Case No. 2307517/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr S Bunjo

Respondent: Progress Vehicle Management Limited

Heard at: London South (By CVP)

On: 27 and 28 February 2023 and 1 and 2 March 2023

Before: Employment Judge Self

Appearances

For the Claimant: In Person

For the Respondent: Mr R McClean – Counsel

JUDGMENT

1. The Claim of unfair constructive dismissal is not well-founded and is dismissed.
2. The Claim of automatically unfair dismissal is not well-founded and is dismissed.
3. The Claim for notice pay not well-founded and is dismissed.
4. The Claims of race discrimination (Direct and Harassment) are not well founded and are dismissed.

WRITTEN REASONS

(As requested by the Claimant on 2 March 2023)

1. By a Claim Form lodged on 11 November 2020 the Claimant asserts that he was:
   a) Unfairly constructively dismissed;
   b) Automatically unfairly dismissed pursuant to section 103A Employment Rights Act 1996 (ERA);

c) Wrongfully dismissed;
d) Discriminated against on the grounds of / in relation to his Nationality (Equality Act – section 13 (direct) section 26 (harassment).

The Claimant had also brought claims asserting disability discrimination but those claims fell away following the judgment of EJ Cheetham KC on 22 November 2022, when it was determined that the Claimant was not a disabled person at the material time in respect of either impairment put forward.

2. The Claimant undertook the necessary ACAS Early Conciliation and entered that process on 30 September 2020 and concluded it on 15 October 2020. Consideration will need to be given in relation to any act or omission alleged to be a discriminatory act that took place before 1 July 2022 as to whether or not it can be said to be part of an act continuing over a period. If any act is deemed to be out of time then consideration will need to be given as to whether or not it would nevertheless be just and equitable for time to be extended.

3. The Claim Form has attached to it a well drafted Particulars of Claim which sets out the factual and legal background to the claim. In actual fact the race discrimination claim is not ticked on the Claim itself, nor is it specifically pleaded as a claim. In contrast the disability claim was exhaustively flagged up with precision. It is clear that the Claimant has had legal assistance with the framing of his Claim.

4. On 14 December 2020 the Respondent lodged their Response in which they denied each and every claim.

5. There has been a slow gestation period for this Claim. Preliminary Case Management Hearings were postponed by the Tribunal in August 2021 and then April 2022. The matter was finally heard on 6 May 2022 before EJ Clarke who:

a) Listed an Open Preliminary Hearing on 19 August 2022 to consider whether or not the Claimant was a disabled person.
b) Determined that although the box for race discrimination had not been marked there was sufficient in the body of the Claim for the Tribunal to determine that such a Claim had been made by the Claimant.
c) Set out a preliminary List of Issues. It was noted that the Claimant ***"struggled to provide information in relation to the Claims he was making"*** on medical grounds and EJ Clarke directed that further information be requested of the Claimant to finalise the issues. The List of Issues set out in the Order, however, appears reasonably comprehensive and reflective of matters set out in the Claim Form running to several pages.

6. The Claimant, via his sister-in-law provided some further particulars but in reality they did little to clarify the issues and a decision was taken that a case management hearing should be convened and the Open Preliminary Hearing (OPH) put back. That hearing came before EJ Truscott KC who recorded that the Claimant was fit enough to attend the hearing but not fit enough to have complied with various outstanding Orders. A further timetable was set for both the OPH and the final hearing but there was no clarification of the issues.

7. On 22 November 2022 the issue relating to disability was determined against the Claimant and his claims relating to that protected characteristic were dismissed by EJ Cheetham KC. A Case Management Order was made which again extended time for the bundle and for the exchange of witness statements. It also records that the Claimant had failed to provide the further information he had been ordered to provide but went onto clarify the necessary points at the hearing so as to rectify that omission.

8. Joining the efforts of EJ Clarke and EJ Cheetham KC the List of issues set out below was presented to the parties and both agreed that they were the issues in the case to be determined at this hearing. They are as follows:

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of Early Conciliation, any complaint about something that happened before 1 July 2020 may not have been brought in time.

1.2 Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in the circumstances to extend time

2. **Unfair dismissal**

2.1 Was the claimant dismissed?

Did the respondent do the following things:

2.1.1.1 Bully, harass, humiliate and verbally abuse the Claimant
2.1.1.2 Physically assault the Claimant
2.1.1.3 Fail to deal with the Claimant's grievances
2.1.1.4 Require the Claimant to undertake personal tasks for Mr Keating
2.1.1.5 Punish the Claimant by withholding a pay rise and a bonus for failing to undertake MR Keating's personal tasks
2.1.1.6 Withhold a pay rise and/or bonus
2.1.1.7 Reduce the claimant's role without consultation and for no reason.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 Whether it had reasonable and proper cause for doing so.

2.1.3 Were there terms implied into the Claimant's contract as to co-operation and support and the provision of a suitable working environment

2.1.4 If so, did the things the Respondent do breach either of those terms?

2.1.5 If so, were the breaches fundamental ones? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.6 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.1.7 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

2.2 If the claimant was dismissed, what was the reason or principal reason for dismissal, i.e., what was the reason for the breach of contract?

2.2.1 What was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal.

2.2.2 Was the reason or principal reason for dismissal that the claimant made a protected disclosure etc? If so, the claimant will be regarded as unfairly dismissed.

2.3 Was it a potentially fair reason?

2.4 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3. **Remedy for unfair dismissal**

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?
3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
3.1.3 If not, for what period of loss should the claimant be compensated?
3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
3.1.5 If so, should the claimant's compensation be reduced? By how much?
3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
3.1.7 Did the respondent or the claimant unreasonably fail to comply with it?
3.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
3.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
3.1.11 Does the statutory cap of fifty-two weeks' pay or £88,519 apply?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. **Wrongful dismissal / Notice pay**

4.1 What was the claimant's notice period?

4.2 Was the claimant paid for that notice period?

4.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. **Protected disclosure**

5.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on 3rd August 2020 during a meeting with Mr Ryland

5.1.2 Did he disclose information? The Claimant says he disclosed:

5.1.2.1 That Mr Keating had publicly humiliated him;

5.1.2.2 That he had been physically assaulted by employees and no action had been taken;

5.1.2.3 That his pleas for help had been ignored or dismissed; and

5.1.2.4 That other employees were illegally using vehicles and not paying taxes.

5.1.3 Did he believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did he believe it tended to show that:

5.1.5.1 A criminal offence had been, was being or was likely to be committed (5.1.2.1, 5.1.2.2 and 5.1.2.4);

5.1.5.2 A person had failed, was failing or was likely to fail to comply with any legal obligation (an obligation under s2 of the health and Safety at Work etc Act 1974 and/or s2 of the Protection from Harassment Act 1997 re 5.1.2.1 and 5.1.2.2);

5.1.5.3 The health or safety of any individual had been, was being or was likely to be endangered (that the Claimant's mental health was suffering as a result of 5.1.2.1 and 5.1.2.2).

5.1.6 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer under section 43C of ERA 1996.

