EMPLOYMENT TRIBUNALS

Claimant: Mr I Issa Adam

Respondent: Asda Stores Ltd

Heard at: Manchester **On:** 11-12 and 15 May 2023
and 16 May 2023 (in chambers)

Before: Employment Judge Slater
Ms D Radcliffe
Dr H Vahramian

Representation
Claimant: In person
Respondent: Mr H Zobidavi, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of "ordinary" unfair dismissal is not well founded;

2. The complaint of "automatic" unfair dismissal because of making a protected disclosure under s.103A Employment Rights Act 1996 is not well founded.

3. The complaint of detrimental treatment on the grounds of making a protected disclosure under s.47B Employment Rights Act 1996 is not well founded;

4. The complaint of victimisation under the Equality Act 2010 is not well founded.

5. The remedy hearing provisionally arranged for 20 September 2023 is cancelled.

REASONS

Claims and issues

1. A list of issues had been agreed by the parties and annexed to the notes of a preliminary hearing for case management held on 25 May 2022. The claimant had, at that time, been represented by counsel. The claimant was represented by solicitors from the start of proceedings and solicitors had drafted his particulars of claim. The claimant ceased to be legally represented sometime before this final hearing.

2. At the start of this hearing, we confirmed with parties that the complaints were still as set out in that agreed list of issues i.e. “ordinary” unfair dismissal, automatically unfair dismissal under section 103A Employment Rights Act 1996, detrimental treatment under section 47B Employment Rights Act 1996 and victimisation under section 27 Equality Act 2010. This list of issues was amended by agreement, following discussion at the start of the hearing and again on the second day of the hearing.

3. During the Tribunal’s deliberations, we realized that the agreed list of issues had incorrectly referred to less favourable treatment in the victimisation issues. We have, therefore, corrected issue 20 to correctly reflect the wording of the statutory provision.

4. This amended list is set out in the annex to these reasons.

Evidence

5. We heard evidence for the claimant from the claimant only. We heard evidence from Stephanie Lynch, operations manager at the respondent’s Lancaster store and the dismissing officer, Andrew Rae, general store manager and the appeal officer, for the respondent. We had written witness statements for all the witnesses. The claimant’s witness statement was very short and did not deal with all relevant matters. The claimant and the respondent agreed that the claimant could rely on the contents of his particulars of claim in the claim form and further particulars which he had provided (still at that time with the assistance of solicitors) in June 2022, together with his witness statement, as setting out the evidence he wished to give.

6. We had a bundle of documents of 562 pages. As noted below, a few documents were added to the bundle during the hearing. References to page numbers in these reasons are to pages of this bundle.

7. There were a large number of documents in the bundle which were handwritten notes of various meetings. An order made at the preliminary hearing had required handwritten documents which were not easily legible, such as notes of meetings, to be transcribed by the party producing the document and an agreed typed version included in the bundle. This order had not been complied with. We ordered the respondent to provide us with typed transcripts of most of the handwritten notes. Since there was not time for these notes to be agreed with the claimant, we said

that, if there was any dispute about what was said, we would consult the handwritten notes and make a decision about what had been said. We were provided with some of these transcripts on the second day of the hearing and the remaining transcripts of the third day of the hearing.

8. On the second day of the hearing, the claimant asked to put in evidence a series of text messages between himself and former colleague. These were text messages from the evening of the first day of hearing. The claimant said that he had only thought of trying to contact this ex-colleague by finding her phone number on an old phone, the previous evening. The respondent objected to this evidence being admitted. We considered it had limited relevance to the issues we needed to decide but the claimant, who was unrepresented, clearly considered it to be of importance. We decided we would admit the evidence but give it such weight as we considered appropriate, having regard to the fact that the other participant in the text conversation was not available to be questioned by the tribunal. We did not consider that the respondent would be prejudiced in any significant way by the text being allowed in evidence. We gave the respondent the opportunity to recall the claimant to give evidence to be questioned about the text exchange, but the respondent did not wish to do so.

9. On the third day of the hearing, the claimant applied to put in evidence WhatsApp messages from a former colleague, from the evening of Friday, 12 May 2023, including letters which the colleague said had been sent by her to the respondent during her employment. The claimant also asked to put in evidence a letter in the name of another former colleague. The respondent objected to these documents being admitted in evidence. We heard the parties' arguments in relation to these documents after completing the evidence of Stephanie Lynch and before hearing the evidence of Andrew Rae. The respondent agreed that we could read the messages to help us decide whether to admit the messages in evidence. We decided not to admit those documents in evidence. Our reason in relation to five of the six documents was that they said nothing relevant to the issues which the tribunal needed to determine. In relation to one of the documents, there was some possible, but very limited, relevance. The document included specific allegations by the former colleague that the tribunal would not be able to make findings of fact about when that colleague was not present at the tribunal to have her evidence tested. The respondent would not be able to bring evidence to counter the allegations made. We considered, in relation to this document, that the prejudice to the respondent of admitting the document in evidence outweighed any possible benefit to the claimant in having those documents admitted.

Conduct of the hearing

10. The claimant, through the clerk, informed the tribunal that he suffered from panic attacks and was stressed. He submitted some documents, largely relevant to remedy, which included a letter from his GP saying that he had been suffering from anxiety and depression and reported symptoms including panic attacks.

11. We took regular breaks throughout the hearing and informed the claimant that, if he needed further breaks, he should let us know. The claimant did not request any additional breaks and appeared able to carry on with the hearing.

12. In the initial discussion at the start of the hearing, the judge asked the claimant whether he had prepared questions for the respondent's witnesses. He said he had not. The Tribunal decided to hear the evidence of the claimant first (which was in line with the provisional timetable set out at the case management hearing). The judge advised the claimant to use the time in the evening of the first day to prepare some questions. He did not do so. He asked a few questions of Stephanie Lynch. The judge and non-legal members then asked some questions and gave the claimant an opportunity to ask some further questions, which he did, before Mr Zobidavi re-examined the witness. The tribunal gave the claimant permission to ask a further question after re-examination and then allowed Mr Zobidavi to re-examine in relation to those questions.

13. The third day of the hearing was on a Monday. We had not completed Mrs Lynch's evidence by the end of Friday so completed her evidence on Monday. The claimant, through the clerk, informed the tribunal that he had not been able to prepare any questions for Mr Rae. The judge reported in open tribunal what she had been told so that Mr Zobidavi was aware of the situation. The judge said that we would do the same as we had done with Stephanie Lynch i.e. the claimant could ask any questions he had and then the judge and non-legal members would ask questions, then giving the claimant a further opportunity to ask questions. We followed this procedure.

14. We limited the parties, with their agreement, to 30 minutes of oral submissions each.

15. The case had been listed for a three-day hearing, but we did not complete evidence and submissions until the end of the third day. We, therefore, reserved our decision. The tribunal was able to arrange a day in Chambers for the following day.

Facts

16. The claimant worked for the respondent, a large chain of supermarkets, from 19 May 2006 until his summary dismissal on 26 May 2021 as a service colleague at the respondent's Preston Fulwood store. At relevant times, he was contracted to work 13 hours per week. He had, in the past, worked more hours but asked to reduce his hours because of caring responsibilities.

17. The claimant had brought a substantial number of grievances during his employment with the respondent. At one point, during cross examination, he agreed that this was 19 grievances but then said he could not be sure of the number. He had brought at least one claim in the employment tribunal against the respondent prior to this claim. We did not have any reliable evidence as to how many, if any, of the previous complaints included complaints of race discrimination.

18. The respondent has a whistleblowing policy and an ethics hotline which it encourages employees to use to report concerns. The claimant was surprised to learn at some point that this hotline was not independent of the respondent. In the Tribunal's experience, this is not unusual.

19. The first alleged disclosure which the claimant relies on as a protected disclosure and a protected act was, he says, made to the respondent's ethics

hotline in the second part of 2019. However, the claimant gave no specific evidence as to what was said in this conversation other than what was recorded on p.80 as being the subject of the disclosures generally i.e. that it was about concerns about racism/racial bias in ASDA, in particular in relation to overtime. We have seen no documentary record of the call. Given the lack of evidence, we do not feel able to make any specific findings of fact as to what the claimant said in this call.

20. We find that Stephanie Lynch and Andrew Rae were not aware of a call by the claimant to the ethics hotline in 2019.

21. The claimant made a call to the respondent's ethics hotline in or around early February 2020. The claimant does not rely specifically on this call as a protected disclosure and/or protected act but it is relevant because it triggered the investigation of a grievance made by the claimant. The claimant then relies on information disclosed at a grievance hearing on 16 March 2020 as the second alleged protected disclosure and protected act.

22. In his call in early 2020, the claimant raised various matters which are not relevant to the case we need to decide. He did not mention alleged discrimination in the allocation of overtime or permanent contract hours. He did allege race, disability and religious discrimination in relation to other matters. He alleged that people coming to the store are trained and taught discrimination and racism.

23. The claimant was asked for further information, by emails of 17 and 19 February 2020. His replies are set out at page 160. This included an allegation that "Pod" [as Padraig Finnegan was known] gave overtime to majority white colleagues but not Asian colleagues.

