bays based on business needs and relevant skills. The claimant was difficult and said he did not agree and invited DA to suspend him or sack him. RB explained to the claimant that that was not the purpose of the meeting – it was simply to explain how labour was allocated between bays. The claimant was uncooperative and disrespectful towards DA. The minutes record the claimant as saying: *"Make a note of this. After what I have been through here I have no respect for anyone. I don't care. So there you go".* Having heard the evidence of DA, we accept the minute of that meeting as accurate.

Correspondence with VR

7.55 On 20 March 2019 VR sent to the claimant a note (page 192) of his statement taken at the meeting on 15 March 2019 and asked him to confirm its accuracy or make changes. The claimant responded at 10pm by email (page 191). The claimant asked whether VR would base her investigation on the minute he had been asked to approve or on the Grievance Statement. The claimant commented that he had seen some things missing from the minute VR had prepared and that had made him question her role. The claimant told VR he had visited her website and noted she acted for employers and not employees and so asked if her organisation was best suited to investigate issues impartially. The claimant asked how VR could be independent if her clients were employers. The claimant referred back to the Grievance Statement and said that that set out the matters he wished to be investigated. The claimant referred to the fact that it had not been possible during the meeting to open the Grievance

Statement. The claimant concluded that he would return the minute with amendments if necessary but ideally he would be happy for VR to use the Grievance Statement.

7.56 On 22 March 2019 at 9.38 VR responded (page 191) confirming her experience in handling grievances. VR confirmed that she had begun her investigations and would come back to the claimant when they were complete.

7.57 On 22 March 2019 at 9:56 the claimant responded (page 193) and set out a quote from the website of VR which raised questions in his mind as to the independence of VR. The quotation set out in his email read:
"Our advice and guidance can help avoid successful claims. We adopt a common sense approach which is based on a step by step process. We will of course help with any existing claims which we can discuss and agree terms with you once you become a member company. Should Employment Tribunal representation be necessary we will agree all costs up front so…."
The claimant asked for an urgent reply as time was of the essence.

7.58 At 15:59 the same day the claimant chased VR for a reply in these terms (page 193):
"I'm sorry but I expected a response from you today, you should recognise that this investigation is my investigation and I have a say in how it's conducted and who conducts it.
I think that both you and your partner ought to reconsider the below statement on your website and realise that not even the most corrupt legal representation would promote such an incriminating statement.
If this is what your business practice represents, then I don't want you to have anything to do with this investigation. If you stand by the unlawful statement on your website then what happens to justice?....".
The website statement which concerned the claimant was-
"…. and guidance can help avoid successful claims…".

Correspondence with VR and JB and acceptance of resignation

7.59 On Sunday 24 March 2019 at 13:14 the claimant wrote (page198) to JB in these terms:
"My name is Noris Rosario. Following the letter dated 8 March 2019 where you arranged a meeting with the independent grievance officer. You made a grave error, the meeting you arranged was a grievance meeting, it should have been identified to the investigator that this is a "formal grievance hearing".
Your letter trivialised a formal grievance hearing into a grievance procedure which would ultimately omit offenders and offences from the investigation.
Following this grave error you have wasted time and I have identified a conflict of interest with the investigator which will not go unnoticed. I have now been forced to hand in my notice at HT Manchester. APTIV have been notified and you (can) now add your name and the investigator to this matter".

7.60 On Monday 25 March 2019 at 11:13 the claimant wrote again to JB (page 197) in these terms:

"I'm being forced to hand in my notice this situation is becoming unbearable, I have changed my address and I am in the process of relocating my family if you need to make contact do so by e-mail or phone.
If your error was a mistake or something you were not aware of you know now and "what do you intend to do about it?"
You ought to know HTs grievance procedure and how it works. The rescheduled meeting you arranged should have been the continuation of HTs first stage formal grievance procedure.
Your invitation didn't mention the class of meeting or grievance which you should have clearly stipulated.
I presume APTIV will be in touch, I am currently on annual leave and expect to hear from you in due course.
If any more time is wasted this won't look good for you or HT so please ask your independent investigator to be impartial and stop wasting time.
Your investigator's conflict of interest will be reported to ACAS in the form of a formal complaint if she acted in the correct way Springboard will have nothing to worry about however if the investigator is proven to have acted unlawfully then she will have a huge problem on her hands".

7.61 On 25 March 2019 at 11:31 the claimant sent a long email to VR (pages 200-202).The claimant told VR that she ought to know that she was conducting a formal grievance procedure and not an informal one. The claimant asserted that if VR was following any type of ACAS procedure, then that indicated she did not think his concerns were serious enough to warrant opening a formal grievance or that he had not attempted to follow the informal grievance route earlier. The claimant told VR that she had a duty to be impartial, but her decisions were clearly not impartial. The claimant continued: *"Your conflict of interest and unlawful conduct now forces me to hand in my notice".* The claimant commented that the formal grievance procedure had been opened following his e-mail on 8 February 2019. The claimant commented that VR may have been deceived or that she was attempting to deceive him. The claimant noted that his meeting with VR had been stopped because of a coughing fit suffered by VR. The claimant noted that following a number of meetings using the informal route that a formal grievance route had now been embarked upon and questioned why VR did not understand that. The claimant asserted that SM had become an offender by giving the claimant false information after his investigations in October 2018. The claimant indicated that he considered that his informal meetings with SM and with CC clearly demonstrated that he had used the informal grievance procedure. The claimant asserted that it was clear to him that VR either did not know that she was now conducting a formal grievance procedure or that she was seeking to protect HT Manchester and he continued: "*Following your informal grievance investigation you will perhaps conclude by making me out to be a vexatious aggrieved employee who sends his manager threatening grievance e-mail following unsuccessful interviews. I will have to appeal your decision and things will get complicated".* The claimant stated that if VR did not realise she was being manipulated then he apologised to her but that if he was correct in his assumptions then both VR and JB and Springboard HR had become the latest offenders in the matter. The claimant's concern was summarised as being that VR was conducting an informal grievance procedure whereas she should be conducting a formal grievance procedure and that she had a conflict of interest.

7.62 On 26 March 2019 at 11:23 the claimant wrote to VR (page 203) asking about handing in his notice. VR replied at 11:49 saying she could not deal with that matter and referring him to his line manager. VR copied that message from the claimant and her reply to JB.

7.63 On 26 March 2019 at 11:33 (page 197) the claimant wrote to JB and stated that *"I would like to hand in my notice but I believe 1 month notice is required*..". On the same day at 12:03 (page 207/8) the claimant wrote to VR with further criticisms of the procedure being followed.

7.64 On 26 March 2019 at 4:01pm the claimant wrote again to VR telling her that in light of her conflict of interest and of the fact that she could not be impartial or independent that her services were no longer required. At 16:17 that same day, VR replied that it was not for the claimant to say her services were no longer required and that she had informed HT Manchester and Aptiv of his allegations against her and that she was not prepared to enter into correspondence with him whilst the investigation was ongoing as this would be deemed as bias and that the investigation would continue to its conclusion.