6. **Direct Race Discrimination (Equality Act 2010 section 13)**

6.1 The claimant is from Bosnia and Herzegovina. He relied upon a hypothetical comparator.

6.2 Did the Respondent do the following things:

6.2.1 Demote the Claimant and diminish his work responsibilities without consultation or reason (April 2019 and Jan 2020);
6.2.2 Denied the Claimant a pay rise and/or bonus (Xmas 2019);
6.2.3 Failed to deal with the Claimant's grievances; (From April 2019)
6.2.4 Required the Claimant to undertake personal tasks for Mr Keating. (April 2019)
6.2.5 On 15th April 2019 David Creton of PACE Accident Repair Centre punched the Claimant and called him a "foreign Cunt" on 15 April 2019
6.2.6 On numerous occasions Mr Keating called the Claimant a "foreign twat", a "foreign bastard" and/or a "foreign goofball".
6.2.7 On numerous occasions Mr Keating made fun of the Claimant's accent and/or made silly jokes at the claimant's expense
6.2.8 The Claimant was not given a pay rise and/or bonus
6.2.9 The Claimant's role was reduced and jobs taken away from him.
6.2.10 Grievances set out in para 11 of the Particulars of Claim were not investigated or dealt with appropriately.

6.3 Was that less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was and so a hypothetical comparator will be used.

6.4 If so, was it because of race?

6.5 Did the Respondent's treatment amount to a detriment?

7. **Harassment related to race (Equality Act 2010 section 26)**

7.1 Did the Respondent do the following things:

7.1.1 Did David Creton of PACE Accident Repair Centre Call the Claimant a "foreign cunt" on 15 April 2019

7.1.2 Call the Claimant a "foreign twat", a "foreign bastard" and/or a "foreign goofball" on numerous occasions.

7.1.3 Make fun of the Claimant's accent and/or made silly jokes at the Claimant's expense on numerous occasions.

7.2 If so, was that unwanted conduct?

7.3 Did it relate to race?

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

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

8. **Remedy for discrimination**

8.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

8.2 What financial losses has the discrimination caused the claimant?

8.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

8.4 If not, for what period of loss should the claimant be compensated?

8.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

8.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

8.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

8.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

8.9 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

8.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

8.11 By what proportion, up to 25%?

8.12 Should interest be awarded? How much?

Postponement Applications

9. It appears that the Claimant has appealed the Judgment of EJ Cheetham KC and there was correspondence relating to the same which led EJ Wright to indicate that, notwithstanding any appeal and because of the obvious delay in waiting for the appeal to be dealt with, the overriding objective was in favour of the Claim proceeding at the end of February (i.e. at this hearing). That followed a request from the Respondent which related also to difficulties with finalising the bundle and the exchange of witness statements. The Claimant, all be it opaquely, asked that the hearing be postponed on account of the outstanding appeal and again EJ Wright refused that request for the same reasons. There has been no appeal to EJ Wright's rulings.

10. At the outset of the hearing the Claimant made a further application to postpone the hearing until after the outcome of his appeal had been adjudicated upon. The basis was that to proceed would be unjust because the behaviour that he had been subjected to was because he had had a heart attack and effectively that the disability claim was his main claim. In order for the Claimant to understand the consequences of any postponement the Judge went through the estimated listing consequences which would be at best an appeal hearing at the end of 2023 and possibly up to mid-2024 if there was a final hearing of the appeal. Taking into account the listing position in London South if the appeal was allowed then it could well be 2025 before the final substantive hearing was held. Although hard to be precise a further delay of up to 2 years could accrue for matters to be considered by a Tribunal that took place in 2019/2020.

11. The Claimant told me that he was unconcerned about the delay in his quest for justice and whether it was 2 years, 5 years or 10 years he would continue in that pursuit.

12. The Claimant did not put anything new forward over and above that which he had put forward to EJ Wright and which she had rejected. We had no power to reconsider the decision of EJ Wright and the proper course would have been to appeal her decision. Notwithstanding that, the Claimant had not provided any cogent basis for the hearing being postponed and indeed there were powerful arguments for proceeding.

13. Firstly, this matter has been delayed substantially already by the situation within the Tribunal system and it is clearly better in terms of recollection and evidence that claims are heard at the earliest opportunity. Secondly, the matter was ready for hearing with the issues determined, bundle in place and statements exchanged. Thirdly, the Claimant was entitled to lead the same

evidence as to how he was treated in respect of his heart attack and that would still be relevant to the constructive dismissal claim and findings of fact could be made. Fourthly, the disability discrimination claims were largely on the same factual basis as the race discrimination claims, save for the reasonable adjustments claim. If the Claimant was successful on his appeal findings of fact as to whether he had been subjected to the treatment complained of could be used in any subsequent disability discrimination claim with a consideration of whether any conduct found was less favourable treatment on the ground of disability or arose from the disability.

14. In all the circumstances the benefits of proceeding and obviating further delay was the course that the Tribunal took as the Claimant had failed to persuade them that a postponement was required.

15. The Claimant refused to accept the ruling to proceed and moved straight into a second application to postpone and this time he asserted that it was because he was not fit to proceed on account of his heart condition and anxiety. This was a new ground for a postponement and so we permitted the Claimant to proceed with his application. He said that he had found it hard to prepare his case and that he did not think that he could go through the hearing and if the hearing proceeded it would be unjust.

16. The Tribunal reflected on the fact that there had been plenty of time to prepare for the hearing and that the Claimant had been writing lengthy emails in relation to matters relating to the bundle and the exchange of witness statements. We were satisfied that the Claimant had been able to engage in the process effectively and we rejected his suggestion that his health had inhibited his preparation. We noted that he had a very clear Claim Form and that the statement he had prepared on the last occasion for the disability hearing was, in fact a statement that dealt with the vast majority of the issues in the case as had been commented upon by EJ Cheetham KC at paragraph 5 of his November Judgment.

17. The Claimant provided no medical evidence to support his position and although he later said that he would supply such evidence he did not at any point during the hearing. The Tribunal were mindful that the delay would be substantial because when asked as to when he believed that he would be well enough to deal with his case the Claimant was unable to give any indication. He had already told us that so far as he was concerned time was not an issue. Balanced against all of this was the clear benefit of getting the case dealt with sooner rather than later before memories faded further and the fact that substantial cost would be wasted if this matter was postponed. The Claimant had indicated that he found the fact and the effort of the proceedings stressful and the Tribunal formed the view that delaying matters further would just retain that stressor in the Claimant's life and in all likelihood prolong any

recovery. Taking into account all of the above we declined the Claimant's application.

18. We kept a careful watch over the Claimant during the course of the hearing and facilitated breaks on a regular basis to assist him. Although not relevant to the issue of postponement there was nothing that happened in the course of the hearing that led us to think that our assessment that this claim should proceed was incorrect.

The Hearing

19. We heard oral evidence from the Claimant and also from Mr Keating (Managing Director) and Mr Rylands (HR). All parties also provided written statements and all were the subject of cross examination. We were provided with a bundle of documents and we considered such documents as we were taken to by the parties. Both parties addressed us in closing.

20. The Claimant was cross examined for just over one day. We were satisfied that he was able to respond to the questions asked and indeed did so in a combative manner regularly. The Claimant had limited questions for the witnesses and explained that it was because he found difficulty in forming questions. He made a number of statements from which the Employment Judge crafted questions and the Tribunal also asked questions in compliance with that set out in Rule 41 to ensure fairness and the overriding objective. By so doing the Tribunal mitigated some of the disadvantage the Claimant would necessarily experience as an anxious individual conducting his own litigation.

21. Prior to dealing with the findings of fact and the evidence the Tribunal would first wish to deal with the claim of automatically unfair dismissal pursuant to **section 103A Employment Rights Act 1996**. This was not dealt with as a preliminary point during the case but we consider it appropriate to deal with it at the outset of our reasons That provision reads as follows (so far as is material):

"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."

22. Section 43 defines a Protected Disclosure as follows:

"In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

23. Section 43B (1) states:

(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 any 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 of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

23. In this Claim the Claimant states that he made qualifying disclosures to his employer in accordance with section 43C.