24. Gareth Woods, a senior manager with the respondent's Manchester region, was appointed to investigate the claimant's grievance. He had a first interview with the claimant on 16 March 2020 (p.185). Much of the interview was about issues not relevant for this claim. In relation to contract hours, the claimant is recorded as saying: "I said I need 24 hours. You are giving new people hours. Been waiting since November. Asked Pod. They give seasonal 24 hours. They also give full time. I asked him again. Said it was a mistake. I'm only doing 14 years why can't you give me 24 hours. This is discrimination." In relation to overtime, the claimant alleged that he had evidence that people were getting overtime from the office. He alleged that Asian colleagues were not being promoted. Gareth Woods said to him "you have made an assumption that store is racist?" The claimant said that is what colleagues told him and they could not all be wrong, all Asian colleagues could not be wrong. He alleged that there was a management problem with Asians in the store. The claimant said there were three or four colleagues who said they were too scared to do a grievance as it would make it worse for them. He was asked for the colleagues' names and refused, saying it was confidential. Gareth Woods referred to details in the claimant's ethics complaint including overtime given to white colleagues. The claimant alleged "overtime and contracted hours is racism".

25. We have seen a note made by Lorraine Morris, the notetaker at the hearing, in which she records what she says was a conversation with the claimant during an adjournment when no one else was present (p.215). The claimant was inconsistent in his evidence about whether any conversation had taken place but denied that a

conversation as recorded took place. We do not find it necessary to make a finding as to whether or not the conversation as recorded took place to reach our conclusions, so do not do so. This was, however, part of the material available to Stephanie Lynch when she made her decision to dismiss the claimant. In that note, Lorraine Morris wrote that the claimant said to her that "this all could have been avoided. If Pod give me 24 hours this wouldn't be happening. I gave him the hint. He is an ignorant man." She wrote that the claimant said this was his third tribunal and he had won the other two, that he had warned Pod that he would go to a tribunal. "Told him don't come at me about weekends you won't win." She wrote that the claimant told Mr Finnegan to leave the weekends and give him 24 hours contractual.

26. Gareth Woods interviewed the claimant again on 27 April 2020 (p.217). In relation to contract hours, the claimant said he had requested increased hours the previous October. He said that Mr Finnegan had told him no problem and he would look into it after the claimant had signed the new contract. He said Mr Finnegan then said that Asda House was not giving hours and he said the same thing to the beginning of December. He said Mr Finnegan told him that Asda House made a mistake in giving contract hours. The claimant said he had requested to work 7 am to 2 pm on Wednesdays and additional hours on Monday and Tuesday. The claimant alleged that seasonal temps had taken these hours. He gave the name of an employee who was working Wednesdays. He alleged that she had taken the hours he wanted but, after looking through the rotas, he noted that she was working 12.30 to 8 pm. When Mr Woods put it to him that he had raised that temps had received the hours 4 to 8 pm, the claimant asked him to investigate. The claimant said about Mr Finnegan: "my main concern he has given three white checkout colleagues hours so racism and these colleagues are biased." He also said that Mr Finnegan told him that he could give him the hours he wanted but he had to work weekends. The claimant said he had explained to Mr Finnegan that he did not work weekends for 12 or 13 years and that this had been approved by court and tribunal. Mr Woods asked him to provide evidence.

27. In relation to overtime, the claimant alleged that most overtime was given to white colleagues. He mentioned one particular colleague, Jackie, he said got overtime all the time. He said they told him that she was getting overtime for petrol but said that petrol was 15 minutes. He mentioned another colleague, Dawn, who got overtime directly from the office. The claimant agreed that everyone, apart from those two colleagues, filled in the overtime sheet regardless of colour. The claimant alleged that those two colleagues got overtime before the sheet came out. Mr Woods asked why this was racist and the claimant said "would you say that's not racist". The claimant said that overtime was racist while colleagues were getting it from the office. The claimant alleged that Asian colleagues' relationship was really poor with Mr Finnegan. The claimant alleged that Mr Finnegan was being manipulated by two managers who were racist.

28. In both interviews, Mr Woods appeared patient in trying to clarify the claimant's complaints and give the claimant an opportunity to provide evidence in support.

29. Gareth Woods also interviewed various other employees in connection with the grievance.

30. Mr Piggott (p.250) was asked about the claimant saying that overtime is mainly given to white colleagues. Mr Piggott denied this, saying he could prove it with numbers; overtime had always been distributed fairly. He said that they deleted some information which was auto populated then left the sheet out for all colleagues.

31. Mr Finnegan was interviewed (p.263). In relation to overtime, Mr Woods told Mr Finnegan that the claimant stated that he only gave overtime to white colleagues and that he said Mr Finnegan was racist. He asked Mr Finnegan if he actively gave overtime only to white colleagues. Mr Finnegan said the overtime sheet was for everyone. It was first come and first served. He denied discriminating. Mr Woods said that the claimant stated that two white colleagues were given overtime first: Jackie and Dawn. Mr Finnegan said that Jackie got overtime "but she will do anything and gives her best and does a good job. Jackie is petrol. Dawn doesn't really do a lot of overtime."

32. In relation to contract hours, Mr Finnegan said that the claimant was contracted Monday and Tuesday and wanted to do Wednesdays. He said he had told the claimant that he would need to pick up a weekend shift but they were over contracted on Wednesdays. He said he had told the claimant that, until he picked up a weekend shift on contract, he could not increase his contract hours. Mr Woods put it to Mr Finnegan that the claimant said he had contracted a temp to the shift the claimant wanted on Wednesday. Mr Finnegan said he did not remember doing that, but he did tell him he needed to do a weekend shift to increase his hours. Mr Finnegan understood that the claimant said he could not do weekends because his wife was disabled.

33. Mr Woods said to Mr Finnegan that "on managers he says wider store needs to be replaced, they are unfit, people coming to store are being taught to be racist". Mr Finnegan said he was appalled at that, he was part of the team. He asked if the claimant was saying he was racist. He said they taught people the right way, coaching, training, never racist. He named three section leaders from ethnic minorities in the store.

34. A page of the notes of the interview with Jackie is missing (p.275). There is nothing relevant in the pages we have seen.

35. Donna McDonald, a white employee, (p.281) is recorded as saying: "I think there has been an issue with overtime. There is a white colleague who gets overtime and I think Asian colleagues think that person is favoured but that's not the case."

36. Gareth Woods met again with the claimant on 6 July 2020 (p.289). He took the claimant through their findings. Complaints investigated included, but were not limited to, the complaints about overtime and contracted hours. Gareth Woods did not uphold the claimant's complaints. There are 5 pages missing from the notes. Mr Woods did not uphold the complaint about overtime only going to white colleagues, saying he found no evidence of this. Mr Woods concluded there was no evidence temps were given the contract hours the claimant required. A temp was given 2-10 p.m. The claimant accepted he had been offered a larger contract but said he did not want to have to work every Saturday. He did not dispute that

he worked some Saturdays. There is no finding recorded in the pages we have seen on whether managers were trained to be racist.

37. An investigation recap form was completed. Much of the investigation related to matters not relevant to this claim. In relation to the complaint about contract hours, the form recorded "Lisa was aware he wanted to increase his contract. However we have found no evidence of the hours given out to temps were the hours he wanted. Lisa confirmed Pod did offer increased contracted hours to Ibrahim but he refused as he did not want to be contracted to Saturdays although Ibrahim's punches demonstrate evidence that he work Saturdays as overtime." In relation to overtime, the notes record: "Pod has confirmed Ibrahim has raised about overtime going to white colleagues. Pod stated overtime is fair and equal to everyone and Ibrahim does 20 to 30 hours overtime a week." The allegation was recorded as being that, as checkout manager, Pod will only give overtime to white colleagues and not to Asian colleagues. The summary records "no evidence found. We validated over-time sheets and punch details across four weeks April to May. Ibrahim provides paperwork from January and February which also showed all colleagues had overtime regardless of ethnicity. Throughout Ibrahim's two investigations Gareth challenged what evidence did Ibrahim have and he couldn't produce any document or evidence to support his grievance. We found plenty of evidence to show that overtime is given to all colleagues Asian or white. Looking at details Ibrahim has had a lot of overtime which has meant he has appeared on the working time directive. Everyone interviewed agreed overtime was given out fairly. One colleagues he raised got preferential treatment - Jackie - it is clear her overtime is to meet compliance needs on petrol and she does the unsociable hours no one else wants such as evenings and being a [word indistinct] in bad weather." No recommendation was made for disciplinary action against the claimant.

38. We understand that there was an outcome letter of 6 July 2020. Stephanie Lynch had a copy of this letter when she was dealing with the disciplinary matter. However, at some point after this, the letter has gone missing. Neither party was able to provide us with a copy of this letter.

39. Gareth Woods could have made a recommendation that disciplinary action be taken against the claimant if he had formed a view that the claimant had made his allegations in bad faith i.e. not believing them to be true. He did not make such a recommendation. The record of the meeting when the claimant was informed of the outcome of the ethics process does not include anything which suggests that Gareth Woods formed a view that the claimant knew his allegations to be untrue when he made them.

40. It appears that the claimant did not appeal against the outcome of the ethics process.

41. By a letter dated 20 August 2020 (p.304), Padraig Finnegan brought a grievance. He referred to his interview with Gareth Woods. He wrote that the claimant had accused him of favouring other colleagues due to their ethnicity, only giving overtime to white colleagues. He wrote that he had been accused of refusing to increase the claimant's contract to allow him to work on Wednesday without working a weekend shift as per the new Asda contract. Mr Finnegan wrote that he was allegedly accused of training all new managers who come to be trained to be biased against ethnic minorities along with the whole store management team. He

wrote: “in short he accused me of being a racist.” Mr Finnegan wrote that all the claimant’s claims were unfounded and that Mr Finnegan and the whole store team had been exonerated and cleared of crimes. He wrote “whilst I appreciate and completely understand why all these claims have to and must be thoroughly investigated, I find it very upsetting and disheartening that Mr Issa can use these terms so frivolously to help him further his own cause**,** without caring or understanding the real meaning of these words, nor the suffering thousands of people have had to endure, with myself being one of them.” Mr Finnegan wrote that he had three reasons for writing the letter: 1) to express how the whole situation had affected him; 2) how he managed this colleague on an ongoing basis had become difficult; and 3) to help ensure that using terms so inflammatory must be a serious decision and not a throwaway comment to undermine someone just for doing their job correctly.