7.65 On 26 March 2019 at 23:44 JB, having returned from a period of leave, wrote to the claimant (page 207A). JB confirmed that the omission of the word "formal" from the invitation letter of 15 March 2019 did not trivialise the seriousness of the grievance raised or prevent those complained about being properly investigated. JB confirmed that she had been directed by Aptiv to investigate the complaint made by the claimant as she had not been named in it. The normal process would have been for a director and for JB to listen and investigate with the aim to resolve the grievance. However, due to the number of employees located at the Manchester site who had been cited within the complaint, she wished to ensure that the claimant felt an impartial investigation had taken place and therefore instructed VR from Springboard HR who she confirmed had no prior involvement with any part of the points raised in the claimant's grievance and she had asked her to conduct a full and thorough investigation of the grievance and advise the business on any recommendations that would help resolve the matter. JB noted that the claimant had not provided any clarification as to how he had reached the conclusion that VR had a conflict of interest. JB continued:
"It is disappointing to hear that you feel you are being forced to hand in your notice despite the business making every attempt to listen and understand your complaints and endeavour to resolve them. I can confirm your contract of employment states you are only required to provide one week's notice which would make your final date at Hellermanntyton Saturday 30 March 2019. I believe you are currently on holiday from Monday 25 March until Wednesday 27 March following which are your three rest days, therefore you will not be required to return to work any shifts. Any details of any monies owed to yourself or any overpayment of holidays will be confirmed in an e-mail to you prior to the next pay date on 6 April 2019……. I would also like to confirm that I will be asking Vivian Ryan to conclude your grievance by investigating the employees in which you have cited in your complaint and the outcome will be set out in writing to yourself. This will ensure that any recommendations identified where the business can improve can be put into place to prevent any similar complaints arising".

7.66 On 27 March 2019 at 6:42 the claimant wrote a 6 page email to JB (pages 262-268). The thrust of the claimant's complaint was that VR was going to use the statement given by him orally at the meeting on 15 March 2019 rather than the Grievance Statement which he had prepared and which was clearly much more detailed. Another message was sent by the claimant to JB on the same day at 11:27 (page 261) and again at 15:08 (page 260) in which the claimant noted he had asked Aptiv to remove VR from the investigation because she was now a named party to the matter. The claimant thanked JB for confirming the period of notice he was required to give and confirmed that was something he was still considering as he was still sceptical about returning to work.

7.67 On 27 March 2019 at 17:32 JB replied to the claimant and confirmed that in light of the emails sent by the claimant on 24 March 2019 at 13:15, 25 March 2019 at 11:14 and 26 March 2019 at 11:33, she had considered that the claimant had on those three occasions resigned his employment and that the termination would be effected as from 30 March 2019. JB confirmed that she had not seen any evidence to demonstrate that VR had a conflict of interest and for that reason VR would be continuing as an independent investigator to investigate the grievance raised by the claimant.

7.68 On 27 March 2019 the claimant wrote again to JB at 19:37 (page 258) and again at 23:01 (page 295). The claimant stated that the emails on which JB was relying to evidence a resignation did not constitute a resignation and the claimant stated he would return to work following his annual leave. He concluded: *"I leave when its more suited to me to do so I will not be drove out by you. In the same way I expressed my intent to leave I have expressed my intention to stay".*

7.69 On 27 March 2019 at 6:48 the claimant wrote to VR (page 240) to confirm he had sent the Grievance Statement to VR on the day of their meeting. The claimant asserted that VR used the grievance sent to SM on 8 February 2019 as the basis for their meeting. VR had been unable to open the Grievance Statement sent by the claimant during the meeting and it was unclear if she had any intention of using the Grievance Statement as the basis of the meeting or the investigation. The reference to the email of 8 February 2019 suggested use of an informal grievance procedure. The claimant asked VR a "simple question" was she using the Grievance Statement as the basis of her investigation. There was no response to that direct question from VR at that time.
7.70 On 28 March 2019 JB wrote to the claimant at 10:08 (page 211) and stated that the claimant had confirmed his resignation on three separate days and that indicated an intention to leave HT Manchester and not a decision taken in the heat of the moment and thus the termination of employment would be processed on 30 March 2019. In reply, the claimant wrote to JB three times at 11:18 (page 208), 13:08 (page 214) and 14:21 (page 213). The claimant made it clear that he had not terminated his contract and did not accept JB's decision to terminate his contract. He had been looking to JB to provide sympathy, understanding and a little empathy but that all JB had done was to force the claimant to terminate his contract of employment,

7.71 On 29 March 2019 JB wrote again to the claimant at 9:08 (page 326) simply saying that she had noted the various points raised by the claimant. The claimant wrote to JB that same day at 12:42 (page 212), 14:09 (page 325) and 15:16 (page 216). In the first message the claimant asked to appeal against JB's decision to terminate his contract, in the second message he described VR as an imposter. In the final message

the claimant urged JB to drop her forced termination of his contract and stated that if JB did not do so he would be forced to "*change the course and dynamics of this procedure*" and that if JB did not do as the claimant asked she would regret her persistence.

7.72 On 30 March 2019 the claimant wrote again to JB at 15:30 (page 218) in which he again stated he had not terminated his contract but rather had tried to get her attention by threatening resignation and he had actually wanted JB to discourage him from doing so and to give him some support.

7.73 On 3 April 2019 VR advised the claimant that it would be at least 2 weeks before she would be able to conclude her investigations. On 15 April 2019 the claimant told VR that she had until "Friday" to conclude her investigations and report the outcome. VR replied at 10:03 to the effect that she was moving through the allegations as quickly as possible but would not complete the investigation in the timeframe demanded by the claimant.

7.74 On 27 March 2019 the claimant wrote to JB at 19:37 (page 258) and in the course of that message wrote:
"Your now making this matter an issue. If I want to hand in my notice I will hand in a letter to terminate my contract. Like I said you and Vivienne have caused the confusion not me. I am incline to disagree with you and I insist that I will confirm my notice when I'm ready. It would also appear that the only time you responded to my emails is when its something to do with my notice. I know you cannot wait to get rid of me but unless you are sacking me or this is unfair dismissal I suggest that you allow me to leave when I decide to confirm this in writing".