24. The disclosures that the Claimant made were said by him to be made on 3 August 2020 during a meeting with Mr Ryland and the information that was said to be disclosed was that:

    a) Mr Keating had publicly humiliated him;
    b) The Claimant had been physically assaulted by employees and no action had been taken;
    c) That his pleas for help had been ignored or dismissed; and
    d) That other employees were illegally using vehicles and not paying taxes.

25. Leaving aside all of the other parts of the definition the Claimant needs to demonstrate that he reasonably believed that he made these disclosure of information in the public interest. That was particularly relevant in this case on the basis that at first blush the matters raised by the Claimant at a) to c) relate to the behaviour meted out to him by certain individuals and are seemingly personal in nature.

26. The leading case is **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA**. For a disclosure to be in the public interest, it must serve the interests of persons outside the workplace Mere multiplicity of workers sharing the same interest was not enough. In the Court's view, even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard

disclosure as being in the public interest, as well as in the personal interest of the worker. In this regard, the following factors suggested by N might be relevant:

a) the numbers in the group whose interests the disclosure served

b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

c) the nature of the wrongdoing disclosed

d) the identity of the alleged wrongdoer.

27. In **Chesterton**, the employment tribunal had identified other features, aside from the number of employees affected, which might be said to render disclosure in the public interest — specifically, that the disclosure was of deliberate wrongdoing and that it allegedly took the form of misstatements in the accounts to the tune of £2–3 million. The statutory criterion of what is 'in the public interest' does not lend itself to absolute rules and the Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract of the **'Parkins v Sodexho kind'** may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. Tribunals should, however, be cautious about reaching such a conclusion. The broad intent behind the 2013 statutory amendment was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistle blowers, even where more than one worker is involved.

28. Further appellate guidance was provided by the EAT in **Dobbie v Felton t/a Feltons Solicitors 2021 IRLR 679, EAT**. The EAT, having considered Chesterton Global in detail and summarised the key principles which derive from it, observed that the essential distinction drawn in that case is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest. The EAT stressed that there may be a difference between a matter of public interest and a matter that is of interest to the public, and that there may be subjects that most people would rather not know about that may be matters of public interest. A disclosure could be made in the public interest even though the public will never know that it has been made, and a disclosure could be made in the public interest even if it relates to a specific incident without any likelihood of repetition.

29. A key difference between other contexts in which the courts have considered the public interest and the test in S.43B(1) ERA is that, for a disclosure to qualify under that section, the worker need only have a reasonable belief that his or her disclosure is made in the public interest. Therefore, a tribunal is not tasked with asking itself the objective questions of what the public interest is, and whether a disclosure served it; the legislation poses the altogether more difficult challenge of gauging:

a) what the worker considered to be in the public interest

b) whether the worker believed that the disclosure served that interest, and

c) whether that belief was held reasonably.

30. When considering whether a worker has a reasonable belief, tribunals should take into account the worker's personality and individual circumstances. So, in relation to 'public interest', a tribunal might take into account the fact that the average man or woman in the street will have a less clearly defined concept of the 'public interest' than a lawyer or civil servant and will not deprive a worker of protection simply because his or her genuine belief was wrong.

31. In **Chesterton**, the EAT rejected the suggestion that a tribunal should consider for itself whether a disclosure was in the public interest and stressed that the test of reasonable belief remains that set down by the Court of Appeal in **Babula v Waltham Forest College 2007 ICR 1026, CA**. After reviewing Lord Justice Wall's judgment in that case, the EAT concluded that the public interest test in S.43B(1) can be satisfied even where the basis of the public interest disclosure is wrong and/or 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 was objectively reasonable. On appeal, the Court of Appeal agreed that the test as expounded in Babula remains relevant. It made the point that tribunals should be careful not to substitute their own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question as part of its thinking — indeed, that is often difficult to avoid — but only that that view is not, as such, determinative. The Court stressed that the necessary belief is simply that the disclosure is in the public interest — the particular reasons why the worker believes that to be so, are not of the essence. All that matters is that his or her (subjective) belief was (objectively) reasonable.

32. The protected disclosures relied upon were all said to have been made orally at a return-to-work meeting with Mr Ryland on 3 August 2020. In the Claimant's statement at paragraph 06-02 and 06-04 the Claimant wrote:

"At this meeting I tried to find a way forward and tried to resolve a number of issues related to my work conditions and the way I was treated.

"At this meeting I've told Matt Ryland that the company has done everything to humiliate me and taking all my responsibilities away from me which put me through stress and humiliation. I also told him it was impossible for me to work under the same conditions and considering the circumstances the company will have to commit to some kind of compensation for those years"

33. There is no indication within those statements of anything other than the Claimant raising those matters as a personal issue alone. In cross examination the Claimant confirmed that he raised the alleged protected disclosures in order to try and get some form of resolution for **himself** for what he considered was inappropriate conduct towards **him.** The Claimant was given an opportunity both during cross examination and via questions from the tribunal as to why he had raised the issues and he, on more than one occasion, confirmed it was because he wanted to sort out his own position within the workplace.

34. The Claimant gave no evidence whatsoever that he had raised the matters because he believed that there was a public interest in what he had raised and accordingly we are satisfied that the alleged protected disclosures at 5.1.2.1 to 5.1.2.3 whilst brought up at the meeting of 3 August 2020 are not public interest disclosures as the Claimant had no reasonable belief that they were made in the public interest and on his own account were only disclosed for his own personal interest. The Claimant has at no point provided any evidence that he believed that his disclosures were in the public interest. We find that he never held that belief.

35. So far as the other protected disclosure at 5.1.2.4 is concerned we find that that disclosure was not made at the meeting of 3 August but was raised at an earlier time, in emails. There is no evidence to support that this was believed to be made in the public interest. We do not accept that this disclosure was a qualifying disclosure either. We are also satisfied that the tax issue was not something that contributed to any of the conduct which led to the Claimant's resignation and/or his treatment by the Respondent. The Claimant has failed to put forward any form of evidence to support this.

36. As there was no protected disclosure and in any event no treatment was on account of the alleged protected disclosures the automatically unfair dismissal claim, pursuant to section 103A ERA 1996 must fail.

The Facts

36. The Respondent is a Vehicle Management Company. It processes car accident insurance claims and the Respondent supplies replacement vehicles to customers. The Respondent was started by Mr Keating, who is American, in April 2000 and has grown over time employing around 150 staff of diverse nationality and ethnic background. We were told that HR has just Mr Ryland working within it and that since 2018 he had been based at the Atherstone branch in the Midlands whilst most of the staff were at the Croydon branch. It is, of course, a matter for the Respondent as to how they allocate their resources but it did seem to the Tribunal that this was a Company that was under resourced in terms of HR Assistance with all the risks that entails.

37. There was a major difference in view as to the relationship that pertained between the Claimant and Mr Keating. The Claimant asserted that Mr Keating had never treated him well and there was no personal relationship at

all. Mr Keating, in contrast, described a close relationship for nearly two decades meeting with families on birthdays, at Christmas, and at their respective holiday homes in Spain. Mr Keating stated that when the Claimant returned from Spain he stayed at Mr Keating's house and that when at work the two of them would often chat in Mr Keating's room for lengthy periods.

38. We accept Mr Keating's view of the relationship because:

a) His account was clear, cogent, detailed and consistent.

b) The Claimant effectively refused to answer any questions about this issue when asked by counsel for the Respondent or the Tribunal, despite being warned of the consequences of acting in that manner. He gave no good reason for failing to engage in this important factual foundation stone of the Claim, save that he did not wish to speak of his private life and failed to engage even when the Tribunal made it clear how important it was to the issues.

c) Mr Keating's account was corroborated by Mr Ryland who clearly believed that he lacked authority in the Claimant's eyes on account of the Claimant's alleged close relationship with Mr Keating.

d) The Claimant could have brought members of his family to give evidence to rebut the allegations about the relationship, which had been clearly flagged up in the Particulars of Response (e.g., para 23 page 50), but he did not do so.