42. Mr Finnegan wrote about how upset he had been at the accusations and referred to having been discriminated against himself in the past because of being Irish. He wrote that, even though the claimant’s claims were found not to be true, since the meeting he had already threatened Mr Finnegan’s section leader saying that he would go to the ethics department if the section leader did not give him the overtime he wanted. Mr Finnegan wrote that he was led to believe that, during his time at Asda, the claimant had repeatedly made claims against individuals and the company over the years. Mr Finnegan said he did not know any of the particulars but found it ironic that the only common denominator in every incident was the claimant. He said he could not accept that all these occasions were down to bullies’ racism or victimisation towards the claimant. Mr Finnegan concluded by asking them to take his concerns seriously and investigate the matter as he would not want anyone else “to have to endure this experience unjustifiably when this colleague clearly has an issue with authority and being managed.”

43. Mr Bodi was appointed to investigate Mr Finnegan’s grievance. He met with Mr Finnegan on 23 October 2020 (p.309).

44. Mr Finnegan said that, by the time the claimant came back to him saying he was willing to work Saturdays, they were fully contracted into the weekends. Mr Finnegan said that the claimant had told him that, if he had given the claimant his Wednesday, the claimant would not have put in the grievances against him. Mr Finnegan said that, when he went into the grievance meeting, he was told it was racially motivated because he had not given the claimant the hours. Mr Finnegan said he was accused of training new managers to be racist in the workplace. He said he was accused of giving overtime to white people. He said that anyone could apply for overtime on the sheet. Mr Finnegan spoke about how upset he was and said: “If a manager of 35+ years’ experience gets upset how would a new appointment cope.” He said he was aware that the claimant had put in other claims against the company and that he was the common theme. He questioned how he could manage the claimant. He wrote that the claimant had questioned his section leader, Dan Piggott, who felt intimidated by the claimant. He said the claimant had said he had a list of things he hadn’t used yet against Mr Piggott. He said that Mr Piggott had told the claimant he felt intimidated by the claimant’s conversation and the claimant then back peddled. Mr Finnegan said “I fear Ibrahim is using racism to get what he wants - this is about the fact that Ibrahim is using words he shouldn’t be using. Incorrect in using those words to get what he wants - that’s wrong and not the real meaning of racism.”

45. Mr Bodi asked Mr Finnegan what he wanted from the grievance. Mr Finnegan said it was hard to answer. He questioned how they protected managers in the future. He said if the case was founded then the book should be thrown at them but someone who used the terms the claimant did should not be allowed to happen. Mr Finnegan said he did not want it to be seen as retaliation. He said the claimant had not learned from the May incident regarding his section leader who felt intimidated.

46. We have not seen any letter inviting the claimant to the investigation meetings but Mr Bodi met with the claimant on 12 January 2021 (p.319).

47. Mr Bodi put to the claimant an allegation that he had accused Mr Finnegan of being racist. He did not say the accusation was that the claimant made this accusation "falsely" or knowing this not to be true. Mr Bodi said that if the allegation was proven this could lead to a disciplinary hearing which could result in dismissal. The claimant was asked if he wanted a representative but he declined.

48. When asked why he accused Mr Finnegan of being racist (p.323), the claimant said he did not think he should reply to that question. The claimant alleged that overtime was only given to white employees. The claimant denied that he had accused Mr Finnegan of training new managers to be racist in the workplace. He said "no comment" when it was put to him that he had accused the rest of the management team of being racist and asked for his grounds. He referred to issues with two previous managers. Mr Bodi asked the claimant whether he had accused Mr Finnegan of training new managers to be biased against ethnic minority employees. The claimant replied: "you can't bring it up that's an ethics case now closed. He cannot train managers only section leaders - no is my answer." (p.325). Mr Bodi asked the claimant whether it was true he had repeatedly made claims against the respondent. The claimant said he had many cases against respondent over time but only one case of racism, the rest were other things.

49. The meeting reconvened on 9 March 2021 but the claimant said he could not continue without a GMB representative. The meeting was rearranged for 18 March when the claimant attended with his trade union representative.

50. Mr Bodi met again with the claimant on 18 March 2021 (p.328). The claimant was asked if he recalled a conversation with Mr Finnegan when the claimant was alleged to have said that he would put a grievance in if Mr Finnegan did not give him a specific shift (p.328). The claimant denied such a conversation. Mr Bodi asked the claimant about a conversation with Lorraine, referring to notes about a conversation between the claimant and Lorraine during an adjournment in the Woods interview of the claimant. The claimant said he recalled half of the conversation with Lorraine. He said some parts were not true. He said the discussion was private and should not have been written down.

51. The claimant said that to ask why he would accuse Mr Finnegan of being racist, they would need to open the case again, referring to the ethics investigation (p.330). He denied he had alleged Mr Finnegan trained new managers to be racist (331). He said he had said that two managers were racist, not all managers, and that one of them had now changed.

52. Mr Bodi asked the claimant if he kept a log/diary. The claimant said he kept a log to log all incidents which took place although he sometimes forgot. We note that the claimant did not produce any evidence from this log/diary in support of his grievance dealt with by Mr Woods, although Mr Woods had asked him for evidence. Mr Bodi questioned whether it was acceptable to keep a log. The claimant said that a deputy had told him to keep a log. The claimant's trade union representative said that the union advised people to do this.

53. Mr Bodi asked "Is it not true you have used the race card because you have not got your own way? You have a history of grievance if you don't get your own way of racist discrimination, is that true?" The claimant denied that. Mr Bodi said he had looked through the claimant's file and there were approximately 19 cases since 2011. Mr Bodi said he was Asian himself. He said he believed the claimant used the race card. The claimant said it was not true that he had had 19 grievances. He said it was probably 7 or 8. Mr Bodi said "you have a history – you use the race card – and everyone is racist?" The claimant took issue with the use of the term "race card". He said "cases not substantiated" and said he took legal advice and could not be discriminated against. The claimant's trade union representative said that the claimant's understanding at the time was down to perception.

54. During an adjournment in the meeting with the claimant, Mr Bodi interviewed Dan Piggott (p.344). After the adjournment, Mr Bodi asked the claimant whether he remembered a conversation between himself and Dan Piggott where the claimant threatened Dan Piggott if he didn't get overtime. The claimant said he did and that he had spoken with Mr Piggott about the overtime list coming out after he had left and had asked whether it could not change (p.337). He said he said to Mr Piggott that he would go to ethics if he did not get overtime. The claimant initially agreed that it was a threat to say he would go to ethics if he did not get overtime. He said he apologised to Mr Piggott. He then denied it was a threat.

55. The claimant said he had got overtime the past two weeks. He said a majority of the colleagues getting overtime were white.

56. During a further adjournment, Mr Bodi looked at overtime worked by the claimant in the period 24 October 2020 to 13 March 2021. He also made his decision and made notes which he read to the claimant after the adjournment, giving his decision.

57. The meeting reconvened. Mr Bodi told the claimant he had checked and it was not the case that the claimant had got overtime only in the previous 2 weeks. He asked why the claimant had lied about doing overtime (p.340). The claimant said that October to January were Christmas hours and he was now getting overtime because people were off and he only got overtime if there was a gap. Mr Bodi said that the claimant had said he had only had overtime for the previous two weeks and he had been getting overtime week in, week out, so that was a distortion of the truth.

58. Mr Bodi told the claimant that he had gone back on the customer first system to 24 October 2020. There were 15 weeks since 24 October 2020 where the claimant had done overtime ranging from 23.75 hours up to 50.25 hours. Mr Bodi

said that his decision, based on the claimant's responses to the questions asked, was to forward this to a disciplinary hearing.

59. Mr Bodi's thinking was further recorded in adjournment notes made before the meeting reconvened for Mr Bodi to give his decision (pp351-354). It is not clear from the notes whether this reasoning was read out to the claimant. These notes included the following. Mr Bodi wrote that the claimant had threatened Dan Piggot about overtime and he believed that threatening another colleague to get what you want is unacceptable behaviour. He wrote that he had checked the claimant's file and the claimant had a history of raising complaints/ethics when he did not get his own way. He wrote: "I believe beyond a reasonable doubt Ibrahim, when he doesn't get his own way or for things to work to his way of thinking he uses race/discrimination/bias and political views." Mr Bodi wrote that the claimant had blatantly lied regarding his overtime. The claimant had received overtime 15 out of 19 weeks when he stated he had only had overtime in the last 2 weeks. The claimant had agreed he had threatened Dan Piggott. Using a threat of ethics because you do not get what you want is not acceptable. The claimant making unfounded allegations of racism against Mr Finnegan had huge implications for Mr Finnegan's mental health and well being and how as a manager he approached the claimant in the future. Mr Bodi recorded a concern that, looking forward, if the claimant did not get what he wanted, he would raise another grievance as, in the claimant's mind, this was acceptable (p.354).

60. It appears there was no outcome letter to Mr Finnegan's grievance.

61. The potential disciplinary matter was referred to Stephanie Lynch. She looked at evidence gathered during Mr Bodi's investigation, written statements provided by witnesses during the Ethics complaint, the outcome of the Ethics complaint (which has since gone missing), and notes of meetings. Mrs Lynch was not sure whether she had Mr Finnegan's grievance and was not sure whether she had the notes from Gareth Woods' meetings. There was contradictory evidence about whether Stephanie Lynch had the document at p.159, the recap of the ethics investigation. She decided it was appropriate for the case to proceed to a disciplinary hearing.

