Case No: 2305181/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr T Tamponi

Respondent: Medequip Assistive Technology Ltd

Heard at: London South

On: 21st – 25th August 2023
19th September 2023
(in chambers)

Before: Employment Judge Reed, Ms J Jerram and Mr C Rogers

Representation
Claimant: In person
Respondent: Ms D Gilbert

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The complaints of direct race discrimination are not well-founded and is dismissed.

REASONS

Claims and issues

1. The claimant, Mr Tamponi, brought claims for unfair dismissal (including arguing that his dismissal was automatically unfair on the basis that he was dismissed because he made a protected disclosure) and race discrimination.

2. Mr Tamponi had brought claims for breach of contract / wrongful dismissal. These were struck out at a preliminary hearing on 23rd March 2023.

3. In accordance with case management orders from the Tribunal Medequip had produced a draft list of issues. This had been sent to Mr Tamponi, but was not agreed. At the beginning of the hearing Mr Tamponi initially objected to it, but

following discussion accepted that it accurately identified the issues in dispute between the parties. Mr Tamponi also clarified that the references to his 'formal complaint of discrimination' that he said was a reason for a dismissal referred to his 2nd March 2021 email to Mr Kildfuff, p222.

4. The issues to be determined therefore were:

UNFAIR DISMISSAL/PROTECTED DISCLOSURE

1. What was the principal reason for the Claimant's dismissal?

The Respondent contends that the reason for dismissal was conduct – namely refusing to consent to provide a DBS Renewal Certificate.

The Claimant contends that the real reasons behind his dismissal were:

- having made several protected disclosures,
- having refused to provide information about his application for EUSS,
- having submitted a formal complaint of discrimination,
- having dared to ask for more information and documents about DBS check,
- being unwilling to make a false statement to the Disclosure and Barring Service.

2. Did the Claimant make a protected disclosure?

The Claimant contends that he made disclosures to the Respondent on:

13th January 2021, to Mr Nigel Cook, director of HR, SHEQ and Governance;
2nd March 2021, to the Disciplinary meeting's chair Mr Gary Kilduff;
14th May 2021, to the Investigator Mr Neil Harryman;
1st June 2021 to the Respondent's Regional Manager Mr Marc Varley.

Were they disclosures of information?
Did the Claimant have a reasonable belief that his disclosure(s) tended to show a relevant failure on the part of the Respondent?
Did the Claimant have a reasonable belief that the disclosure(s) were in the public interest?
What part, if any, did the fact that the Claimant had made those disclosure(s) play in the Respondent's decision to dismiss him?

3. Did the Respondent follow a fair procedure in dismissing the Claimant?

4. Did the Respondent have a genuine belief, reasonably held, that the Claimant had committed the alleged misconduct?

5. Was the decision to dismiss the Claimant within the range of reasonable responses open to a reasonable employer in the circumstances?

RACE DISCRIMINATION

1. The Claimant is an Italian national and therefore an EU and an EEA citizen.

   The Tribunal clarified at the Preliminary Hearing that the Claimant alleges two discriminatory acts:

   1. having been instructed to provide information about his application for EUSS by 15.01.2021 and warned about his continuous employment; and

   2. having been subjected to less favourable treatment when singled out and disciplined for allegedly putting some other individuals' safety at risk by not reporting a breach of the Respondent's own C-19 protocol.

2. The Respondent accepts that it asked all EU national employees, including the Claimant, for information on their settled status under the EU Settled Status Scheme. The Claimant accepts that he refused to provide any information.

The Respondent asserts that it asked all EU national employees, including the Claimant, for information on their applications for Settled Status under the EU Settled Status Scheme, and that the appropriate comparator would be a non-Italian national who is also an EU citizen.

The Claimant contends that the Respondent claimed, at that time, being required to verify that its Employees with EEA/EU/Swiss Citizenship had applied for EU Settled Status and instructed the Claimant to provide evidence of his application by 15.01.2021, warning that the continuity of his employment could be at risk if he failed to do so.

The Claimant informed the Respondent that he did not have to provide information about his application for Settled Status, that he should not even have been asked for it and refused to provide that information.

The Claimant asserts that the appropriate Comparators, in respect of this first alleged discriminatory act, are all the Respondent's workers and employees with a not time-limited right to work, that were not identified by the Respondent as being eligible for a post-employment right-to-work check, and not instructed to provide information about their Status.

3. Was the Respondent's decision to single out the Claimant and discipline only him for allegedly failing to notify the depot's management of a possible C-19 contamination a discriminatory act? If so, was the Claimant singled out because of a protected characteristic, namely race? If not, was he singled out because of a protected characteristic of the comparators, namely UK citizenship, that he did not share?