39. There was an issue over the Claimant's job title and /or what his duties were. We were not assisted by the absence of any written job description and no good reason was given for the failing and we refer back to our concerns over the under resourcing of adequate HR. The contract in the bundle referred to the Claimant as Transport Supervisor and that was the job title adopted by the Claimant in his Claim Form and in his resignation letter. The Claimant produced as late disclosure, at the end of the first day of the hearing, a signed copy of a contract from when he started in 2008 which described him as a Transport Manager and that was how he wished to describe himself at the hearing.

40. To some extent in the absence of a Job Description for either role the extent to which the Claimant was doing the role of one or the other is irrelevant as the material distinction between the two is impossible to deduce. In our view the Claimant had an important role in respect of dealing with the numerous drivers whom he organised and trained. We cannot see how such would fall outside the ambit of either a Transport Manager or of a Transport Supervisor We also record that although deemed to be difficult to manage there has been no criticism of the Claimant over the period he worked in terms of effort or output.

41. From a structural perspective Mr Keating told us and we accept that he sat at the top of the Respondent as Managing Director and below him sat a number of non-statutory directors governing various areas (Finance, IT, Marketing

etc.). In the operational area there were Transport Managers. We form the view that the Claimant's status in the hierarchy was complicated by his ability to have a direct line via his friendship to Mr Keating which permitted him a higher status than his specific role in the hierarchy would have permitted. Realistically he was viewed as a Transport Manager even though his role probably stood just below that level. We are satisfied by dint of his friendship with Mr Keating that it was to Mr Keating that he would largely report and that he did not believe that he had to report to anybody else. We are satisfied that the contract the Claimant produced was his contract and in that he was described as a Transport Manager but that Transport Supervisor would also have adequately described the work that he did which Mr Keating acknowledged as an important role.

42. Again, as background we have considered the nature of the organisation. It is apparent that it is not a process driven organisation from an HR perspective. There are a number of areas where there was a certain level of casualness where other organisations may have had more regulated processes. The lack of job descriptions comes to mind as does the failure to minute or record return to work meetings and a lack of formal structure when considering any adjustments required for an individual coming back into the work place. When things are going well then such gaps can be papered over but when things are not going so well the absence of formality can make life a lot more difficult when considering the audit trail of what has been done and when.

43. Following an investigation we note that Mr Ryland seemed very aware that there was a culture of "racist banter" within the front office, transport and fleet department (e-mail 19 November 2019 page 236). For most organisations that would be a red flag for which action would need to be taken even if there were no complaints about the same and all appeared to be taking it in a joking fashion. Such a culture brings with it massive risks of litigation and discord within the workplace.

44. We are satisfied that there was a culture of bad language within the workplace and we are satisfied that was prevalent from Mr Keating down. We have seen some of his emails and from that we are quite satisfied that his verbal language would have been no different, We are satisfied that the issue of race and background was something that was the wide spread topic of jokes and "banter" and that in the main it was shrugged off and people gave as good as they got. We are quite satisfied that the Claimant was within this culture as opposed to being outside it, as there is evidence to support his involvement therein both gathered during his employment and after he had left. Whilst such an atmosphere could have been unwanted and created an environment that would have satisfied the necessary environment for a harassment claim we have no evidence that anyone did take the comments in that way (including the Claimant) and indeed that was the view taken by Mr Ryland when he made enquiries into an allegation of racism against the Claimant.

45. We are satisfied that the Claimant would often sit and chat with Mr Keating in his room and would have robust jokey discussions about members of staff and each other. Those discussions may have been deemed rude and offensive by others but they not deemed so by the two participants. We are satisfied that both would **"take the piss"** out of each other as suggested by Mr Keating and make jokes, often personal, about each other. Mr Ryland provided evidence of that from when he was based in Croydon as did Mr Keating. The Claimant again was highly reluctant to give any evidence about his relationship with Mr Keating save to condemn it as wholly poisonous. We do not consider that his recollection was an accurate one but one that was self-serving and false to try and support his claim.

46. The Respondent has clearly been reasonably successful and the organisation has grown over the years under Mr Keating's direction. We formed the view that Mr Keating was not somebody who would suffer fools gladly, and that he would treat people as he found them. He accepted that he would use a phrase such as **"stop standing round with your thumb up your ass"** if he thought workers were not pulling their weight but similarly we consider that if staff were doing a good job and /or went the extra mile then he would be prepared to reward that endeavour. We believe that Mr Keating kept a close eye on all parts of his business and that if required he would offer praise / encouragement / a robust rebuke / criticism as the circumstances required.

47. We are also satisfied that because of the Claimant and Mr Keating's long-standing relationship that the Claimant was given a certain level of latitude on account of the trust that had built up over the years but at the same time the Claimant was not wholly immune for criticism when merited. We understand why it was that Mr Ryland felt somewhat impotent when dealing with the Claimant because of the Claimant's direct line to Mr Keating.

48. There had been a long-standing relationship that had survived the first period of employment and the emigration to Spain and then many years together from 2008. The Claimant provides no detail of any specific incident before 2019 and even on the Claimant's case any shouting that Mr Keating is alleged to have done was not directed at him alone but to ***"everybody when he was not happy about things"***.

49. In February 2019 the Claimant suffered a heart attack. The Claimant accepted that he was kept on full pay and we are satisfied that this was on account of discretion exercised by Mr Keating. Mr Ryland's view was that this was an example of an occasion when the Claimant was treated better than others might be although Mr Keating indicated that he had regularly exercised his discretion in that way. On either view it is not a sign of subjecting the Claimant to less favourable treatment or harassing him or having a negative punitive view towards him at all let alone for a statutorily prohibited reason.

50. Another example of this is when the Claimant had his bank card declined and asked for an advance / loan of £2,000 from Mr Keating (p.194). That request was accommodated too. These are actions which are completely at odds with

the picture the Claimant has sought to paint of his employment with the Respondent and his relationship with Mr Keating.

50. The Claimant has sought to portray himself in this case as a victim who has been abused, controlled and bullied by Mr Keating and others within the Respondent. Although we acknowledge that it is in different circumstances the Claimant did not portray himself in that light when answering questions and/or in the way he put his case. Whilst giving due consideration to the stress of giving evidence and the pressure that brings the Claimant was often aggressive in his answers to counsel's perfectly reasonable questions and at times was singularly, and in our view deliberately, unhelpful in the answers he gave. In essence he chose whether to answer questions or not and at time simply refused despite being told by the Tribunal that the questions were reasonable and that if he failed to answer adverse inferences could be drawn and/or another's version of the same event was likely to be preferred. The Tribunal have also noted from emails presented to us that the Claimant was not, in the period under consideration, an employee short of giving his own view to others including Mr Keating and was very reluctant to take instruction. His responses did not indicate the cowed, bullied, fearful employee that he sought to portray himself as at this hearing. We do not accept the Claimant's portrayal of himself as a victim.

51. In mid-March an issue arose about giving "big Mario" a pay rise. We have seen strident emails (208) from the Claimant in May about the said pay rise to Ruth Davey and Craig Buchanan copying in inter alia Mr Keating. He clearly disagreed with the decision and sets out his position in firm terms going as far as to order that payroll deduct the increase from Mario's wages that he had received the previous month from the next month's wages. That would have been in all likelihood an unlawful deduction of wages. Mr Keating, with some justification, expresses concern about the manner in which the Claimant was going about things. This matter is an example that rebuts the suggestion that the Claimant was afraid in the work place to express himself and was passive and bullied. We find that this demonstrates that the Claimant was quite prepared to put his view forward if he wished to and to do so robustly.