62. With the assistance of an HR business partner, Stephanie Lynch wrote to the claimant by a letter dated 23 March 2021 (p.355) inviting him to attend a disciplinary hearing on 13 April 2021. She wrote that at the hearing he would be asked to respond to the following allegations:

> "You accused Padraig Finnegan CTM of being a racist
> accused Padraig Finnegan CTM of training new managers to be racist/biased against ethnic minorities
> favouring white colleagues above ethnic minority colleagues
> threatening a section leader relating to available over time
> using threatening behaviour for personal gain/benefit."

63. Stephanie Lynch, in response to questions from the judge, accepted that the first three allegations should have included the allegation that the claimant made those accusations, knowing them not to be true.

64. There was no other letter prior to the disciplinary hearing stating the allegations in more accurate terms.

65. The letter informed the claimant of his right to representation at the disciplinary hearing. The letter informed him that "bullying and harassment toward any colleague in the workplace is unacceptable and is deemed gross misconduct, and if proven may result in your summary dismissal."

66. The disciplinary hearing did not take place on 13 April because the claimant was absent due to sickness. The hearing was rearranged twice and took place on 26 May 2021.

67. The disciplinary hearing was conducted by Stephanie Lynch with a notetaker for the respondent. The claimant was accompanied at the meeting by a trade union representative, Mr Grieve (p.363).

68. At the start of the meeting, Stephanie Lynch outlined the allegations as follows:

> "Falsely accused Pod of being a racist and this was unsubstantiated at the ethics investigation. He falsely accused Pod of being racist and this was unsubstantiated at the ethics investigation. You falsely accused Pod of being racist by being biased against ethnic minority training new managers. You accused Pod of favouring white colleagues above ethnic colleagues with specific reference to the allocation of overtime. I have information which has been shared to unsubstantiate this claim. Further to the ethics complaint there is an allegation of threatening a S/L in relation to available over time. To which you admitted. Finally, using threatening behaviour towards the leadership team for personal gain benefits to which I am taking into account."

69. Stephanie Lynch invited the claimant to add anything or discuss and "mitigation". She did not question him about what he thought when he was making the allegations and why. The claimant made various points, repeating that he thought he had been right in making his allegations. In relation to the second allegation, the claimant named two managers other than Mr Finnegan. In relation to the allegation of the threat to the section leader, the claimant said he had said that if he did not get overtime he would put in a complaint to ethics. He said Mr Piggott took this as a threat because he is a sensitive person. He said this was resolved with Mr Piggott so questioned why it was being brought up. The claimant referred to two colleagues he said had been bullied but would not provide names.

70. The claimant's trade union representative asserted that overtime and contract access to hours were the main bugbears for the claimant. He said the claimant perceived if he was being treated differently it was down to his race or colour.

71. The meeting began at 10.02 and concluded at 13.55. The meeting adjourned at 12.02 for Stephanie Lynch to make a decision. The meeting reconvened at 13.50 and Stephanie Lynch informed the claimant of her decision to summarily dismiss him.

72. The decision to dismiss was given orally (p.379). The reasoning explained did not explain specifically why, if this was the case, Mrs Lynch had concluded that the claimant had made allegations, knowing them to be untrue. The explanation given

was in similar terms to those subsequently included in the outcome letter. She informed the claimant that he was summarily dismissed for gross misconduct. She advised the claimant of his right to appeal.

73. The decision to dismiss was confirmed by a letter dated 26 May 2021 (p.384). We accept that Mrs Lynch's reasons for dismissing the claimant were those set out in her letter of 26 May 2021.

74. The allegations set out in this letter were as follows:

> "1. You falsely accused Padriag Finnegan CTM of being a racist
> 2. You falsely accused Padriag Finnegan CTM of training new managers to be racist/bias against ethnic minorities
> 3. You accused him of favouring white colleagues above ethnic minority colleagues
> 4. You threatened a section leader relating to available overtime
> 5. Using threatening behaviour for personal gain/benefit."

75. Stephanie Lynch wrote that her findings were:

> "1. Unsubstantiated through ethics hearing - no further evidence to review
> 2. Unsubstantiated through ethics hearing - no further evidence to review
> 3. Evidence showed this to be an incorrect and hence unsubstantiated
> 4. You admitted this allegation. You did have overtime on a regular basis. The threatening behaviour towards the section leader occurred on more than one occasion and after mediation.
> 5. You discussed your motivation to be increased contracted hours and overtime, this is directly therefore, linked to personal gain. "

76. Stephanie Lynch wrote:

> "Having taken all the facts of the case into consideration and as this constitutes a gross misconduct offence I decided you should be summarily dismissed; this is dismissal without notice or lieu of notice and with immediate effect."

77. Mrs Lynch agreed that allegations one and three were the same, relating to the allegation about overtime. In her witness statement (paragraph 35.1) she wrote that she had concluded that the claimant had falsely accused Mr Finnegan of making decisions around overtime allocation based on race. She referred to the claimant receiving overtime in 17 weeks since 24 October 2020, writing that, she was satisfied that, having received a good level of overtime, the claimant would have known that the allegation of racism against his manager was not true. We have some doubt as to whether Mrs Lynch was considering at the time whether the claimant knew the allegations to be false when he made them since the contemporaneous material of the notes of her oral decision and the outcome letter do not make it clear that this is what she was deciding. Her explanation only went to whether the claimant had been right in his allegations as a matter of fact. When asked by the judge to explain her conclusion in relation to the first allegation, she replied that the facts were unsubstantiated in the ethics investigation, which does not address the issue of whether the claimant knew the allegations to be untrue when he made them. When asked further about what it was that made her think he knew the allegation was not right when he made it, she referred to the amount

of times the claimant referred to Mr Finnegan being a racist, having overtime and her belief that he knew Mr Finnegan was not a racist. When asked what that belief was based on, she said it was down to the overtime allocation. If he said he did not get overtime but got it week in and week out, she said it was her belief that the claimant knew the allegation was not true. Mrs Lynch then confirmed that she had been looking at overtime from October 2020.

78. We accept that, in the Woods investigation material before Mrs Lynch, she had Mr Woods' finding that the claimant had been given overtime in the early part of 2020 and this had triggered the Working Time Directive.

79. In relation to allegation 2, Mrs Lynch wrote in her witness statement (paragraph 35.2) that the ethics team found the complaint unsubstantiated. However, we have seen no finding from Mr Woods in the material we have seen. Unfortunately, the respondent has lost the outcome letter. Mrs Lynch wrote that there was no attempt by the claimant to evidence his allegation. She reiterated this in oral evidence, saying this was just the claimant's opinion. We have seen from the record of the Ethics complaint that the claimant had not made this allegation specifically about Mr Finnegan. The only discussion about this complaint at the disciplinary hearing was the claimant saying he was confused and that he referred to two other managers.

80. We accept the evidence of Mrs Lynch as to the reasons given for finding allegations 4 and 5 proven (paragraph 35.3 of her witness statement). She considered that the claimant telling Mr Piggott that he would report him to the Ethics team if he did not give the claimant overtime was a threat, seeking to influence the section leader to give him overtime, and considered that was not an acceptable way to conduct himself in the workplace.

81. The effective date of termination was 26 May 2021.

82. The claimant appealed by a letter dated 2 June 2021. Unfortunately, the respondent has lost this letter. By letter dated 5 June 2021, the respondent responded to 7 points the claimant raised and wrote that, if the claimant would like to pursue his appeal, he should resubmit the appeal outlining the specific grounds for the appeal.

83. The claimant wrote again on 10 June 2021 confirming that he wished to appeal "on the grounds of both severity and procedure" (p.388). He wrote: that he did not consider he should have been dismissed, after 15 years without any disciplinary sanction, but other options such as mediation or a final written warning should have been considered; that his requests for overtime should not be considered as "linked to personal gain"; that he should be able to complain if he believed something was wrong without fear of being dismissed; and that he had not threatened anyone.

84. Andrew Rae was appointed to hear the appeal. He wrote the claimant on 14 June 2021 inviting the claimant to attend an appeal hearing on 24 June 2021. The claimant was advised of his right to be accompanied. The appeal hearing was rescheduled for 28 June 2021.

85. The appeal hearing took place on 28 June 2021 (p.391). The hearing was conducted by Andrew Rae with a notetaker. The claimant was again accompanied by his trade union representative, Mr Grieve. The meeting began at 11.30.

86. During the appeal hearing, Mr Rae asked the claimant to be specific about his issue with overtime, saying that there was documented evidence that the claimant had been given overtime. The claimant said he had not received any overtime from January, February, March. He said later in the hearing that he had not got overtime in 2019, before his grievance. The meeting adjourned between 12.53 and 14.00, during which time Mr Rae accessed the claimant's payslips. After the adjournment, the claimant disputed that the payslips showed overtime. Mr Rae said that the claimant had said he was not getting overtime in 2019 but he was. The claimant then asserted that he had said September.

87. There was a further adjournment at 15.00 for Mr Rae to make a decision. The meeting reconvened at 16.27 and Mr Rae gave his decision to uphold the dismissal. He read out his reasons which included the following (p.416). He said the claimant had not presented him with any new evidence or explained anything previously stated that would show reasons or some context as to why the claimant had behaved in the manner he had been accused. He said the claimant had said that overtime was not given in 2019 and that was the main reason behind his grievance against Mr Finnegan. Mr Rae said that, upon reviewing the claimant's take home pay, it was clear that for 10 months out of 12 the claimant had various amounts of overtime. In relation to the allegation of the threat to the section leader for personal gain, Mr Rae agreed that the concern was more to do with the threat, agreeing that all overtime was for personal gain. Mr Rae agreed that everyone should be able to put in a grievance without fear of being dismissed but said:

> "however, if statements or accusations made in a grievance are found to be untrue, then, like Pod did, a grievance against you might well be expected."