7.75 On 7 May 2019 VR completed her investigation and issued it in writing (pages 338-343). The opening paragraph reads: "*Further to you submitting your formal grievance to Scott Mayne via e-mail on 8 February 2019, your grievance hearing held on 15 March 2019 and my subsequent investigation into allegations against Hellermanntyton and members of its management team and lastly your document dated 14 February 2019 (87 pages which is written in the way of a diary) which was emailed to me on the day of your grievance hearing, I can now confirm that I have completed the investigation…"*

The Grievance Outcome

7.76 The outcome report noted allegations of race discrimination, reverse sex discrimination and bullying and harassment. The outcome dealt with the ethnic background of employees within the respondent company particularly across the four production department shifts. It dealt with the allegations against DA in respect of the ethnic background of employees on his team who were subject to discipline. The outcome dealt with the allegations made by the claimant in respect of the recruitment processes including the question of the English test and compared the scores for the interviews which took place on 18 September 2018 and the comprehensive feedback from that interview given to the claimant by PN. The scores for the interview on 18 October 2018 were dealt with as was the fact that the claimant did not receive feedback in relation to that interview. The outcome dealt with the internal transfers In respect of the September vacancies. The outcome dealt with the meeting which the claimant had on 1 February 2019 with PN. The outcome dealt with the training received by the

claimant for the fixed term contract role. The outcome dealt also with the acceptance by JB of the claimant's resignation. The outcome dealt with the incident with the note addressed to JC. VR concluded that she had found no endemic race discrimination within the business or institutional racism. She made two recommendations: the first one with regard to amending the recruitment process to include feedback in a timely manner and the second being a recommendation to cross reference job applications to avoid confusion. The claimant was told of his right to appeal. The claimant did appeal (pages 344-368) but the appeal was not processed as by then the claimant's employment had ended.

The Respondent's Grievance Procedure

7.77 The respondent's grievance procedure was set out at pages 378-382. The procedure provides for attempted informal resolution of grievances by contact with line managers or with HR. If that fails, then a formal grievance procedure is set out. The first stage is for the aggrieved party: "*to put the complaint in writing. The written statement will form the basis of the subsequent hearing and any investigations, so it is important that the points of complaint are set out clearly detailing the nature of your grievance and indicate the outcome that you are seeking. If your grievance is unclear you may be asked to clarify your complaint before any meeting takes place…… you will receive an invite to attend a formal grievance hearing within five working days of receipt of your written complaint to be held as soon as is reasonably practicable".*
The procedure explains that the purpose of the formal grievance hearing is to establish the facts and that during the hearing it may become apparent that further investigation may be required. The procedure provides for a right of appeal, the right to be accompanied and makes provision in respect of data protection.

Submissions

8. We received detailed written submissions from the representatives of both parties. These were supplemented by oral submissions, and all are briefly summarised.

Claimant

8.1 The claimant referred back to the document he had submitted in readiness for the first case management hearing in October 2019. We read that document as requested by the claimant.

8.2 The claimant referred to the fact that the February 2020 Orders were not part of the trial bundle. (It had been explained to the claimant on several occasions that the Tribunal had had sight of all case management orders and in particular would have regard to the February 2020 schedule which detailed the issues as amended by the orders of Employment Judge Phil Allen).

8.3 The claimant asserted that the respondent had spent four years seeking to conceal material evidence in this matter. The claimant asserted that the stress of the proceedings had placed him in a vulnerable position. The claimant asserted that his anxieties had peaked and he could no longer continue.

8.4 The claimant contended that he had made a protected disclosure on 13 February 2019 to the respondent through the Aptiv driveline. The claimant made submissions about events which had occurred after the date of the termination of his employment.

8.5 The claimant submitted that the documents in the bundle explained how, from the first day after the formal grievance meeting, it was clear the investigator was not impartial or independent and that a miscarriage of justice was to occur.

8.6 The claimant made submissions about the way the case had been prepared for hearing and the fact that he had not been allowed at the hearing in November 2019 to advance all the claims he wished to advance.

8.7 The claimant asserted that he and his colleagues had had a meeting on 4 October 2018 with the Production Manager at which protected acts and protected disclosures were made but the resulting investigation had been tainted. The Production Manager had produced false evidence including false candidates to cover up unfair bias in recruitment processes and procedures. The claimant submitted that the outcome of the independent investigator's investigation was not fit for purpose. The claimant submitted that his data had been wrongfully deleted and that that had prejudiced these proceedings. The claimant submitted that from the moment he had advanced his claim form, it had presented a problem for the Tribunal.

8.8 In oral submissions, the claimant submitted there were many discrepancies between the written and oral evidence. He submitted he had made a protected act on the 4 or 5 October 2018 but the events leading to his constructive dismissal covered the period from September 2018 through to March 2019 and not just from 8 February 2019 onwards.

8.9 The claimant submitted that he had researched the company of VR and concluded that her approach would not be independent. The invitation letter which he received to a meeting built up his frustration and he felt his concerns would not be addressed. He had come to realise that the investigation by VR would not be independent or impartial because she was paid by Aptiv and there was a clear conflict of interest. Aptiv was not supportive of the claimant and tried to cover things up. The final straw which led him to resign was the incident with Jake when he was appointed to a position which had not been advertised. The claimant asserted he had an invisible disability but had not told the respondent that he had a disability. The claimant concluded that he had every confidence that the Tribunal would consider his case fairly.

Respondent

8.10 In written submissions the respondent noted the claimant's evidence that the alleged protected disclosures were made in a telephone call on 13 February 2019 in which the claimant had allegedly told the recipient of the call that there had been fraudulent conduct of an informal grievance investigation by Scott Mayne (including him using fictitious names for job candidates and telling the claimant that candidates had left the respondent's employment within one month of them beginning) and that there had been sex and race discrimination by the respondent in its recruitment process. However, in cross examination the claimant had indicated that the 13

February 2019 call was merely a "*first phone call"* when he had outlined he had concerns about CC sitting on a grievance panel which concerned her. A reference to page 223 does not reflect either version put forward by the claimant.

8.11 The claimant was advised to include in his witness statement details of how any disclosure of information fulfilled the requirements of section 43B of the 1996 Act. The claimant did not do so. The claimant has not shown any reasonable belief that any alleged disclosures were in the public interest and cannot have had a reasonable belief that they tended to show the matters alleged when in cross examination he abandoned his evidence in chief and stated he had not raised discrimination matters in that call. The respondent accepted that Aptiv driveline was an authorised third party to receive disclosures on behalf of the respondent as set out in section 43C(2) of the 1996 Act.

8.12 It was submitted that the evidence of SM should be preferred in respect of the alleged protected act on 5 October 2018 and that if the claimant had used the words unconscious bias in that conversation, then SM would have remembered it. The respondent accepted that a protected act was made on 8 February 2019.

8.13 It was submitted that the claimant does not advance any complaint in respect of an actual dismissal but only a constructive dismissal. Accordingly, consideration must be given as to the reason why the claimant resigned after the respondent acted as it did. Even as pleaded, the reasons set out by the claimant are not detriments and there is no causative link between any supposed detriments and the resignation. It is entirely innocuous for the respondent to engage a third party to hear the claimant's grievance even if that third party had previously been engaged by the respondent and even if the invitation letter to the meeting omitted the word "formal". Reference was made to **Shamoon -v- Chief Constable for the Royal Ulster Constabulary 2003 IRLR 285** and **Blackbay Ventures Limited (t/a Chemistree) -v- Gahir EAT/0449/2012.**

8.14 If the Tribunal find that there was detrimental treatment of the claimant by the respondent, it should then consider whether those detriments were a breach of contract so serious as to go to the heart of the contract. The Tribunal should not seek out matters upon which the claimant does not rely. The investigation meeting on 11 February 2019 was not a meeting about which the claimant had any complaint. There was no constructive dismissal.