52. On 10 April Mr Ryland wrote to the Claimant saying that, as already discussed, they wanted the Claimant to slowly reintegrate himself back to work and initially to do no more than 18 hours a week. There was no return-to-work meeting as such but the Claimant was offered flexible hours. As Mr Keating said they trusted him as a long-standing employee to do what he could do without micro managing him.

53. There is nothing on the papers to suggest that save for allowing the Claimant to come and go as he pleased that there was any form of demotion or reduction in duties except that when the Claimant was not at work others would have to fill in and undertake his tasks to keep the business moving. There was an issue about the Claimant being reluctant to adopt new technology and also there was a concern about the Claimant going to

Warwickshire to the other site as he had just had a heart attack on account of the substantial travelling which Mr Keating considered was not absolutely essential. Whilst the Claimant mentions emails that will prove his case re demotion (2.12 /2.13 of his statement) but none have been produced and the Claimant confirmed that he had no other relevant documents for us to consider when asked at the hearing.

52. On 15 April the Claimant went to the adjoining yard of Pace Arc Limited and spoke to Dave Creton about using some of that yard. Pace Arc are a wholly separate company to the Respondent and Mr Creton is a director of that company. Mr Keating is as well.

53. Mr Creton did not take kindly to the suggestions made by the Claimant about some cars coming into his yard and told him to "***fuck off***" on a number of occasions. Mr Creton told Mr Ryland subsequently that anybody who made that suggestion would be told to fuck off in the same manner. We accept that. The Claimant asserts that at the end of the discourse Mr Creton said to him ***"now fuck off out of my yard you faring (foreign) cunt"*** and then walked away.

54. The experience may have been sufficient for many to realise that Mr Creton was not in the mood for further discourse nor would further discussions bring about a satisfactory outcome. The Claimant, however, pursued Mr Creton into his office and accepts that at some point he pushed Mr Creton following which Mr Creton punched him in the face and broke his glasses. The Claimant alleges that he was held by another individual. Mr Creton accepts that he punched the Claimant but only after he had been grabbed whilst sitting at the desk.

55. The Claimant raised a complaint that evening to Mr Ryland copying in Mr Keeting seeking £650 for his glasses and £2000 for damage to his lip (198). Mr Ryland managed to get an account from Mr Creton (all be it grudgingly provided) despite him not working for the Respondent. Mr Ryland suggests that the Claimant issued death threats to Mr Creton (whom he allegedly described as a "mother fucker") when making an oral complaint, which the Claimant denies. Mr Ryland reported back Mr Creton's view of matters at which point the claimant indicated that he did not have any trust in Mr Ryland handling the matter and so wished to go to the police about it. At that point any grievance as such was withdrawn.

56. Mr Ryland formed the view that he had no authority over Mr Creton and in any event the Claimant had indicated that he would deal with the assault via the police which he considered to be the proper course. The Respondent did subsequently agree to replace the Claimant's glasses which was authorised by Mr Keating after he had taken a look at the situation.

57. The Claimant was not happy with the way that Mr Ryland dealt with the matter and indicated he was going to make a complaint about him. There was

clearly tension between the two men at that time. It appears to us that Mr Ryland did what he could and stopped when asked to do so by the Claimant.

58. Mr Keating states that he did look into the matter as well after the Claimant had come to him. He states that he saw CCTV footage that appeared to show the Claimant remonstrating with Mr Creton in the yard, although there was no sound. Mr Keating stated that he did not ignore the matter but considered the comments of all parties involved including Mr Keenon who was a witness and then decided to pay for the Claimant's glasses as an act of goodwill but not to take any action against Mr Creton who worked for the other Company he was a director of and not this Respondent.

59. For the Claimant this incident was a big issue and he came back to it in the hearing time and time again. He was clearly very disappointed at what he saw as a lack of support from Mr Keating who, of course, on our finding he was very close to. We consider that by paying for a pair of glasses to the tune of £650 Mr Keating did show support for the Claimant.

60. This Claim is brought against Progress Vehicle Management Limited. Whilst Mr Keating is a director of both companies and the premises are adjoining, by all accounts Pace Arc Limited for whom Mr Creton was a director also is a different legal entity. Under section 109 (1) of the EqA:

"Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

The Claimant has brought a race claim against his employer for the act of Mr Creton (6.2.5 and 7.1.1) who was not employed by that Company. Section 109 (1) EqA does not allow that to happen. Is there another way that the Respondent can be held liable for the acts of Mr Creton? We have no evidence to suggest that Mr Creton was acting as the Respondent's agent nor is there any evidence to suggest that Mr Keating or the Respondent instructed, caused or induced the alleged act of Mr Creton (s.111 EqA) or that there was any aiding of the alleged contravention.

61. In this case Mr Creton must be deemed to be a third party and the Equality Act provides no basis for third party harassment since the repeal in 2013 of sections 40(2) to 40 (4) of EqA (**Unite the Union v Nailard (2019) ICR 28, CA**) There was no previous issue between Mr Creton and the Claimant that we have been told about and so the punch and the alleged abuse cannot be laid at the door of the Respondent. Accordingly those matters must be dismissed. It is, of course, feasible that a failure to deal with an alleged third-party incident could be motivated by race and we will deal with that at a later point in these Reasons when dealing with the Claimant's grievances and their handling.

62. On 23 May 2019, in an email relating to Big Mario's pay rise, the Claimant states:

“he is using the company vehicle for years without paying any tax or rent”

This seems to relate to the fourth protected disclosure which did not seemingly cause any ripple on the pond at the Respondent.

63. The Mario issue rumbled on and Ms Davey reports on 29 May that he had returned his company car. Mr Keating suggests a meeting the following Monday to which the Claimant replies copying others in with “you” being Mr Keating:

“I thought you clearly stated that you don't want to get involved in this matter but you obviously changed your mind…. Now if you want to get involved and change my programme in a process that's fine too then I don't really need to be involved. All I want out of this is clearly going forward I would appreciate better communication”

Again, we consider that this does not fit in with the cowed bullied persona that the Claimant asserted he was during the course of his employment and demonstrates that the Claimant is quite at ease saying his piece to Mr Keating if he disagreed.

64. In July 2019 (the date varies from 5 July to 20 July) the Claimant asserted that he was shouted at by Mr Keating and subjected to bad language and that he was pushed against a wall and thereby assaulted. Mr Keating had no recollection of the incident and there is no contemporaneous record of the same. Whilst it is entirely plausible that Mr Keating raised his voice and used bad language to the Claimant, in the workplace that of itself in this specific environment would seem to us to be entirely in keeping with the manner in which the operation ran and many others did the same and Mr Keating did the same with many others.

65. We do not accept that the Claimant was pushed against the wall. Taking into account the upset and outrage exhibited by the Claimant about the Creton assault, it is inconceivable that the claimant would not have raised the same contemporaneously, especially as he was quite happy to challenge Mr Keating in other areas as set out above. Further we are also sure that the Claimant’s nationality had nothing to do with any incident of voice raising / bad language because as the Claimant accepted that would not be out of keeping for Mr Keating’s approach to all staff.

64. In October the Claimant gave a written warning to a driver who subsequently appealed and raised a race complaint against the Claimant. Mr Ryland heard the appeal and overturned the warning because he did not consider the Claimant had followed proper procedure. The Claimant did not accept that decision and raised issues about it particularly because an allegation of race related conduct had been made against him.