He wrote that it was up to an investigating manager to decide whether the grievance was retaliation or genuine facts/concerns that needed addressing. He said that, from Dan Piggott's perspective, the claimant's threat to go to ethics might have been very intimidating. Such a threat would put someone's ability to make a balanced decision very difficult.

88. The outcome of the appeal was confirmed by a letter dated 1 July 2021 (p.418). The letter incorrectly referred to dismissal on the grounds of capability. This was clearly a mistake, given the contents of the rest of the letter. The letter addressed the appeal grounds given by the claimant.

89. We find that Mr Rae took a wider approach than simply reviewing Mrs Lynch's decision to see if it was taken in a procedurally correct way, undertaking investigation himself in relation to overtime worked in 2019.

90. We accept the evidence given by Mr Rae in his witness statement about the reasons for his decision. These included that he believed that the claimant had been intentionally dishonest in his grievance against Mr Finnegan and this behaviour was severe enough to have resulted in the claimant's dismissal. Mr Rae could not see how the claimant was able to say he had been denied overtime. It was not clear how the claimant was saying that the alleged overtime was due to his race. Mr Rae concluded that the claimant had knowingly made a false

allegation against Mr Finnegan, because the claimant had received overtime regularly in 2019. Mr Rae concluded that there was no foundation for the claimant to say he had something genuine to complaint to ethics about. The claimant did not try to tell Mr Rae that there was any further subtlety to his allegation e.g. that his other colleagues would get preferential overtime, leaving the less appealing overtime for him. Mr Rae concluded that the simple fact that the claimant had, contrary to his allegations, been in receipt of copious amounts of overtime made his allegations unbelievable.

91. The claimant began early conciliation on 11 June 2021 and the ACAS early conciliation certificate was issued on 23 July 2021. The claimant presented his claim to the employment tribunal on 25 August 2021. Following a private hearing for case management in May 2022, the claimant provided further particulars in relation to his protected disclosure complaints on 8 June 2022 (p.79). The respondent presented amended grounds of resistance subsequently.

Submissions

92. Both parties made oral submissions.

93. Mr Zobidavi, for the respondent, made submissions which we summarise as follows. In relation to "ordinary" unfair dismissal, it was clear that Mrs Lynch had found that the claimant had made allegations of racial motivation about the allocation of overtime, knowing the allegations to be untrue. If the Tribunal found there were defects in the disciplinary part of the process, these were cured at appeal. Mr Rae's view was that, how could the claimant make a complaint that he was not receiving overtime when he was, and bring serious allegations against a manager about that. Mr Rae addressed any defect, particularly in relation to overtime worked in 2019. The claimant had not complained about contract hours in the ethics complaint. From the respondent's point of view, this issue was of limited importance. In relation to the discrepancy between the wording of the allegations in the invitation letter and the outcome, the claimant knew at the start of the disciplinary hearing what the allegations were. There was never any suggestion by the claimant that he was in doubt about the allegations he was to answer. The process and sanction were fair.

94. In relation to protected disclosure detriment and unfair dismissal, Mr Zobidavi submitted that there was no reliable evidence about a disclosure in 2019. In relation to the alleged disclosure in 2020, there was, at face value, a disclosure of information. The claimant could not have genuinely believed the contents of the disclosure in relation to overtime. It was a feature of the claimant's evidence that it was not just Asian colleagues who had issues about overtime, but white colleagues did as well. It was unbelievable and unreasonable that the claimant could form a belief that Mr Finnegan was treating him and other ethnic minority employees less favourably than white colleagues. What he described was favouritism rather than racism. The claimant could not have believed the disclosure was in the public interest; he appeared solely concerned with his own hours and earning potential. In relation to causation, Mr Zobidavi submitted that there was nothing inherent in the correspondence suggesting a causal link between the decision to proceed to disciplinary action and dismissal and the protected disclosure, if it was one.

95. In relation to victimisation, Mr Zobidavi submitted that the claimant made the allegation in bad faith, knowing it not to be true. The claimant was using the Ethics

hotline to get what he wanted. The exchange with Lorraine supports this line of thinking. The claimant was inconsistent with his answers and an unreliable witness. Mr Zobidavi referred to **Martin v Devonshires Solicitors** 2011 ICR 352 for the proposition that there can be a separation between the protected act and a feature of this which provides a separate reason for dismissal.

96. The claimant submitted that he had proved that two colleagues had been given permanent contract hours. There was no discussion about training new managers. There was little conversation with Lorraine in the corridor. The respondent was silent about contract hours and had concentrated on overtime.

Law

"Ordinary" unfair dismissal

97. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 ERA. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

98. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

99. In relation to a conduct dismissal, the Tribunal is guided by the authority of **British Home Stores v Burchell** [1979] IRLR 379. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the **Burchell** test: was this belief was based on reasonable grounds and formed after a reasonable investigation?

100. Information revealed in the course of an internal appeal that relates to the original reason for dismissal should be taken into account when considering the fairness of that dismissal, irrespective of whether the internal appeal takes place before or after the dismissal has been effected: **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL.**

Protected disclosures ("whistleblowing")

101. What constitutes a protected disclosure is defined by sections 43A to 43H ERA. Section 43A provides: "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."

102. The relevant parts of section 43B for this case are as follows:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> ……..."

103. The worker must establish only reasonable belief that the information tended to show the relevant failure. The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable. The EAT in **Soh v Imperial College of Science, Technology and Medicine EAT 0350/14**, said there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. As long as the worker reasonably believes that the information tends to show a state of affairs identified in s.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny. In **Soh**, the employment tribunal had wrongly considered whether the claimant herself reasonably believed in the truth of the allegation — that the college examination system was being undermined — rather than whether she reasonably believed that the information disclosed tended to show that the allegation was true.

104. There is a low threshold for "belief": **Korashi v Abertawe Bro Morgannwg University Local Health Board** [**2012] IRLR 4 EAT**. However, the reasonableness test clearly requires the belief to be based on some evidence

105. There can be a qualifying disclosure of information even if the worker is wrong. The EAT in **Darnton v University of Surrey 2003 ICR 615** held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the tribunal. The EAT acknowledged that determination of the factual accuracy of the worker's allegations will, in many cases, be an important tool in helping to determine whether the worker held the reasonable belief that the disclosure in question tended to show a relevant failure. It observed that it is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he or she believes that the factual basis of the allegation is false.

106. In **Babula v Waltham Forest College [2007] ICR 1026**, the Court of Appeal held that an employee who informed the police and other enforcement agencies that he believed that an act of racial hatred had been committed could rely on the

protection of the whistleblowing provisions to argue that his dismissal was automatically unfair, even though his belief was mistaken. The Court held that a belief may be reasonably held and yet be wrong.

107. An employee will not have a reasonable belief that a disclosure is in the public interest if the information disclosed tends to show a breach only of that employee's contract of employment. However, as was the case in **Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA**, the public interest test may be met if the information disclosed affects a sufficient group of employees of the respondent. The disclosures about accounting practices in that case affected the earnings of over 100 senior managers, including the claimant. The EAT observed that the words 'in the public interest' were introduced to do no more than prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In the EAT's view, a relatively small group may be sufficient to satisfy the public interest test — this is a necessarily fact-sensitive question.

108. There is no dispute in this case that the disclosure was made to the claimant's employer, so section 43C is relevant.

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

110. Section 47B(2) disapplies section 47B where the worker is an employee and the detriment in question amounts to dismissal.

111. "Detriment" is not defined in the ERA. In **Ministry of Defence v Jeremiah 1980 ICR 13 CA,** Brandon LJ said that it meant "putting under a disadvantage." Brightman LJ said a detriment "exists if a reasonable worker would or might take the view that [the actions of the employer] was in all the circumstances to his detriment".

112. Section 48(2) ERA provides that in relation to a complaint including a complaint that the worker had been subjected to a detriment in contravention of section 47B

> "On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

113. The employer must show that the protected disclosure did not materially (in the sense of more than trivially) influence the employer's treatment of the claimant: **Fecitt v NHS Manchester (Public Concern at Work Intervening)** 2012 ICR 372 CA.

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

115. A whistleblower's conduct and his or her protected disclosure may be properly separable in the context of a detriment claim and in the context of an unfair dismissal claim: **Bolton School v Evans 2007 ICR 641 CA**.

116. In **Martin v Devonshires Solicitors 2011 ICR 352,** the EAT held that there can be cases where an employer subjects a person to a detriment in response to the doing of a protected act but where the employer could say that the reason for the detriment was not the complaint as such but some feature of it which could properly be treated as separable, such as the manner in which the complaint was made.

Victimisation under the Equality Act 2010

117. Section 27 of the Equality Act 2010 (EqA) provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is 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."

118. Section 27(3) provides:

> "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

119. The protected act does not have to be the only or the main reason for the detrimental treatment. It is enough that the protected act is a material reason for the detrimental treatment.

120. Section 136 EqA provides:

> "(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.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

Conclusions

121. Before dealing with the specific complaints, we address the issue of missing documentation. As noted in our findings of facts, a number of documents have gone missing and some of the notes of meetings are missing certain pages. Whilst it is regrettable that the respondent has not taken better care to secure relevant documents, we do not draw any conclusion adverse to the respondent in relation to the various complaints from the fact that documents have gone missing. Some of the documents which have gone missing are documents which the claimant would be expected to have had a copy of (although he did not supply the missing documents either) e.g. the outcome letter from the Woods ethics investigation and the claimant's original appeal letter. This suggests to us a lack of care in securing documents rather than any sinister motive in suppressing relevant evidence.