8.15 In oral submissions it was stated that the contents of page 223 were more reliable than the oral evidence of the claimant. The claimant had not satisfied the test of a protected disclosure in his evidence. If the claimant had used the words "*unconscious bias*" that was not necessarily referring to a breach of the 2010 Act and it would not amount to a protected act in any event even if the words were spoken - which it was submitted they were not. It was submitted that the responded was not in breach of contract when it set about having the claimant's grievance investigated by an independent third party. It is entirely innocuous to engage a third party to hear a grievance even if that person has been used by the respondent before and it could not reasonably be considered a detriment by the claimant. In any event, the respondent dealt with the matter of complaint promptly and the chronology should be carefully considered. There is no breach of any implied term in the claimant's contract. The grievance was not ignored and when the report was ultimately produced it did uphold some of the matters complained about. Had the claimant not resigned when he did, he

could have remained in employment and may well have been satisfied with that outcome. The evidence of the claimant was confused, and his credibility is adversely affected as a result. VR was not a reluctant witness and written answers to the 41 questions should be taken at face value. She gives clear answers to the questions and, in contrast to the claimant, she is a reliable historian.

9. The Law

Constructive Dismissal

9.1 The Tribunal has reminded itself of the provisions of Section 95(1)(c) of the Employment Rights Act 1996:

"For the purposes of this part an employee is dismissed by his employer if and only if …

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

9.2 The Tribunal has noted the definition of constructive dismissal by Lord Denning was in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221:**

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be

bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employers conduct. He is constructively dismissed."

9.3 We have reminded ourselves of the decision **WA Goold (Pearmark) Limited -v- McConnell 1995 IRLR 516** in which the EAT confirmed that there was an implied term in a contract of employment that the employer would reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievances they may have. We have noted the words of Morison J in that case: "*Further, it seems to us that the right to obtain redress against a grievance is fundamental for very obvious reasons. The working environment may well lead to employees experiencing difficulties, whether because of the physical conditions under which they are required to work, or because of a breakdown in human relationships, which can readily occur when people of different backgrounds and sensitivities are required to work together, often under pressure. There may well be difficulties arising out of the way that authority and control is exercised, sometimes by people who themselves have insufficient experience and training to exercise such power wisely".*

9.4 We have reminded ourselves of the decision of the Employment Appeal Tribunal in **Hamilton -v- Tandberg Television Limited UKEAT/65/02** in which it was suggested the quality of an employer's investigation may not breach the implied term so long as there is in place a procedure which gives an employee the opportunity to raise his grievance and in which there is a right of appeal. We have noted the words of Judge McMullen: "*There was a procedure, it was activated, it was prompt, it was the subject of an appeal. The Applicant had an opportunity to have his say. There was in reality little dispute about some of the matters which formed the basis of the*

investigation. The criticism however, is of the Respondent's judgment as to the seriousness of the incidents and of the quality of the Respondent's investigation. It is suggested that the Employment Tribunal erred in law in failing to condemn the investigation. The standard against which investigation should be judged appears to us, in this case at least, to be the band of reasonable responses".

9.5 We have reminded ourselves of the provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and the Guide to that Code which was relevant and in force in 2019 namely that issued in 2017.

9.6 We have reminded ourselves of the decision in **Malik -v- Bank of Credit of Commerce International SA [1997] IRLR 463** where Lord Steyn states that there is implied into a contract of employment an implied term of trust and confidence which provides that: "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee".* We note that the impact on the employee of the employer's behaviour is what is significant and not its intended effect and that the effect is to be judged objectively.

9.7 We have noted the words of Browne- Wilkinson J in **Woods v W M Car Services (Peterborough) Ltd [1981] ICR 666**:

"To constitute a breach of this implied term it is not necessary to show the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect judged reasonably and sensibly is such that the employee cannot be expected to put up with it".

The complaint under section 103A of the 1996 Act

9.8 We reminded ourselves of the provisions of section 103A of the 1996 Act which read;

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".

and of the relevant provisions of Part IVA of the 1996 Act and section 43B(1) which read:

"(1) In this part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
(a) that a criminal offence has been committed, is being committed or is likely to be committed;
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;
(d) that the health or safety of an individual has been, is being or is likely to be endangered;
(e) that the environment has been, is being or is likely to be damaged; or
(f) that information tending to show any matter falling within any one the preceding paragraphs has been or is likely to be deliberately concealed".

Section 43C which reads:
(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure….
(a) to his employer
(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer is to be treated for the purposes of this part as making the qualifying disclosure to his employer.

9.9 In terms of the approach needed in this type of case to adjudicate a complaint advanced under section 103A of the 1996 Act we reminded ourselves of an explanation given by Judge Barry Clark in a recent decision in the EAT namely **Wztrzyszcewski -v- British Airways plc 2023 EAT 7:**

"*Under the ERA, the claimant complained of unfair dismissal, but only within the meaning of section 103A; this is because he lacked the qualifying service to bring a complaint of "ordinary" unfair dismissal under section 94(1) ERA. His resignation could be a dismissal if it fell within the circumstances described at section 95(1)(c) ERA; by this provision, an employee is treated as dismissed if he "terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct". This is colloquially known as an "unfair constructive dismissal" or "constructive unfair dismissal", although such expressions do not appear in the statute. As is well established, the common law test of contractual repudiation applies to the concept of unfair constructive dismissal as embodied in the ERA. Where an employee is dismissed for a reason that the statute expressly prohibits, such as the making of protected disclosures, that dismissal will be regarded as unfair. This is sometimes colloquially called an "automatically unfair dismissal". Again, this expression does not appear in the statute. This case deployed a double colloquialism of the sort familiar to practitioners but which can be confusing to litigants in person: that of the "automatically unfair constructive dismissal". In a case of this sort, an ET will usually need to decide (among other matters) whether the employer subjected the employee to detrimental treatment for the prohibited reason (such as the making of protected disclosures), whether that treatment repudiated the contract of employment (often expressed as a fundamental breach of the implied term of mutual trust and confidence), and whether the employee resigned in consequence".*

Protected Disclosures

9.10 We note that any disclosure must amount to a qualifying disclosure. The fact that the information being disclosed is already known to the respondent does not prevent the disclosure being qualifying. The Tribunal must not apply a rigid distinction between information being disclosed and allegations being made and the Court of Appeal in **Kilraine -v- London Borough of Wandsworth 2018 ICR 1850** held that the information referred to in section 43B is capable of covering statements which might also be characterised as allegations. Allegations and information are often intertwined. However, the disclosure must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)a-f. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show the listed matter then it is likely that his or her belief was reasonable. A disclosure of information must convey facts. In **Goode -v- Marks and Spencer plc EAT 0442/2019** the disclosure made by the

employee had merely expressed an opinion about Marks and Spencer's proposals and so could not fall within section 43B. The EAT stated the only information the letter disclosed related to Goode's state of mind so this could not possibly tend to show a relevant failure. It is necessary for the worker to give evidence of what information he had actually provided to his employer. A mere inquiry about a matter is very unlikely to amount to a disclosure of information.