4. In respect of this second alleged discriminatory act, the Claimant compares himself to three UK national employees with whom he was working and whom the Respondent did not decide to discipline.

Procedure, documents and evidence heard

5. The Tribunal heard evidence from the claimant in support of his case. The Tribunal heard from the following witnesses on behalf of Medequip: Timothy McNicholas, Gary Kilduff, Neil Harris and Steven Smith.

6. The respondent produced a bundle of documents containing 311 pages. References to page numbers in this decision are references to that bundle. Mr Tamponi produced a supplementary claimant's bundle of documents, which was also considered.

7. Both parties made submissions on both the facts and law. These submissions are addressed as they arise in these reasons.

Findings of fact

8. The Tribunal considered the documentary and oral evidence to which it was referred. All findings of fact are made on the basis of the civil standard of proof. That means that the Tribunal concluded that they are more likely to be true than not.

9. The written reasons are not intended to address every point of evidence or resolve every factual dispute between the parties. The Tribunal has made the findings needed to resolve the legal disputes before it. Where no findings are made or findings are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Background

10. Medequip is a company that provides medical devices, such as mechanised beds, to individuals who are disabled, but able to remain living at home. It does so in partnership with the NHS and Local Authorities, who are primarily responsible for those individuals' care.

11. Between 14th November 2017 and 25th May 2021 Mr Tamponi worked for Medequip as a warehouse operator / cleaner. He had previously worked for them through a recruitment agency for a short time.

12. In broad terms, Mr Tamponi's role involved dealing with the medical devices at the depot. In particular, he and other operatives / cleaners were responsible for processing devices when they were returned to the depot. Devices would need to be cleaned and sometimes repaired so that they could be reused.

13. Inevitably these operations were affected by the COVID pandemic. There was naturally a concern that items being returned to the depot could represent an

infection risk and would need to be dealt with appropriately. This included identifying and segregating items that represented a COVID risk, as well as cleaning them appropriately.

14. In both 2020 and 2021 Mr Tamponi raised a number of concerns in relation to the COVID procedures.

15. Although Mr Tamponi did not rely on any communications in 2020 as forming part of his protected disclosure case it is appropriate to set these out briefly so that his communications in 2021 can be understood in their proper context. There are also a number of disciplinary actions against Mr Tamponi, which are also relevant to the context of events in 2021.

16. On the 29th of March 2020 Mr Tamponi wrote an e-mail to Woona Ademolu, a HR manager, also copied to Medequip's Safety, Health, Environmental and Quality department, p98. In that e-mail he suggested that COVID procedures were not being followed diligently enough, potentially contaminated items were being mixed with uncontaminated items, and that his line managers where not taking either the situation or his concerns seriously enough.

17. In effect, that e-mail was treated as a grievance raised by Mr Tamponi. It lead to an investigation meeting on the 13th of May 2020. This was conducted by Gary Yandel, a Depot Manager. Mr Yandel then wrote to Mr Tamponi on 26th May 2020. He concluded that there were no significant problems in relation to the COVID procedures, although he thanked Mr Tamponi for raising his concerns.

18. Mr Tamponi was not happy with this outcome and appealed the grievance outcome by email on 1st June 2020. There was an appeal hearing on 15th June 2020 conducted by Marc Varley. Fozia Mahmood, Head of HR, also attended remotely. The appeal was rejected. Mr Varley agreed that there were occasions on which the COVID process had not been followed, but concluded that these were relatively minor incidents and that, looking overall, Medequip and its managers were acting appropriately.

19. During that meeting, Mr Varley realised that Mr Tamponi was recording the meeting. He asked Mr Tamponi, to confirm this, which he did. Mr Varley asked Mr Tamponi to stop recording, which he did. Mr Tamponi said that he was entitled to record the meeting and that it wasn't against the rules. Ms Mahmood asked him to delete the recording, but Mr Tamponi refused, saying that he wanted to check the law and seek advice.

20. This incident lead to Mr Tamponi being suspended, with pay, and he was invited to a disciplinary hearing, p132. This meeting was initially scheduled for the 19th June 2020, but later moved to 25th June 2020 at Mr Tamponi's request. This ultimately lead to Mr Tamponi receiving a final written warning, p146-47.

21. Mr Tamponi appealed this decision, but the decision was upheld, p163-165.

22. In October 2020 Medequip began to check employees' temperature at the beginning of their shift, as part of their COVID procedures. Mr Tamponi did not object to his policy, agreeing that it was an appropriate precaution. However,

he then realised that Medequip was recording the temperature results, which he objected to. He refused to have his temperature taken and recorded.