122. We deal first with the complaints of protected disclosure unfair dismissal and detriment. Where we refer to issue numbers, we are referring to the numbers of issues in the Annex to this document.

Did the claimant make a protected disclosure?

123. The claimant relied on two alleged relevant disclosures. The first was a call to the ASDA ethics hotline in the second part of 2019. The claimant has not satisfied us, on the evidence, that he disclosed evidence, as alleged, in a call at that time about white colleagues being treated more favourably than non-white colleagues in relation to being offered overtime and contract hours (see paragraph 19). The first alleged protected disclosure is not proved as a matter of fact so the complaint of s.103A unfair dismissal and detrimental treatment on the grounds of making a protected disclosure cannot rely on this alleged protected disclosure.

124. The second alleged protected disclosure was set out in the further particulars as being, at a grievance hearing on 16 March 2020, repeating these allegations, including identifying the white colleagues in question. The respondent conceded that such a disclosure of information was made.

125. At that meeting, the claimant alleged "overtime and contracted hours is racism" (see paragraph 24). We consider that we should consider the information given at the meeting together with the preceding emails of 17 and 19 February 2020 as constituting the relevant disclosure of information. The claimant, at the meeting and in the preceding call to the ethics hotline and clarifying emails, made an allegation that overtime was being given to white and not to Asian employees. The allegation about contract hours was specifically relating to the claimant not getting the contract hours he had sought. We do not find that the claimant made a wider allegation about white employees being treated more favourably than Asian employees in relation to being given permanent contract hours.

126. Issues 22 to 25 relate to the requirement in section 43B(1) ERA that, in order for a disclosure of information to be a protected disclosure, the disclosure must, in the "reasonable belief" of the worker, (1) be made in the public interest and (2) tend to show that one of the six relevant failures has occurred, is occurring, or is likely to occur. The relevant failure the claimant relies upon is a failure to comply with a legal obligation. The clamant asserted in the further particulars that the legal obligation was to protect employees from discrimination and prevent race discrimination in the workplace. We consider that the relevant legal obligation is

more simply put as the obligation not to discriminate in a way contrary to the Equality Act 2010, since the race discrimination alleged is by managers of the respondent for whose acts the respondent would have vicarious liability.

127. We will deal first with the second limb of that test: whether the claimant had a reasonable belief that the disclosure of information tended to show that the respondent had failed to comply with a legal obligation, being the obligation not to discriminate because of race.

128. The information disclosed was that white employees were being treated more favourably than Asian employees in relation to the allocation of overtime and that the claimant was not being given the contract hours he had sought because of his race.

129. We do not need to consider whether the claimant reasonably believed the truth of the allegations and it would be an error of law for us to do so, in accordance with **Soh v Imperial College of Science, Technology and Medicine**. What we need to consider is whether the claimant reasonably believed that the information disclosed tended to show that the respondent had failed to comply with a legal obligation. However, if we were satisfied that the claimant believed, at the time he made the allegations, that the factual basis of those allegations was false, this would, in accordance with **Darnton v University of Surrey**, be likely to lead us to conclude that the claimant did not reasonably believe that the disclosure of information tended to show that the respondent had failed to comply with the obligation not to discriminate because of race.

130. We are not satisfied that the claimant, at the time he made the allegations, did not reasonably believe that the information he disclosed tended to show the respondent had failed to comply with the obligation not to discriminate because of race. There is evidence to suggest that the claimant was not the only employee who perceived that Asian employees were being treated less favourably than white employees in relation to overtime. Donna McDonald, a white employee, when interviewed by Gareth Woods said “I think there has been an issue with overtime. There is a white colleague who gets overtime and I think Asian colleagues think that person is favoured but that’s not the case” (see paragraph 35). The claimant, from what he said when interviewed internally and during this hearing, clearly perceived an unfairness in the allocation of overtime and in not being awarded his contracted hours. We consider that the claimant, looking for an explanation for why he believed he, and in the case of overtime, other Asian employees, were being treated less favourably than other white employees, genuinely believed that this could be because of race.

131. We conclude that the claimant had a reasonable belief that the information he disclosed tended to show that the respondent had failed to comply with a legal obligation, being the obligation not to discriminate because of race.

132. Turning to the second limb of the test, we must consider whether the claimant had a reasonable belief that the disclosure was made “in the public interest”. In applying this test, we must separate out the two parts of the disclosure of information: the information that white employees were being treated more favourably than Asian employees in relation to the allocation of overtime and the information that the claimant was not being given the contracted hours he wanted because of his race. We conclude that claimant did have a reasonable belief that

the information about allocation of overtime was in the public interest, because it related to a group of employees at the store where the claimant worked. We conclude that the claimant did not have a reasonable belief that the information about his contracted hours was in the public interest because this related to the claimant only. It was about his contracted hours only and did not affect anyone else.

133. We, therefore, conclude that the claimant made a protected disclosure in the meeting on 16 March 2020 about the allocation of overtime favouring white employees over Asian employees. We do not find that any other disclosure of information was a protected disclosure.

Detrimental treatment on the ground of making a protected disclosure

134. The detrimental treatment relied upon by the claimant was being subjected to the investigatory and disciplinary procedure by the respondent. We take this to include the investigation conducted by Mr Bodi. Although Mr Bodi was investigating in relation to Mr Finnegan's grievance, the outcome of this was a recommendation by Mr Bodi of disciplinary action against the claimant. Stephanie Lynch, who took the decision to dismiss the claimant, relied on this as the investigation prior to the disciplinary hearing she conducted.

135. We conclude that the claimant was subjected to a detriment by disciplinary action being taken action against the claimant. We conclude that this put the claimant at a disadvantage because it rendered him liable to dismissal if the allegations being investigated were upheld. We do not consider that the investigation itself by Mr Bodi was subjecting the claimant to a detriment. Mr Bodi was investigating in the context of a grievance brought by Mr Finnegan. We do not consider that the claimant could reasonably consider he was being subjected to a detriment by being interviewed, as a relevant person, in that grievance investigation.

136. The disciplinary procedure culminated in the claimant's dismissal but the dismissal itself cannot be considered as detrimental treatment under s.47B ERA since the claimant was an employee and the claim is brought against his employer: s.47B(2) ERA which disapplies s.47B in these circumstances. A complaint about unfair dismissal because of making a protected disclosure has to be considered under s.103A ERA, which we deal with later.

137. The remaining issue is whether the claimant was subjected to the disciplinary process on the ground that he made the protected disclosure about allocation of overtime.

138. Since the claimant has proved that there was a protected act and that the respondent subjected him to a detriment by subjecting him to the disciplinary process, the burden passes to the respondent, in accordance with s.48(2) to show the ground on which that act was done. The respondent must show that the protected disclosure did not materially (in the sense of more than trivially) influence their decision to take disciplinary action, if they are to successfully defend the claim.

139. The taking of disciplinary action is unlikely to have occurred "but for" the claimant making his protected disclosure. The protected disclosure is part of the

background to the disciplinary action, being a reason for Mr Finnegan to bring his grievance, which triggered the investigation by Mr Bodi, resulting in a recommendation to take disciplinary action and Stephanie Lynch taking disciplinary action. However, the proper approach is not to ask whether "but for" the protected act, the disciplinary proceedings would have been started. We must, instead, consider what was, consciously or unconsciously the respondent's reason or motive for taking disciplinary action. The respondent must satisfy us that, consciously or unconsciously, the protected act was not a material factor in Mr Bodi's decision to recommend disciplinary action nor in Mrs Lynch's decision to take disciplinary action.

140. We did not hear evidence from Mr Bodi. The evidence we have of his thought process is contained in the notes of his investigation and the reasons he gave orally, as recorded in the notes, for his recommendation that disciplinary action be taken against the claimant. Mr Bodi, who identifies himself during the interviews as being Asian, puts to the claimant a number of times during the interviews that he thinks the claimant is "playing the race card". By this, we understand that Mr Bodi did not believe that the claimant genuinely believed that there was race discrimination in relation to the allocation of overtime and other matters, but was making an allegation of race discrimination when he did not get what he wanted. Mr Bodi, in his adjournment notes, recorded concern that the claimant had made unfounded complaints and would continue to do so, if he did not get what he wanted. He referred the effects on Mr Finnegan of the unfounded allegations and the concern about managing the claimant in future. He referred to the claimant agreeing he had threatened Mr Piggott with making a complaint to ethics if Mr Piggott did not give him overtime, which Mr Bodi considered unacceptable. (See paragraph 59).

141. Mr Bodi was considering allegations the claimant had made which were not limited to the allegation about race discrimination in the allocation of overtime.

142. In relation to the allegation about race discrimination in the allocation of overtime, we conclude from the notes we have seen, that Mr Bodi's concern was not the making of the allegation itself, but the making of allegations of discrimination without, as Mr Bodi saw it, good reason to make the allegation. He concluded that the claimant had lied to him about how much overtime he was getting. Although the claimant's complaint in February and March 2020 was about overtime distribution before the date of his complaint, in the interview with Mr Bodi, he said he had only been given overtime in the 2 weeks prior to the interview. Mr Bodi proved this statement to be incorrect by checking records for overtime back to October 2020, the interview taking place in March 2021. We infer that this supported Mr Bodi's conclusion that the claimant was making allegations of race discrimination when he did not get his own way, rather than because of a genuine belief that he had been discriminated against.

143. We conclude that this is a case where a distinction can be drawn between the disclosure and the manner of the disclosure. We conclude that it was because Mr Bodi formed the view that the claimant was making false allegations that he knew to be false that he recommended disciplinary action. We conclude that the respondent has discharged the burden of proving, in relation to Mr Bodi's recommendation, that the protected disclosure was not a material factor in his decision.