9.11 The question of whether a disclosure of information is made in the public interest is unlikely to arise save in cases advanced under section 43B(1)(b) of the 1996 Act. The focus is on whether the worker reasonably believed the disclosure was in the public interest. The concept of public interest was inserted into the 1996 Act to prevent a worker from relying on a breach of his or her contract of employment where the breach is of a personal nature and there are no wider public interest implications. A relatively small group may be sufficient to satisfy the public interest test but that is a matter for each tribunal. Factors which might be relevant (the so-called Chesterton guidelines) are the number of people whose interests are affected by the disclosure, the nature of the interests affected, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer. A case where a worker is the principal person affected can be in the public interest if it affects the wider interests of employees generally. Case law suggests that complaints about contracts of employment and working conditions can still attract protection and that the public interest aspect is not a significant hurdle. In **Dobbie-v- Felton t/a Feltons Solicitors 2021 IRLR 679 the EAT** the distinction between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest was considered. There may be a difference between a matter of public interest and a matter that is of interest to the public and there may be subjects that most people would rather not know about that may still be matters of public interest and it may be in the public interest even if the disclosure relates to a specific incident without any likelihood of its repetition.

9.12 We note that it is necessary for the Tribunal to consider what the worker considered to be in the public interest, whether the worker believed the disclosure served the public interest and whether that belief was held reasonably. It does not matter if the genuine belief was wrong and even if there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest is objectively reasonable. The courts have stressed that the necessary belief is simply that the disclosure is in the public interest and the particular reasons why the worker believes that to be so are not of the essence. A disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters which the Tribunal finds were not in his or her mind at the time. In principle, the Tribunal might find that the particular reasons why the worker believed the disclosure to be made in the public interest did not reasonably justify his or her belief but nevertheless find it to have been reasonable for different reasons which he or she had not articulated at the time. All that matters is that his subjective belief was objectively reasonable.

9.13 The breach of legal obligation referred to in section 43B of the 1996 Act can cover the provisions of a contract but does not extend to a breach of guidance or best practise. It also is wide enough to cover the employer's duty not to discriminate under the 2010 Act. In **Fincham -v- HM Prison Service 0925/2001** it was observed that there must be some disclosure which actually identifies albeit not in strict legal language the

breach of legal obligation on which the worker is relying. In **Bolton School -v- Evans 2006 IRLR 500** it was accepted as obvious that the disclosure related to sensitive information about pupils falling into the wrong hands and that could give rise to a potential legal liability. The EAT reached a similar conclusion in **Western Union Payment Services UK Limited-v- Anastasiou EAT 0135/2013**. It was accepted that reference to misleading information in a prospectus was sufficient specificity. In **BlackBerry Ventures Limited (above**) the EAT stated that, save in obvious cases, if a breach of legal obligation is asserted the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. Clearly a worker need not always be precise about what legal obligation he envisages is being breached or is likely to be breached. In cases where it is obvious that some legal obligation is engaged, the absence of specificity will be of little evidential relevance. However, in less obvious cases a failure by the worker to at least set out the nature of the legal wrong he believes to be at issue might lead a Tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of legal obligation.

9.14 In the case of an alleged constructive dismissal, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, the dismissal is automatically unfair.

Constructive Dismissal or Express Dismissal – position unclear

9.15 We note that where (as in this case) there is confusion as to whether the contract of employment ended by an express dismissal by the employer or by a resignation by the employee, broadly the test as to whether ostensibly ambiguous words amount to a dismissal or to a resignation is an objective test. All the surrounding circumstances both preceding and following the incident and the nature of the workplace in which the misunderstanding arises must be considered. If the words are still ambiguous the Tribunal should ask itself how a reasonable employer or employee would understand those words in the light of those circumstances. Any ambiguity will be construed against the party seeking to rely on the ambiguity. We remind ourselves that a resignation or a dismissal once given or communicated cannot be withdrawn save with the consent of the other contracting party.

9.16 Generally speaking unambiguous words of dismissal or resignation may be taken at their face value. Exceptions to this are where there is an immature employee or a decision taken in the heat of the moment or an employee being jostled into a decision by the employer. However, absent such special circumstances an unambiguous resignation will be valid.

9.17 We remind ourselves that it is possible for an employee to resign his contract with notice and then for the employer to summarily dismiss the employee during that notice period. In those circumstances, the contract ends with an express dismissal and any claim of constructive dismissal arising out of the earlier resignation falls away.

Victimisation – section 27 of the 2010 Act

9.18 The Tribunal has reminded itself of the provisions of this section which read:

(1) A person ("A") discriminates against another person ("B") if A subjects B to a detriment because-
(a) A does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following in a protected act-
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information given , or the allegation is made, in bad faith…….

We have reminded ourselves of the relevant provisions of section 39 of the 2010 Act which read:
(4) An employer (A) must not victimise an employee of A's (B)-
(a) as to B's terms of employment
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service:
(c) by dismissing B
(d) by subjecting B to any other detriment.

(7) In subsections(2)(c) and(4(c) the reference to dismissing B includes a reference to the termination B's employment-
(a) by the expiry of a period (including a period expiring by reference to an event or circumstances)
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

9.19 The Tribunal has reminded itself that a claim for victimisation requires the Tribunal to make an enquiry into and to determine the reason why the alleged discriminator did a particular act. That reason must be because the victimised person has done a protected act as defined by the 2010 Act. The protected act need not be the only or main reason for the action complained of: it is sufficient if the protected act materially influences those actions.

9.20 The relevant provisions of section 136 of the 2010 Act provide:
(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

9.21 A claimant need not show that any detrimental treatment was meted out because of the protected act but rather it is sufficient if the protected act has a significant influence on the employer's decision-making. A significant influence is an influence which is more than trivial. This test was adopted by the EAT in **Villalba -v- Merrill Lynch 2007 ICR 469.** It is not necessary for the protected act to be the primary cause of the detriment so long as it is a significant factor.

Discussion and Conclusion

Complaint of automatic unfair constructive dismissal – section 103A of the 1996 Act

Protected Disclosure

10.1 We have first considered whether the claimant made a qualifying disclosure as defined in Part IVA of the 1996 Act on 13 February 2019 when he reported matters to Aptiv. It is common ground that if there is a qualifying disclosure then that became a protected disclosure by reason of section 43C(2) of the 1996 Act.

10.2 We have considered whether the claimant disclosed information to the respondent through Aptiv on that occasion. The claimant told us at paragraph 18 of his second witness statement that he had revealed concerns about discrimination in the recruitment process, fraud and deception following informal investigation, not following company procedures and unfair treatment to minority groups and agency workers. That contrasts with what the claimant told Employment Judge Leach in February 2020 (paragraph 12 of the schedule to the orders) when he made reference to fraudulent conduct of an informal investigation by SM including the use of fictitious names for job candidates and falsely telling the claimant that two candidates had left the respondent's employment within one month of starting. There is reference to sex and race discrimination in the recruitment process which is common across both accounts. The record made by Aptiv which appears at page 223 refers first to the claimant's concern about an employee being awarded a permanent contract for a vacancy of which the claimant had not been made aware. Secondly, there is reference to the claimant's suspicions that he was perceived by the respondent to be Portuguese.