65. On 20 November at 1035 Mr Keating stepped into the escalating row between Mr Ryland and dealt with it in a blunt and uncompromising style as follows:

"Get him off suspension. Do not suspend anyone for a personal matter. What the fuck are you all thinking? You have wasted all this time and money on this and fucked it up by not following any procedure correctly."

We do not consider this email to be any form of aberration on the part of Mr Keating from his normal way of doing business which when a blunt assessment was required it would be delivered.

66. On 20 November at 1102 the Claimant wrote to Messrs Ryland and Mr Keating saying that he wished to make a formal complaint into the company for not taking disciplinary action against an employee for making a race related allegation against him. At 1431 that same day the Claimant indicated that he would not wish to pursue his grievance but would wish to deal with matters privately. Enquiries showed that there was a large amount of what could be described as "racist banter" in the workplace flowing all ways. It would appear that this was taken as give and take on all sides. On 2 December(256) Mr Ryland wrote to the Claimant as follows:

"Following the grievance filed against you I am writing to inform you that the grievance had been settled with following measures taken: reissuing of numerous policies including but not limited to bullying, and health safety and Working Time Regulations. During the investigation I was forced to investigate alleged incidents of racism in the workplace. During my interviews and follow up questions it was noted that racist banter is rife in the transport department. It was reported that you received comments about your own heritage as have a number of other drivers about theirs. I've been told that you have joined in with the banter as well, although nobody can provide an example of anything within recent memory. Finally, in regard to the alleged racism I'd like to clarify your colleagues that have provided the above info have also stated they do not believe you to be racist. They've stated that if anything you occasionally get caught up in driver banter due to a general good relationship with them. To summarise I can confirm that no action was asked to be taken against you so none will be".

67. If at this time Mr Keating or Mr Ryland were looking to scapegoat the Claimant and possibly be rid of him this would have been an opportunity to manipulate matters to the Claimant's disadvantage. They did not.

67. Mr Ryland concluded by asking whether the Claimant still wished to raise a grievance against the employee. There is no reply within the bundle indicating that he did.

68. On 2 January 2020 Mr Buchanan was promoted to Croydon Transport Manager and the Claimant asserts that his duties were reduced because of that. We are satisfied that Mr Buchanan was Ms Davey's assistant and following her illness took over her duties. We do not accept that this appointment marked any form of demotion or diminution in the Claimant's

duties. Mr Buchanan was a natural successor. The Claimant does not make any written complaint around this time about being demoted. We feel sure that had the Claimant considered that he had been demoted at the time he would have raised the issue then.

69. Towards the end of January, the Claimant indicated that he was not feeling well and on 28 January indicated that this was on account of a bad stomach. On 7 February the Claimant stated:

"I have been to see the cardiology team yesterday and my GP this morning. My health situation is not improving as expected I am struggling with some medications side effects, not eating, sleeping and so on. I was advised take some time off work and take relevant treatments which should help me."

The certificate from the GP indicated that the Claimant should be signed off for a month because of ***"heart failure and depression"***. On 6 March the condition was given as ***"stress"***. Following a discussion Mr Ryland spoke to the Claimant about reintegrating the Claimant back to the work place and that he was considering a phased return on reduced hours and light duties. That was a sensible approach.

70. On 27 March the Claimant was notified that he was being placed on furlough and the Claimant responds with a courteous letter. On 17 April Mr Ryland confirms receipt of the Claimant's furlough agreement and offers to put him in touch with professionals to assist with his mental health.

71. On 1 July 2020 the Claimant was notified that he was required to return to work on 13 July as furlough was coming to an end. That was subsequently extended to 3 August 2020. Mr Ryland intended the meeting to be a catch up in relation to the Claimant's health and to establish the basis upon which the Claimant was going to return. There was no intention that this was to be a formal meeting and certainly Mr Ryland could have had no prior notice of what the Claimant was to say.

72. When the Claimant attended at the meeting he raised a number of issues that he considered had contributed to his stress in the workplace. We can find nothing in the bundle that would indicate that the Claimant had been suffering work place stress over the course of 2019 /2020 save for that associated with the assault and the allegation against him for allegedly making racial comments although we take general cognisance of the stress anybody must feel following a heart attack.

73. Mr Ryland responded on 11 August having undertaken some enquiries. He noted (and we accept) that the Claimant was talking in the meeting about a severance package of £35,000 and a "nice" car and so we find that it was in the Claimant's mind that he was going to leave the Respondent before the meeting. We do not accept that the Claimant raised the matters as a formal grievance but accept that his complaints usurped the original purpose of the meeting.

74. The Claimant complained that there was no return-to-work meeting and that he resumed his regular duties too quickly on his return and was working long hours. Mr Ryland pointed out that there had been a suggestion that he return on 18 Hours and the claimant had ignored that, but in any event the Claimant had taken substantial time off on an ad hoc basis. Mr Ryland accepted that certain duties had been reallocated but that was because the Claimant was absent regularly and because of his health condition. There had been no demotion. The Claimant raised being publicly humiliated on two occasions by Mr Keating but does not assert in the meeting that it was race related or that he had been assaulted by him. There was a string of complaints about not being listened to and being excluded which Mr Ryland responded to. We have not been able to find any evidence of deliberate exclusion at all.

75. At the end of the letter Mr Ryland noted that the Claimant's physical health was fine and that the only issue impacting was one of stress and that the Claimant should therefore return on light, non-managerial duties on 17 August. The Claimant was then signed off on 13 August for ***"stress depression and anxiety related to work"*** and the Claimant went back briefly, writing to Mr Ryland primarily in relation to the Creton assault back in April 2019.

76. On 26 August the Claimant raised issues about the advance that he had had saying that he wished to pay it off. Mr Keating offered to write off the balance almost immediately afterwards to assist with the Claimant's mental health by removing what might have been a worry.

77. On 1 September the Claimant signed a letter which was drafted by his solicitor, resigning his employment. It read as follows:

"I am writing to inform you that I am resigning from my position as Transport Supervisor with immediate effect.

Please accept this letter as formal notice of my resignation and termination of my employment contract with you.

Due to bullying and harassment in the workplace, being demoted without good reason, a failure to make reasonable adjustments for my disability, being subjected to unreasonable or unfair treatment, being forced to work in breach of health and safety laws and many attempt to resolve outstanding issues with a grievance that have never been addressed promptly. Due to the same issues of the breach of my employment contract I would like to resign on the grounds of constructive dismissal. I feel that I have no other alternative but to resign from my position.

Due to your behaviour as outlined above I believe that the employment relationship is irrevocably broken down and I resign as a result of the fundamental breach of the employment contract. I consider this to be a fundamental breach of the employment contract on your part in particular the duty of trust and confidence."

There is no reference therein to protected disclosures being made and being material to the decision to resign nor to any race related conduct.

78. On 7 September the Resignation was acknowledged and Mr Keating responded to certain points therein.

The Law

79. **Unfair Constructive Dismissal**

The statutory basis for constructive dismissal is set out at section 95 (1) (c) of the ERA 1996 and that section states that an employee is dismissed by his employer if 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.

80. It follows that the test for constructive dismissal is whether the employer's actions or conduct amounts to a repudiatory breach of the contract of employment (**Western Excavating (ECC) Limited v Sharp (1978) 1 QB 761**).

81. It is an implied term of any contract of employment 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 trust and confidence between employer and employee (**Malik v BCCI SA (1998) AC 20**).