144. In relation to Mrs Lynch's decision to proceed with disciplinary action, we conclude that she was endorsing Mr Bodi's recommendation, for the reasons given by Mr Bodi. For the same reasons in relation to Mr Bodi's decision, we conclude that the respondent has discharged the burden of proving, in relation to Mrs Lynch's decision to take disciplinary action, that the protected disclosure was not a material factor in her decision.

145. We, therefore, conclude that the complaint of detrimental treatment on the grounds of making a protected disclosure is not well founded.

Protected disclosure unfair dismissal – s.103A Employment Rights Act 1996

146. The dismissal will be automatically unfair if the making of the disclosure was the reason or principal reason for the dismissal.

147. The decision to dismiss was taken by Mrs Lynch and confirmed on appeal by Mr Rae.

148. Five reasons were given for dismissal in the dismissal letter (p.384), although Mrs Lynch agreed that numbers 1 and 3 related to the same thing; the allegation of race discrimination in relation to the allocation of overtime. Items 4 and 5 related to the same matter: threatening a section leader with a complaint to Ethics if the section leader did not give the claimant overtime. The second allegation appears to have been found proven on an incorrect understanding of what the claimant had alleged. He had not alleged that Mr Finnegan had trained new managers to be racist/bias against ethnic minorities. The original ethics complaint and notes of the interviews with the claimant indicate that the claimant did not make this allegation against Mr Finnegan. The claimant had, in his ethics complaint, made an allegation that people coming to the store are trained and taught discrimination and racism, without specifying who he alleged was doing the training. In interviews he said this was not an allegation against Mr Finnegan. The claimant named two other managers, although he said that one had now changed.

149. We did not consider that it was clear from the dismissal letter and the oral reasons given by Mrs Lynch whether she had simply concluded that the claimant had made allegations of race discrimination, including in relation to allocation of overtime, which turned out to be incorrect, or whether she had concluded that he had made those allegations knowing them to be wrong. The reasoning given, "unsubstantiated" suggests at least as much the first possibility as the second. Given the lack of contemporaneous evidence as to Mrs Lynch's reasons for concluding, if she did, that the claimant made the allegation of race discrimination in relation to allocation of overtime knowing the allegation to be untrue, we treat with some caution Mrs Lynch's evidence in her witness statement and oral evidence as to her thought process. However, since Mrs Lynch relied heavily on Mr Bodi's investigation, it may be that she adopted Mr Bodi's view that the claimant did not believe the truth of what he was saying when he made the allegation. The burden of proving the reason for Mrs Lynch's actions lies on the respondent. If the decision to dismiss we have to consider was the decision of Mrs Lynch alone, the respondent would not have satisfied us that Mrs Lynch's decision was based on a conclusion that the claimant made false allegations knowing them to be untrue.

150. We consider, however, that we should take together the decisions of Mrs Lynch and Mr Rae in deciding whether or not the reason or principal reason for

dismissal was the making of the protected disclosure. Mr Rae upheld the dismissal on the same grounds as Mrs Lynch (the reference to capability in the appeal outcome letter obviously being a mistake when read in the context of the rest of the letter). Since Mr Rae was relying on the same grounds, as stated in the dismissal letter, we consider that we can consider his reasoning, in addition to that of Mrs Lynch, in deciding whether or not the reason or principal reason for dismissal was the making of the protected disclosure. Mr Rae did not set out in his outcome letter as clearly as he does in his witness statement his conclusion that the claimant had been intentionally dishonest in his grievance against Mr Finnegan. This may be because he adopts, in the letter, a structure based around the particular appeal grounds put forward by the claimant. However, the contents of the letter are consistent with what Mr Rae states in his witness statement, so we accept that the rationale in his witness statement is one he considered at the time and is not a rationale arrived at in the knowledge of these proceedings. In particular, Mr Rae refers in his letter to the claimant having stated in the appeal hearing that he had not received overtime in 2019 but this being proved to be incorrect. This was key to his conclusion that the claimant had been intentionally dishonest in making his allegation against Mr Finnegan.

151. We conclude that the respondent has shown that the reason or principal reason for dismissal was not the making of a protected disclosure but the claimant's misconduct. The misconduct included, but was not limited to, making allegations of race discrimination in relation to the allocation of overtime against Mr Finnegan which the claimant knew to be false.

152. We, therefore, conclude that the complaint of unfair dismissal under s.103A ERA is not well founded.

<u>Victimisation under the Equality Act 2010</u>

153. We did not find the first alleged protected act, the call to the ethics hotline in 2019, was proved on the facts.

154. The allegation made at the grievance hearing on 16 March 2020, that white colleagues were treated more favourably than non-white colleagues in relation to being offered overtime and that the claimant was not given the contract hours he wanted because of race discrimination, was an allegation of a breach of the Equality Act 2010. This was a protected act unless s.27(3) EqA applies.

155. Section 27(3) EqA provides that giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. We need to decide whether the allegation was false and, if it was, whether the claimant made his allegation of race discrimination in March 2020 in bad faith.

156. The claimant put his complaint about overtime in varying ways during his initial complaint and subsequent interviews. Sometimes it appeared he was saying he got no overtime and other times that white employees got more overtime than Asian employees. We are not determining a complaint of race discrimination in relation to the allocation of overtime and are aware that we do not have all the information before us that we might be asked to consider if we were considering a complaint of race discrimination. If the allegation was that white employees received overtime and Asian employees did not, we conclude, on the information

available to us, that this allegation was false. If the allegation was more nuanced, that white employees received a disproportionate amount of overtime compared to Asian employees, we are less confident in reaching a conclusion as to the truth or otherwise of such an allegation, given the limitations of the material before us. However, if we have to reach a conclusion on this, we conclude that the claimant has not proved facts from which we could conclude that there was race discrimination in the allocation of overtime. It certainly appears that the claimant received significant amounts of overtime, comparative to his contractual hours, at times. Sometimes this was enough to trigger consideration as to whether he would be working in excess of the hours allowed by the Working Time Directive (48 hours per week, on average, whereas he was contracted to work 13 hours per week). We do not, however, have comparative figures of overtime worked by white employees.

157. Even if the allegation was false in the sense of not being true (leaving aside the belief of the claimant as to whether it was true or not), it will still be a protected act unless the allegation was made in bad faith. For reasons previously given, we accept that the respondent formed a view that the claimant made the allegation knowing it to be untrue. However, from our reading of the relevant documents and based on the evidence of the claimant in this Tribunal, we are not satisfied that the claimant acted in bad faith when he made the allegation in March 2020. We conclude that it is more likely that the claimant believed the allegations at the time to be true. We consider it more likely than not that the claimant misunderstood what is needed to establish race discrimination, perceived unfairness in the allocation of overtime and awarding of increased hours (rightly or wrongly) and, looking for an explanation, considered that it could be due to race, seeing those he considered to be receiving preferential treatment to be white. The claimant accepted in the interview with Mr Woods that employees who had to fill in the overtime sheet to get overtime included white employees which was perhaps more consistent with favouritism towards particular white employees (as suggested by Mr Zobidavi in his submissions) than race discrimination in the allocation of overtime generally. However, we conclude that the claimant did not understand this when he made his allegations in March 2020, since he did not have a proper understanding of what needed to be established to prove race discrimination. He saw that the favoured ones were white and he was not, as he saw it, favoured in relation to obtaining overtime.

158. We conclude, therefore, that s.27(3) EqA does not apply and conclude that the claimant did do a protected act in March 2020.

159. The detrimental treatment relied upon is being taken through the disciplinary procedure and being dismissed. For reasons given in relation to the protected disclosure detriment complaint, we consider that being subjected to the disciplinary process is being subjected to a detriment. Being dismissed is self-evidently detrimental treatment.

160. The remaining issue in relation to victimisation is, therefore, whether the claimant was subjected to a detriment because he had done a protected act.

161. The initial burden of proof is on the claimant to prove facts from which we could conclude that he was subjected to disciplinary proceedings and dismissed because of doing the protected act. The claimant has not explained to us what matters he relies on as satisfying this initial burden of proof. We assume (without

deciding), in the claimant's favour, that the initial burden of proof is satisfied so the burden of proof passes to the respondent to prove that the detrimental treatment was not because the claimant had done a protected act.

162. For the same reasons we have given in relation to the complaint of protected disclosure detriment, we conclude that the respondent has proved that the taking of disciplinary proceedings was not in any material sense because of the claimant having done a protected act. We conclude that it was because Mr Bodi formed the view that the claimant was making false allegations that he knew to be false that he recommended disciplinary action and Mrs Lynch then endorsed this recommendation.

163. The dismissal was for a number of reasons. One of these reasons was the respondent's conclusion that the claimant had deliberately made a false allegation about race discrimination in the allocation of overtime. We conclude that the protected act itself was not a material reason for the dismissal; rather, it was the respondent's conclusion that the claimant had deliberately made a false allegation when doing the protected act. We conclude, for this reason, that the complaint of victimisation is not well founded.