10.3 The claimant explained to us that there were only so many characters which could be accommodated in a report to Aptiv and that there had not been room for more to be recorded on 13 February 2019. However, we note from later conversations (particularly page 226) that much longer entries were made. The claimant was damaged in cross examination on this point as he conceded that the conversation on 13 February 2019 was merely the "*first phone call"* of many and that he had related his concerns about CC's intention to sit on the grievance panel on 25 February 2019 which is a different version still. The claimant's evidence on this important point was confused. We noted that at the first case management hearing before Employment Judge Ryan in October 2019, the claimant had relied on the grievance in February 2019 as being the protected disclosure and the conversation with Aptiv did not figure in that summary of the case at all.

10.4 We have balanced the evidence and conclude that the contemporaneous note on page 223 is more likely to be an accurate note of what was said on 13 February 2019 and other versions are rejected by us. We conclude that the claimant had become confused as to what he said, when he said it and to whom he said it given that he made no contemporaneous notes of the conversations and particularly because there were so many conversations over a very short period of time. We conclude that the claimant made the report on 13 February 2019 because he was upset at being brought to a disciplinary investigation meeting on 11 February 2019

and he was out to cause trouble for the respondent by the fact of making the report rather than paying attention to the contents of his report.

10.5 We conclude that what the claimant revealed to Aptiv on 13 February 2019 were allegations of a general nature which did not amount to a disclosure of information within section 43B(1) of the 1996 Act. In later conversations with Aptiv, the claimant clearly disclosed information but that is much later in the relatively short time frame in this case. The claimant's case carefully set out in the February 2020 orders stands or falls on the report on 13 February 2019.

10.6 Even if information was disclosed on 13 February 2019, the claimant gave us no evidence as to the basis of any belief held by him that what he had disclosed tended to show one of the matters listed in section 43B(1)a-f of the 1996 Act. The claimant was clearly directed by Employment Judge Leach at paragraph 13.1 of the schedule to the February 2020 orders to deal with that matter, but we had no evidence from the claimant at all on that point. On looking at the report on page 223, we discern no factual content capable of tending to show that the respondent was likely to fail to comply with a legal obligation or any information as to what that legal obligation was. The matter is not obvious and, without evidence from the claimant on the point, that element of the definition of qualifying disclosure is not made out.

10.7 The claimant was also directed to give evidence as to his reasonable belief that any disclosure of information was in the public interest but again no evidence of any kind was provided in witness statements by the claimant in respect of this essential element of a claimed qualifying disclosure. We asked the claimant about that matter, given that he appeared in person and had not been asked about it in cross examination. The claimant had clearly not thought about that element of the definition at all and replied that it was in the public interest because the respondent was a large organisation with public contracts and he felt it was preposterous. We were given no further information. We did not find that evidence at all compelling and conclude that the claimant had no belief at any time that his report to Aptiv on 13 February 2019 was in the public interest. We have considered the **Chesterton** guidelines (paragraph 9.11 above) and note the matters disclosed on 13 February 2019 related solely to the claimant. We conclude that those matters did not affect the interests of the wider workforce and nothing about those matters suggests a wider public interest. We conclude that if any belief in public interest was held that it was not reasonably held.

10.8 For those reasons we conclude that the report to Aptiv on 13 February 2019 did not amount to a qualifying disclosure and the essential foundation for a successful complaint under section 103A of the 1996 Act is not present.

10.9 In case that conclusion is wrong, we have gone on to consider the other elements of the complaint under section 103A of the 1996 Act.

Resignation

10.10 The case advanced by the claimant is that he was constructively dismissed and that the reason the respondent acted as it did towards him was solely or principally because he had made the protected disclosure. The essential feature of a successful constructive dismissal claim is that the claimant must show that he resigned his employment. It has always been the respondent's case that the claimant

resigned and, certainly from the date of the hearing before Employment Judge Phil Allen in April 2021, that has also been the claimant's case – but that was not always the case.

10.11 The circumstances leading up to the termination of the claimant's employment effective from 30 March 2019 were complicated as our findings of fact demonstrate. It is possible that the events of March 2019 amounted either to an actual dismissal of the claimant by the respondent or to a resignation by the claimant or to a resignation by the claimant on notice followed by an actual dismissal by the respondent during the notice period. Both parties now advance the case of resignation by the claimant and nothing more. The claimant also seeks to argue that he was entitled to resign, and that the resignation should be converted to a dismissal pursuant to section 95(1)(c) of the 1996 Act.

10.12 Just because both parties agree that the case is one of simple resignation does not mean to say that that is how the contract of employment ended. It is a matter for this Tribunal to decide the circumstances in which the claimant's contract came to an end. If we were to decide that the contract ended by actual dismissal, then the basis of a constructive dismissal claim would not be made out.

10.13 What is clear is that the claimant did not expect to have had his resignation accepted by JB as is clearly apparent from the numerous items of correspondence sent by the claimant to JB after 26 March 2019. The claimant asserted he was looking for support from JB and instead found she had accepted his resignation. The claimant expressed his wish to continue working for the respondent if only to be able to decide, in his own time, if and when to resign. An employee who alludes to resignation in correspondence with his employer is playing a dangerous game and may find, as in this case, that matters do not turn out as he might have wished.

10.14 We have considered the three emails sent by the claimant to JB. The first on 24 March 2019 (paragraph 7.59) records the claimant as having been forced to hand in his notice. Those words beg the questions, when was notice handed in and to whom? The second message on 25 March 2019 (paragraph 7.60) refers to the claimant being forced to hand in his notice. The third and final message on 26 March 2019 (paragraph 7.63) says the claimant would like to hand in his notice but questions the period of notice to be given. We conclude that the effect of those three messages is ambiguous. We have looked at all the surrounding circumstances to seek to remove ambiguity and find that the situation is still ambiguous and so we have considered how a reasonable employer receiving those messages in the light of all the circumstances would have understood those words. We conclude that a reasonable employer would have seen those messages as evincing a resignation of his employment by the claimant on 24 March 2019 and re-iterated on 25 and 26 March 2019 with the only question being the length of notice required. On 26 March 2019, JB accepted the resignation and clarified the notice period as one week and indicated that the resignation would be effective from 30 March 2019 taking the resignation to have been communicated on 24 March 2019 with appropriate notice. Having applied the appropriate legal test, we conclude that the claimant's contract came to an end by reason of his resignation on 24 March 2019 with the effective date of termination being 30 March 2019. In applying that date, the respondent removed any suggestion that it was dismissing the claimant during his notice period.

Accordingly, we are satisfied that the claimant resigned his employment and that that prerequisite of his constructive dismissal claim is made out.