82. Any breach of the implied term of trust of and confidence would amount to a repudiation of the contract of employment and the test of whether or not there has been a breach of the implied term is objective (**Malik at 35C**). There is no need to demonstrate intention to breach the contract. Intent is irrelevant.

83. A relatively minor act may be sufficient to entitle the employee to resign and leave the employment if it is the last straw in a series of incidents. The particular incident which finally causes the resignation may in itself be insufficient to justify that action, but that act needs to be viewed against a background of such incidents that it may be considered sufficient to warrant treating the resignation as a constructive dismissal. It is the last straw that causes the employee to terminate a deteriorating or deteriorated relationship.

84. It is clear that the repudiatory conduct may consist of a series of acts or incidents, some of which may be more trivial, which cumulatively amounts to a repudiatory breach of the implied term of trust and confidence. The question to be asked is whether the cumulative series of acts alleged, taken together, amount to a repudiatory breach of the implied term. Although the final straw may be relatively insignificant, it must not be entirely trivial. It must contribute something to the preceding acts.

85. The paragraphs prior to his one within this section are a summary of Lord Dyson's Judgment in **London Borough of Waltham Forest v Omilaju (2005) ICR 481.**

86. In **Kaur v Leeds Teaching Hospitals NHS Trust (2018) EWCA Civ 978** it was identified that normally it will be sufficient to answer the following questions to ask the following questions to establish whether an employee has been constructively dismissed:

a) What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?
b) Has he or she affirmed the contract since that date?
c) If not, was that act or omission in itself a repudiatory breach of contract?
d) If not, was it nevertheless a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?
a) Did the employee respond to that breach?

87. **Direct Race Discrimination**

S.13(1) of the Equality Act 2010 (EqA) provides that ***'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'***.

88. An employer directly discriminates against a person if:

a) It treats that person less favourably than it treats or would treat others, and

b) The difference in treatment is because of a protected characteristic.

89. Direct discrimination is rarely blatant. As Lord Browne-Wilkinson observed in **Glasgow City Council v Zafar 1998 ICR 120, HL**, claims brought under the discrimination legislation present special problems of proof, since those who discriminate 'do not in general advertise their prejudices: indeed they may not even be aware of them'. For this reason, the burden of proof rules that apply to claims of unlawful discrimination in employment are more favourable to the claimant than those that apply to claims brought under most other employment rights and protections. In broad terms once a Claimant proves facts from which the tribunal could conclude, in the absence of any other explanation, that an employer has committed an act of direct discrimination, the tribunal is obliged to uphold the claim unless the employer can show that it did not discriminate (**S.136 EqA**.).

90. Given the likelihood that direct discrimination will take a disguised or covert form rather than being overt it is legitimate for a tribunal to look at all the material before it when determining whether there has been less favourable treatment, and that this may include evidence about the conduct of the alleged discriminator before or after the act about which the particular complaint is made.

91. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour — **Anya v University of Oxford and anor 2001 ICR 847, CA.** However, tribunals must be careful not to leap from a finding of unfair or unreasonable conduct — which may well amount to less favourable treatment than that which was (or would have been) meted out to a comparator (whether real or hypothetical) — to the conclusion that such conduct was motivated by the protected characteristic relied on and was thus directly discriminatory. There must be some evidential basis for drawing such a conclusion or adverse inference.

Harassment

93. A claim of harassment under S.26 EqA does not require a comparative approach. It is not necessary for the worker to show that another person was, or would have been, treated more favourably. Instead, it is simply necessary to establish a link between the harassment and a relevant protected characteristic.

94. There are three essential elements of a harassment claim under S.26(1) EqA:

    a) Unwanted conduct

    b) That has the proscribed purpose or effect, and

    c) Which relates to a relevant protected characteristic.

95. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — **Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT**. Nevertheless, he acknowledged that in some cases there will be considerable overlap between the components of the definition.

96. The Equality and Human Rights Commission (EHRC)'s Code of Practice on Employment (2011) ('the EHRC Employment Code') notes that unwanted conduct can include ***'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour***' — para 7.7. The conduct may be blatant (for example, overt bullying), or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions.

97. Where there is disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used.

98. A single incident can amount to unwanted conduct and found a complaint of harassment if sufficiently 'serious' (see para 7.8 EHRC Employment Code),

although it would, of course, have to have the purpose or effect proscribed by S.26(1)(b).

99. The EAT in **Thomas Sanderson Blinds Ltd v English EAT 0316/10** pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is 'unwanted' should largely be assessed subjectively, i.e., from the employee's point of view.

100. The second limb of the statutory definition of harassment in S.26(1) of the Equality Act 2010 (EqA) requires that the unwanted conduct in question has the purpose or effect of:

a) violating B's dignity — S.26(1)(b)(i), or

b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her — S.26(1)(b)(ii).

Accordingly, conduct that is intended to have the relevant effect will be unlawful even if it does not in fact have that effect, and conduct that does in fact have that effect will be unlawful even if that was not the intention.

101. The two strands of the definition are also disjunctive, i.e., a claimant only has to show that the conduct had the purpose or effect either of violating dignity or of creating the proscribed environment.

102. In deciding whether the conduct has the effect referred to in S.26(1)(b) EqA (i.e., of violating a person's (B) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B), each of the following must be taken into account:

a) the perception of B

b) the other circumstances of the case, and•

c) whether it is reasonable for the conduct to have that effect — S.26(4).

103. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

104. In **Pemberton v Inwood 2018 ICR 1291**, CA, Lord Justice Underhill, who sat as the President of the EAT in Dhaliwal, revised the Dhaliwal guidance as follows:

'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that

effect (the objective question). It must also, of course, take into account all the other circumstances — sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so'.

105. The 'other circumstances' of the case to be taken into account under S.26(4) will usually be used to shed light both on the complainant's perception and on whether it was reasonable for the conduct to have the effect. The EHRC Employment Code notes that relevant circumstances can include those of the complainant, such as the claimant's health, including mental health; mental capacity; cultural norms; and previous experience of harassment. It can also include the environment in which the conduct takes place (see para 7.18).

106. Finally the Tribunal will need to address the reason why an act of harassment (if found) had taken place and in particular whether or not, in this case, the Claimant's race was the reason or part of the reason for it.

106. **Time Limits**

Section 123 of the Equality Act 2010 (EQA) reads as follows, so far as is relevant:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

107. One issue on time limits in discrimination cases centres on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

108. In **Commissioner of Police for the Metropolis v Hendricks (2003) ICR 530** the question was said to be whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

109. That approach was confirmed by the Court of Appeal **in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548**, CA. Tribunals should look at the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer.

110. Hendricks was also cited with approval by the Court of Appeal in **Aziz v FDA 2010 EWCA Civ 304, CA** where the Court noted that in considering whether separate incidents form part of an act extending over a period, ***'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.***

111. Section 123 EqA does not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons.

112. The Court of Appeal considered just and equitable extensions in **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA**, and emphasised that the factors referred to by the EAT in **British Coal Corporation v Keeble and ors** are a ***'valuable reminder'*** of what may be taken into account but their relevance depends on the facts of the individual cases and Tribunals do not need to consider all the factors in each and every case. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

113. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** (above) was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. With regard to the Keeble factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with S.33 might help 'illuminate' the task of the Tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the Keeble factors to be taken as the

starting point for tribunals' approach to 'just and equitable' extensions, as they regularly were. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in Keeble – the length of, and the reasons for, the delay.

114. It is clear that tribunals can take a wide range of matters into account when determining whether it is just and equitable on the facts to allow a claim to proceed out of time.