<u>"Ordinary" unfair dismissal</u>

164. We conclude that the claimant was dismissed by the respondent for misconduct. We take together the decisions of Mrs Lynch and Mr Rae in reaching our conclusions on the reason for dismissal. As we concluded in dealing with the complaint of s.103A protected disclosure unfair dismissal, the misconduct included, but was not limited to, making allegations of race discrimination in relation to the allocation of overtime against Mr Finnegan which the claimant knew to be false. We accept that the reasons for dismissing the claimant were those set out in Mrs Lynch's letter of 26 May 2021. We conclude that what they described as the threat to Mr Piggott of making an ethics complaint if Mr Piggott did not give the claimant overtime formed part of their reason for dismissal. Mrs Lynch's dismissal letter also included a conclusion that the claimant had falsely accused Mr Finnegan of training new managers to be racist/biased against ethnic minorities. We have seen no evidence to suggest that Mr Rae considered specifically whether the conclusion that the claimant had falsely accused Mr Finnegan of training new managers to be racist/biased against ethnic minorities was well founded. We conclude that, since the claimant did not raise a specific appeal point which would have led Mr Rae to examine this, he upheld Mrs Lynch's decision on this ground, together with the other grounds for dismissal.

165. We conclude that the respondent had a genuine belief that the claimant had made allegations of race discrimination in relation to the allocation of overtime against Mr Finnegan which the claimant knew to be false and made a threat to Mr Piggott of making an ethics complaint if Mr Piggott did not give the claimant overtime. Although a careful examination of what the claimant had alleged would have shown that the claimant had not accused Mr Finnegan specifically of training new managers to be racist/biased against ethnic minorities, we accept that the respondent had a genuine belief in this aspect of the alleged misconduct. Mrs Lynch's description, at the beginning of the disciplinary hearing, included this allegation. This reflects one of the accusations Mr Finnegan included in his grievance letter as understanding had been made by the claimant about him.

166. We conclude that the respondent has shown a potentially fair reason for dismissal, being conduct.

167. Leaving aside the allegation that the claimant falsely accused Mr Finnegan of training new managers to be racist/biased against ethnic minorities, we conclude that the respondent had reasonable grounds for their belief in his guilt. Whilst we have come to a different view to the respondent, in the context of considering other complaints, on whether the claimant believed in the truth of his allegations about Mr Finnegan discriminating on grounds of race in the allocation of overtime, at the time he made his complaint to the ethics hotline, we conclude that there was material before Mrs Lynch and Mr Rae which could reasonably allow them to form the view which they did. In particular, the claimant making a statement about not receiving overtime in 2019 which Mr Rae then disproved, by accessing the relevant data, was significant in Mr Rae's decision.

168. In addition to this allegation, a separate matter to the subject of the complaint to the ethics hotline was the threat to Mr Piggott to go to the ethics hotline if Mr Piggott did not give the claimant the overtime he sought. We conclude that Mrs Lynch and Mr Rae had reasonable grounds for concluding that the claimant made such a "threat" based on what Mr Piggott said and what the claimant admitted to, and for concluding that this was an improper thing to have said to Mr Piggott.

169. We conclude, again leaving aside the allegation that the claimant falsely accused Mr Finnegan of training new managers to be racist/biased against ethnic minorities, that the respondent carried out a reasonable investigation in all the circumstances. There were deficiencies in the investigation prior to Mrs Lynch's decision; she did not seem to appreciate that the claimant's complaint to the ethics hotline must have related to the allocation of overtime prior to that complaint in February 2020 and, therefore, did not look at the allocation of overtime before that date. Mr Rae's investigation cured this deficiency, looking at the allocation of overtime in 2019 and finding, contrary to the claimant's assertion, that the claimant did receive overtime in that year on a frequent basis. The claimant and Mr Piggott were questioned about the threat to Mr Piggott to go to the ethics hotline if Mr Piggott did not give the claimant overtime.

170. We do not consider that the respondent had reasonable grounds formed after a reasonable investigation for concluding that the claimant had falsely accused Mr Finnegan of training new managers to be racist/biased against ethnic minorities. The claimant's original complaint about training managers to be racist, contained in his Ethics complaint, did not refer specifically to Mr Finnegan and, when asked about this in interview, the claimant was consistent in not levelling this charge at Mr Finnegan, but named two other managers, although he said one had changed.

171. There was a procedural error in the letter inviting the claimant to the disciplinary hearing not setting out correctly the allegations against him; the allegations omitted to make clear that the allegation was that the claimant had made false allegations which he knew not to be true. However, Mrs Lynch correctly stated the allegations at the start of the disciplinary hearing and the claimant has never suggested he did not understand the allegations he was facing. We do not consider the error in the invitation letter to be sufficient to take the procedure followed outside the band of reasonable responses.

172. Making false accusations of race discrimination, knowing the allegations to be untrue, and intimidating a manager when not giving the claimant overtime, with the threat of going to the ethics hotline are very serious offences. Since the respondent had conclude that the claimant was guilty of these offences, we consider the penalty of dismissal to be within the band of reasonable responses.

173. We conclude, taking the decisions of Mr Rae and Mrs Lynch together, that the respondent acted within the band of reasonable responses in dismissing the claimant for the acts of misconduct which they found he had committed. We conclude that the dismissal was fair in all the circumstances. We conclude that the complaint of unfair dismissal is not well founded.

Employment Judge Slater
Date: 30 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
8 June 2023

FOR EMPLOYMENT TRIBUNALS

ANNEX
List of Issues

Unfair Dismissal

1 Was the Claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 (ERA), namely conduct or, alternatively, some other substantial reason, being the irretrievable breakdown of the relationship between the respondent and the Claimant?

2 If so, did the Respondent act reasonably in treating that reason as a sufficient reason for dismissing the Claimant? If the reason was conduct:

(a) did the Respondent form a genuine belief that the Claimant had committed misconduct? The conduct relied upon is that:
   a. The claimant falsely accused Padriag Finnegan CTM of being a racist;
   b. The claimant falsely accused Padriag Finnegan CTM of training new managers to be racist/bias against ethnic minorities;
   c. The claimant accused him of favouring white colleagues above ethnic minority colleagues;
   d. The claimant threatened a Section Leader relating to available overtime;
   e. The claimant used threatening behaviour for personal gain/benefit.

(b) did the Respondent have reasonable grounds for that belief?

(c) did the Respondent form that belief based on a reasonable investigation in all the circumstances?

3 Was the dismissal of the Claimant fair in all the circumstances?

4 In particular, was the dismissal within the band of reasonable responses available to the Respondent?

5 Did the Respondent follow a fair procedure when dismissing the Claimant?

6 If the Claimant's dismissal is found to be unfair, which is denied by the Respondent, did the Claimant's conduct cause or substantially contribute to his dismissal?

7 If so, by what proportion would it be just and equitable to reduce the compensatory award?

8 If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?

9 If so, by what proportion would it be just an equitable to reduce the compensatory award?

10 Has the Respondent failed to comply with the Acas Code?

11 If so, was its failure reasonable?

12 If the Respondent's failure to comply with the Acas Code was unreasonable, is it just and equitable to increase any award by means of the Acas uplift?

13 Has the Claimant complied with the Acas Code?

14 If not, should any compensatory award made to the Claimant be reduced to take into account the Claimant's unreasonable failure to comply with the Acas Code?

15 If so, by what proportion should the compensatory award be reduced?

16 To what extent, if any, has the Claimant mitigated his losses?

17 To what, if any, compensation is the Claimant entitled?

Victimisation

18 Has the Claimant done or are they suspected of having done, a protected act within the meaning of section 27 Equality Act 2010?
The claimant relies on the following as protected acts:

(a) In the second part of 2019, to the ASDA ethics hotline, making allegations that white colleagues were treated more favourably than white colleagues in relation to being offered overtime and contract hours.

(b) At a grievance hearing on 16 March 2020, repeating these allegations, including identifying the white colleagues in question.

19 Did the claimant give false evidence or information, or make a false allegation or was the information given, or the allegation made, in bad faith? If so, it will not be a protected act: s.27(3) EqA.

20 If the claimant did a protected act, was he subjected to a detriment because he had done a protected act by being taken through the disciplinary procedure and by being dismissed?

Whistleblowing – s.103A ERA unfair dismissal and s.47B ERA detrimental treatment

21 Has the Claimant made a disclosure of information, who to and when?

The claimant relies on the following as the relevant disclosures:

(a) In the second part of 2019, to the ASDA ethics hotline, making allegations that white colleagues were treated more favourably than non-white colleagues in relation to being offered overtime and contract hours. The respondent does not concede that such a disclosure of information was made.
(b) At a grievance hearing on 16 March 2020, repeating these allegations, including identifying the white colleagues in question. The respondent concedes that such a disclosure of information was made.

22 Did the Claimant believe that the disclosure tended to show that the respondent had failed, was failing, or was likely to fail to comply with a legal obligation: s.43B(1)(b) ERA? The claimant asserts that the legal obligation was to protect employees from discrimination and prevent race discrimination in the workplace.

23 Was it reasonable for the Claimant to believe that the disclosure tended to show that failure?

24 Did the Claimant believe that the disclosure related to a matter of public interest?

25 Was it reasonable for the Claimant to believe that the disclosure related to a matter of public interest?

26 If the Tribunal is satisfied that there was a protected disclosure within the meaning of the ERA 1996:

(a) Was the making of a disclosure the reason (or principal reason) for the dismissal? If so, the dismissal was automatically unfair: s.103A ERA.
(b) Was the Claimant subjected to a detriment by being subjected to the investigatory and disciplinary procedure by the Respondent?
(c) Was the Claimant subjected to that detriment because of the protected disclosure: s.47B ERA?

Remedy

27 If the Claimant's claims are upheld: what remedy does the Claimant seek?

28 What financial compensation is appropriate in all of the circumstances?

29 Should any compensation awarded be reduced in terms of Polkey v AE Dayton Services Ltd [1987] ICR 142 and, if so, what reduction is appropriate?

30 Should any compensation awarded be reduced on the grounds that the Claimant's actions caused or contributed to their dismissal and, if so, what reduction is appropriate?

31 Has the Claimant mitigated their loss?