Constructive Dismissal

10.15 We note that it is for the claimant to prove on the balance of probabilities that he was dismissed by the respondent. He would show this if he can establish that he resigned in circumstances in which he was entitled to end his contract without notice because of the respondent's conduct. The fact that the claimant actually gave notice is not a bar to a successful claim. The claimant does not have the qualifying service to advance a claim of ordinary unfair dismissal and so retains the burden of proof in this matter. The dismissal claim, as set out in the schedule to the February 2020 orders of Employment Judge Leach, is firmly rooted in the Grievance Email of 8 February 2019 and the manner in which the respondent chose to investigate and generally deal with that grievance. We have given close attention to the respondent's grievance policy, and we have also considered the ACAS Code and the ACAS Guidance to which we refer above. We have noted that the respondent's grievance procedure was not part of the claimant's contract of employment. We have noted that the implied term in relation to grievances in the claimant's contract is that the respondent should afford an opportunity for the claimant to obtain redress of his grievances reasonably and promptly together with a right of appeal.

10.16. We have considered each of the criticisms levelled by the claimant against the respondent in this regard.

10.17 The claimant complains of the decision of JB to appoint an external investigator. That step is not one specifically referred to in the respondent's grievance policy, but we conclude that it was a reasonable step to take. By February 2019 the claimant had raised multiple concerns involving many members of the respondent's management and workforce and had escalated those concerns to Aptiv. By this point in time, the claimant had raised his concerns on several occasions and had had meetings with SM and CC to seek to address his concerns informally. The grievance of 8 February 2019 raised serious concerns about recruitment policies and practices and serious allegations of unlawful discrimination. The decision to treat the matter as a formal grievance and the decision to appoint an external consultant to investigate it were both reasonable decisions and were indicative of the respondent's level of concern about the allegations raised. In acting as it did in these respects, the respondent did not commit a breach of contract.

10.18 The claimant criticises the choice of VR as independent consultant and raises issues in relation to her independence and asserts she had a conflict of interest. In this regard, he refers to the content of VR's website. Whilst we did not hear evidence from VR, we have been able to peruse the responses she made to written questions and we have been able to read the contents of her final report into the grievance raised by the claimant (pages 338-343). We conclude that the criticisms made by the claimant of VR's independence are without foundation. The claimant's interpretation of the content of the website maintained by VR demonstrated a misunderstanding by him of her role and the services she offered to employers. If an employer is to investigate a grievance raised by an employee, then that investigation will either be taken by another employee, who is paid by the employer, or by an external consultant, whose fees are paid by the employer. The fact that the respondent was

to pay the fees of VR does not mean that VR was bound to find against the claimant as he implies or that VR lacked independence. Indeed, the final outcome made two recommendations which were to correct practices of which VR was critical. We accept that VR was an experienced HR professional who could be expected to, and in fact did, produce a balanced report which addressed the concerns raised by the claimant. The claimant's concerns that VR lacked independence and was in a conflict of interest situation were unreasonable. The respondent committed no breach of contract in this regard.

10.19 The claimant was greatly exercised by the omission of the word "*formal"* from the invitation letter he received from JB to meet with VR on 15 March 2019. The letter of 11 February 2019 (page 80) had clearly referred to an investigation into the Grievance Email being carried out under the formal grievance procedure. The letter of 8 March 2019 made no such reference but did refer to the meeting on 25 February being adjourned and the clear inference from the letter of 8 March 2019 is that the same procedure is to continue but with VR carrying out the investigation as an external HR consultant. We conclude that there is no merit in the concern expressed by the claimant in this regard. We conclude that the respondent committed no breach of contract in this regard.

10.20 The claimant asserted that VR in some way restricted the matters he wished to raise and based her enquiries on the statement and resulting minute given by the claimant at the meeting with VR on 15 March 2019 rather than on the Grievance Statement. If that had happened it would have been a serious issue, but it did not happen. We are satisfied that the claimant prepared the Grievance Statement and took it with him in electronic form to the meeting with VR. He sent it to VR during the meeting, but she was not able to open the document because of an IT issue at that time. We are satisfied that VR agreed to and did take full account of that lengthy and discursive document in investigating the claimant's grievance. VR was asked by the claimant about this issue, and she responded that her investigation was based on the "87-page document". VR stated that she annotated the claimant's letter and then proceeded to take witness statements. We did not hear from VR in person, but we have the evidence before us of her outcome report which clearly demonstrates to us that the Grievance Statement informed the matters which were investigated. The minute of the discussion on 15 March 2019 (page 186) refers in the third paragraph to the Grievance Statement. We find that VR did not seek to and did not restrict the scope of her enquiry. The respondent committed no breach of contract in this regard.

10.21 The claimant asserted that VR sought to restrict her enquiry to matters which had occurred or allegedly occurred from 8 February 2019 onwards. There is no evidence whatever to support that assertion which would have been a nonsensical position for VR to have adopted given that the grievance, which was the catalyst for her investigation, was itself dated 8 February 2019.

10.22 The claimant asserted that VR did not establish the reason why she had been appointed to act as an independent investigator and so discover why her appointment was inappropriate. In this regard the claimant relies on the fact that CC could not have had involvement in the grievance investigation because she was named in it. Once again nothing turns on this. We find that it was not clear to CC on a reading of the Grievance Email that she was being grieved against and thus she attended the meeting on 25 February 2019. As soon as the claimant made the position clear and

made it clear that he had reported matters to Aptiv, CC withdrew from any further involvement in the matter and VR was appointed by JB to take over. We conclude that there was no need for VR to understand the history of the previous meeting. VR was appointed by JB to conduct the investigation and it is clear she did so in a thorough and reasonable manner. There is no breach of contract by the respondent in this regard.

10.23 There is no evidence that any enquiries made by the claimant to Aptiv were ignored. We conclude that Aptiv did pass to JB the details of the concerns being raised by the claimant and it was left to JB to decide the appropriate way to address the complaints. We conclude that all of the many matters which the claimant raised in the Grievance Statement were investigated by VR as the outcome report demonstrates. However, the claimant resigned weeks before the outcome report was produced and only nine days after his meeting with VR. In resigning when he did, the claimant joined the ranks of many litigants who have been found to have resigned prematurely in cases of alleged constructive dismissal and before any fundamental breach of contract had occurred. In the event, had the claimant waited to consider the outcome of the enquiry by VR, he would not have discovered in that outcome report any evidence of a fundamental breach of contract by the respondent.

10.24 Accordingly, taking into account all matters relied on by the claimant to evidence a breach of contract relating to the manner in which the Grievance Email and Grievance Statement were investigated, we conclude that there is no evidence of any breach of contract by the respondent let alone a fundamental breach of contract.

10.25 Reference was made as this case was prepared for hearing to a breach of the implied term of trust and confidence in the context of the grievance investigation. We reach the same conclusion in respect of any alleged breach of this implied term as we do in respect of the implied term to deal with grievances. It is clear that right up to the point of his resignation and indeed beyond it, the claimant's suggested outcome for the Grievance Email was that he be appointed to a senior managerial role in the respondent factory in Manchester. If an employee is seeking still to work for his employer and indeed to be promoted to a senior role in management, an argument that his trust and confidence in his employer has been destroyed must fall away. Time and again, in the history of this matter the claimant indicated his wish to continue in the employment of the respondent. We analyse that the claimant took a chance in resigning on 24 March 2019 in the hope and expectation that the respondent would accede to his demands. In that hope and expectation, he was disappointed. We have looked at the respondent's conduct as a whole and, having judged it reasonably and sensibly as we are required to do, we conclude that the respondent was not in breach of the implied term of trust and confidence in the claimant's contract. Indeed, the respondent's conduct came nowhere near doing so.