Conclusions

115. Every discrimination claim apart from the complaint about the way in which the grievance following 3 August meeting is out of time and out of time by a substantial margin taking into account the last day being 1 July. The Claimant did not really provide any form of reason as to why there was such delay, save for his health. Having said that and weighing up the prejudice to both parties we considered that the Respondent were readily able to defend these claims and did not seem to be placed at any prejudice in their ability to defend them. We are mindful that there was a substantial period of lockdown and that the Claimant was not in the best of health. In those circumstances and in the absence of any real prejudice to the Respondent in defending the claim we are prepared to rule that it was just and equitable for time to be extended for these claims to be considered.

116. We have already explained why there can be no liability in respect of the Respondent relating to the act of punching and name calling of the Claimant on 15 April 2019 (paragraphs 60 and 61 above) by Mr Creton. For the sake of completeness and on the evidence we have (which does not include any oral evidence from Mr Creton), we accept that the Claimant was punched and that he was called a foreign cunt. We accept that both would have been unwanted in the context of this specific incident i.e., an aggressive altercation with a man the Claimant did not know particularly well and we accept that both would have created an intimidating environment. Had the act been perpetrated by a member of staff of the Respondent we would have accepted that the comment would have been an act of race harassment for which the Respondent would be liable but as it was the act of a third party no liability attaches to the Respondent. Claim 7.1.1 is rejected (as is the direct discrimination claim on the same facts. We do not consider that the punch, in any event, was related to the Claimant's race as Mr Creton would have punched anybody who had acted in the manner alleged. Allegation 6.2.5 is rejected.

117. We accept that Mr Keating did refer to the Claimant as a twat, a bastard and as a goofball but that was all in the context of the long-standing friendship and

passed (and was accepted) as banter between them. We have no evidence to support the fact that it was in any way racially motivated and reject that the word foreign was placed in front of any of these words. We are equally satisfied that the Claimant called Mr Keating things in jest as well and Mr Ryland spoke of the fact that their relationship was one that maybe not to everybody's taste. It is entirely likely that Mr Keating made jokes at the claimant's expense and may even have teased the claimant's accent but we are quite satisfied that such conduct was replicated by the Claimant and was taken in jest at all material times. The Claimant took it all as one would take it from a long-standing friend and so we are unable to say that prior to 3 August there was ever any sense that the conduct was unwanted or caused the necessary environment for a harassment claim. We do not accept that Mr Keating ever prefaced any of the words cited above with the word "foreign". We accepted his evidence that he would not do so. The harassment claims at 7.1.2 and 7.1.3 are rejected. Further we consider that Mr Keating used such terms with many staff mostly in jest and there is no evidence to suggest that a hypothetical comparator would have treated any differently Allegations 6.2.6 and 6.27 are rejected.

118. We accept that Mr Keating was direct and blunt with the Claimant from time to time but we are equally satisfied that he was the same to others as well. We also accept that on many occasions he was generous with employees by providing loans and salary when off sick. We accept that if he had personal jobs he would offer them to staff members in order to possibly provide extra cash to them and that included the Claimant. We do not accept that he punished individuals who did not do the work for him. Race played no part in the private work offers and Allegation 6.2.4 is rejected.

119. We do not accept that Mr Keating harassed, humiliated and verbally abused the Claimant. Indeed we think it likely that the Claimant was often treated better than other staff and that was well known. We reject the allegation that Mr Keating physically assaulted the Claimant. Mr Keating was straight to the point and direct and would not shy away from administering admonition in trenchant terms when required but we consider that he did not perpetrate any assault on the Claimant. Had he done so there would have been the same reaction by the Claimant as there was in relation to Mr Creton and there was no such similar reaction.

120. Pay rises and bonuses occurred in the Respondent without structure and paid on an ad hoc basis. That is a risky approach and the Respondent would be well advised to deal with such matters in a more transparent structured manner. We are not satisfied that the Claimant was denied either pay rises or bonuses and note that financially the Claimant was treated well via the advance and continued full pay when sick. As stated previously we consider that the Claimant was treated better by Mr Keating because of the friendship and we are satisfied that that there was no less favourable treatment in respect of pay rises and bonuses. Allegations 6.2.2 and 6.2.8 are rejected.

121. We are satisfied that the Claimant's complaints were dealt with appropriately. Mr Keating looked at the Creton incident and there were others which the claimant withdrew himself and so stopped any further enquiry. The Claimant was not an easy person to deal with and whilst the company response was not always perfect it was adequate in all the circumstances. Allegations 6.2.3 and 6.2.10 are rejected.

122. Any diminution in duties was down to the claimant's health. We consider that a more formalised system with ill staff would assist the Respondent in future and we also consider that communications between the two were by no means perfect but in reality the Claimant was his own man within the business and he was going to do whatever he thought needed doing. The Respondent accepts that there was less for the Claimant to do but we are absolutely satisfied that the reason was not race related in any way but related to the Claimant's health. Allegation 6.2.1 is rejected.

123. We are quite satisfied that the Claimant's nationality (or the fact that he was not British) played no part in any of his treatment. The Respondent is a multi-cultural organisation with many staff from different countries and backgrounds. It is clear that race related comments were made within the business but within the organisation that seems to be widespread and not the subject of complaint. We consider it to be a very dangerous culture for there to be and in our view steps need to be taken to address that matter. We find that the Claimant himself was part of it and joined in the jokey nature of it. He was not offended in any way until he sought to bring this claim.

124. We do not consider that the burden has passed to the Respondent. If we are wrong on that however we are satisfied with the Respondent's evidence that the Claimant's treatment was in no way because of his race. We reject all allegations of direct race discrimination and race related harassment.

125. We now move onto the constructive dismissal and many of the findings we have already made are pertinent to that claim. In broad terms we conclude as follows:

    a) We have made our findings about the way Mr Keating managed and the way he was with staff and the standards he expected. It is quite possible that some individuals may find that style hard to deal with but we do not accept that the Claimant was one of those. We find that the two men were friends who happened to work together and for much of the time had a close relationship no doubt punctuated by animated discourse when they disagreed. We do not accept that the Claimant was bullied by Mr Keating whose flip side was one of generosity towards staff beyond his contractual obligations. Whilst he was tough he could be generous too.
    b) We accept that everything was not perfect from an HR perspective. We have identified those failings as we have gone through. There is a lack of process which leads to audit trails not always being complete. The communications with the Claimant could have been improved vis a vis the protective measures they were putting in place but we accept that the

Claimant was a lone spirit who whilst not being completely unmanageable was for not far off for all but Mr Keating.

126. Going through the Kaur test

a) **What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?**

That is very difficult to say and despite being asked the Claimant was not clear. We find that he had made up his mind to go before the meeting of 3 August. We find that meeting and what took place thereafter was an information gathering exercise to try and allow him a spring board to a constructive dismissal claim. On that finding it cannot be anything on or after 3 August. If one goes back then it must have been the Croydon Transport Manager's job being given to Mr Buchanan as part of the alleged reduction in his duties back at the start of the year.

b) Has he affirmed the contract since that date?

We consider that the Claimant has affirmed the contract over the 8 months from the date he alleges he was not given the Transport manager role in January 2020 .

c) If not, was that act or omission in itself a repudiatory breach of contract?

The Transport manager role in January 2020 was not a repudiatory breach of contract but in any event if the contract was not affirmed and the Claimant had not determined to go already there was nothing that took place after 3 August that was a repudiatory breach either.

d) **If not, was it nevertheless a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence.**

We do not consider that it was.

127. The Tribunal does not consider that there was a repudiatory breach of contract and so the unfair and wrongful dismissal claim fails.

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Case No. 2307517/2020

Employment Judge Self

26 May 2023