10.26 We conclude the respondent was not in breach of the claimant's contract of employment when he resigned on 24 March 2019 and that the resignation is not converted to a dismissal pursuant to section 95(1)(c) of the 1996 Act.

Automatic unfair constructive dismissal

10.27 If that conclusion is wrong then we briefly consider the final element which the claimant would have been required to prove had his complaint succeeded to this point (which it has not). If the claimant had proved that he was dismissed, then the burden would continue to lie with him to show that the sole or principal reason that the respondent acted towards him as it did was because he had made a protected disclosure to Aptiv. Clearly our enquiry must be limited to events after 13 February 2019 being the date of the claimed protected disclosure or the later date when JB was informed of the protected disclosure which appears to have been not before 26 February 2019.

10.28 An analysis of what the respondent did with regard to the claimant after 13 February 2019 reveals various incidents. On 25 February 2019 CC and Alex Gibbons met with the claimant to investigate the Grievance Email. The claimant criticised CC for attending that meeting when she was one of the subjects of the Grievance Email. Did CC act as she did because of the alleged protected disclosure? We would not have reached that conclusion because there was no evidence that CC knew of the referral to Aptiv before that meeting took place and what she then did was entirely appropriate, and the matter was taken up by JB. The next event was the claimant's meeting with VR on 15 March 2019. We have dealt above with our assessment of those events, and we would not infer that the actions of VR were by reason of the alleged protected disclosure. On 21 March 2019 the claimant was spoken to by DA about the incident in the workplace on 20 March 2019. There is no evidence from which we could have inferred that DA knew of the alleged protected disclosure or was being influenced to act as he did by someone who knew of it. That incident on 20 March 2019 clearly arose because the claimant was out to cause trouble having become disenchanted with the respondent. The final event was the claimant's interaction with JB from 26 March 2019 onwards. Were her actions by reason of the alleged protected disclosure? The claimant spent very little time with JB in cross examination and the few questions put to her on the decision to accept the resignation revealed no improper motive so far as this Tribunal is concerned.

10.29 The claimant did not spend any time at the hearing seeking to prove this element of his complaint and if it had been relevant for us to consider it, it would not have been made out.

10.30 Accordingly the complaint of automatic unfair constructive dismissal fails because we find the claimant did not make a protected disclosure and because the claimant was not entitled to resign and treat himself as constructively dismissed when he did so and because, in any event, there is no evidence to suggest that any conduct of the respondent towards the claimant was by reason of any alleged protected disclosure.

Complaint of victimisation – section 27 of the 2010 Act.

11.1 The first element of a successful claim of victimisation is a protected act as defined in section 27(2) of the 2010 Act.

Protected Acts

11.2 The claimant asserted two protected acts.

11.3 The first protected act was put forward as the claimant's allegations to SM at the meeting on 5 October 2018 to which we refer at paragraph 7.15 above. For the reasons we set out at paragraph 7.16 above, we conclude that the claimant did not do a protected act at that time. Therefore, that basis for the victimisation complaint falls away.

11.4 It was accepted by the respondent that the claimant did do a protected act in raising the Grievance Email on 8 February 2019 and therefore we consider this complaint on that basis.

Resignation

11.5 The complaint is advanced on the basis that the claimant was constructively dismissed because of doing the protected act on 8 February 2019.

11.6 The same question arises as in the earlier complaint as to whether the claimant resigned his employment. We reach the same conclusion in respect of this complaint as we did in paragraphs 10.10 to 10.14 above.

Constructive dismissal

11.7 The same question arises namely whether the claimant was constructively dismissed but in this complaint within the definition of that phrase in section 39(7) of the 2010 Act. That involves the same enquiry as before and we reach the same conclusion as we did in paragraphs 10.15 to 10.26 above. Accordingly, the complaint of victimisation as advanced does not succeed. The alleged detriment of constructive dismissal on which the claimant relies is not made out.

Discriminatory constructive dismissal

11.8 Should those conclusions be wrong, then we have considered whether the claimant's alleged dismissal was an act of victimisation pursuant to section 27 of the 2010 Act. This would have involved an analysis of the dealings between the claimant and the respondent from 8 February 2019 to 30 March 2019.

11.9 The first interaction of note was the claimant being summoned to a disciplinary investigation meeting on 11 February 2019 by CC. Clearly CC was aware of the protected act but the event being investigated on 8 February 2019 occurred on 6 February 2019. We have considered whether the respondent cynically took advantage of that incident after it had knowledge of the protected act to convene an investigatory meeting on 11 February 2019. We had some concerns that the note left by the claimant on 6 February 2019 was far from being the worst example of industrial misconduct which this Tribunal has seen. However, in this regard the evidence of JC was helpful. We were able to assess him for ourselves and conclude that the upset and anxiety which he says was caused for him by the claimant's letter was genuine and not exaggerated. On that basis we would not have concluded that those actions by the respondent were materially influenced by the protected act.

11.10 The second interaction was the meeting on 25 February 2019 to investigate the Grievance Email and the presence of CC at that meeting. We reach the same conclusion as above and conclude that the events of 25 February 2019 evidenced

nothing of disadvantage to the claimant – CC did as he asked her to do and adjourned the meeting.

11.11 The third interaction was the claimant's meeting with VR on 15 March 2019. We have dealt above with our assessment of those events, and we would not infer that the actions of VR were materially influenced by the protected act.

11.12 On 21 March 2019 the claimant was spoken to by DA about the incident on 20 March 2019. There is no evidence from which we could have inferred that DA knew of the alleged protected act or was being influenced to act as he did by someone who knew of it. That incident on 20 March 2019 clearly arose because the claimant was out to cause trouble having become disenchanted with the respondent.

11.13 The final event was the claimant's interaction with JB from 26 March 2019 onwards. Were her actions by reason of the protected act? The claimant spent very little time with JB in cross examination and the few questions put to her on the decision to accept the resignation revealed no improper motive so far as this Tribunal is concerned.

11.14 Again, the claimant did not spend any time at the hearing seeking to prove this element of his complaint and if it had been relevant for us to consider it, it would not have been made out.

11.15 Accordingly, we conclude that the claim of victimisation fails because the claimant cannot establish that he was constructively dismissed and that is the detriment on which he relied in relation to this complaint. Nothing that occurred after the date of the one protected act made out was sufficient to raise a prima facie case of detriment sufficient to shift the burden to the respondent to explain its actions.

12. For those reasons, the two complaints advanced to the Tribunal by the claimant fail and are dismissed.

EMPLOYMENT JUDGE A M BUCHANAN
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 12 April 2023
JUDGMENT SENT TO THE PARTIES ON

14 April 2023

AND ENTERED IN THE REGISTER

FOR THE TRIBUNAL