23. This lead to an investigation meeting on the 3rd November 2020, conducted by Tim McNicholas, Logistics Manager. Mr McNicholas was not Mr Tamponi's direct line manager (he had a Team Leader who was responsible for his day-to-day supervision). He did, however, have a supervisory responsibility for that team and, in practice, often took on managerial tasks in relation to them and Mr Tamponi.

24. Notes of this meeting have been produced and the Tribunal accepted that there were a broadly accurate record of what was discussed, p166-168. Mr Tamponi indicated that he had no objection to his temperature being taken, but believed that it was inappropriate for it to be recorded and that this was a breach of GDPR. Mr McNicholas said that it was the company policy. Mr Tamponi was suspended pending further action.

25. A few days later Mr Tamponi's suspension was lifted and he returned to work. He was informed that the policy had been changed and that there was no need for a disciplinary action. Although, in his witness statement, Mr Tamponi describes being denied the opportunity of a Disciplinary Hearing, the Tribunal concluded that Medequip had, in fact, changed its policy in response to his objections.

EU Settled Status Letter – 12th November 2020

26. It is agreed that Mr Tamponi, along with other EU employees of Medequip, received a letter on the 19th November 2020 about their immigration position and the right to work in the UK, p172. In Mr Tamponi's case it was handed to him by Tim McNicholas.

27. The letter notes that the Brexit transition period was coming to an end and that there would be new rules in effect from 1st of January 2021. It suggested that EU, EEA or Swiss citizens could apply to the EU Settlement Scheme to protect their right to live and work in the UK. It links to a government website providing more information.

28. The letter also suggests that Medequip was required to ensure that employees who might be impacted had applied or we're applying for settled status. It therefore asked that Mr Tamponi (and other EU employees) submit proof of an application or of settled status to their manager by 15th January 2021.

29. It also noted that failure to provide documentation do confirm status to freely work in the UK by the 15th of January 2021 might place their continued employment at risk.

13th January 2021 email

30. On the 13th of January 2021 Mr Tamponi sentence e-mail to Nigel Cook, Director of HR and SHEQ, p175-176. This is the first communication that Mr Tamponi relies upon as a protected disclosure.

31. The email raised a number of matters. First it refered to a subject access request, which Mr Tamponi says was sent on 24th of September, but he said had been ignored. Second, it raised a number of matters relating to COVID. Mr Tamponi said that a poster had been put up in the depot saying that a risk assessment had been shared with the depot's workers, but that this wasn't true. He said that he has asked to see that assessment, but this request had been ignored. He went on to say that the appropriate COVID procedures were unclear and that items collected from COVID patients were not being properly quarantined properly. In particular, he expressed concern that potentially infectious items were not properly identified or placed in the correct locations.

January Incident and disciplinary proceedings

32. Later January 2021, there was an incident that lead to a disciplinary process against Mr Tamponi. In broad terms, it related to Mr Tamponi's decision to 'scrap' a number of bath lifts and events surrounding that decision. 'Scrap' in this context meaning that items would be determined to be unusable and unrepairable. Such items would be destroyed, rather than being cleaned and / or repaired to be provided to another end user.

33. In summary, Mr Tamponi's account of this incident is as follows. On 25th January 2021 a large number of items had been delivered to the depot. These had been collected from users with COVID and so were potentially contaminated. These were initially placed in the quarantine area, but later some items were moved. This meant that the quarantine system had been breached. Some of these items, including the bath lifts, were then found inside the washroom.

34. On 26th January 2021 Mr Tamponi reached a decision that the bath lifts should be scrapped. He had concluded he could not remove them from the washroom, because they would need to be jet washed to remove the risk of contamination. He was not able to do so, because the jet wash machine was out of order. He concluded that he could not leave them in a 'repair status' because he had been told that items should not be remain as pending repair for too long and, particularly, should not be carried over to the next month in that status. He therefore marked them as to be scrapped.

35. It is clear both from his statements at the time and the evidence he gave to this Tribunal that Mr Tamponi felt that his colleagues were acting irresponsibly and wrongly. In particular he believed that the quarantine system was not being diligently followed and that some the Medequip's employees were cavalier in their actions.

36. At the same time, it is apparent that some of Mr Tamponi's colleagues felt that he was being overly cautious and raising issues unnecessarily. One of these colleagues, Mr Nuttman, disagreed with his decision to scrap the bath lifts and reported this to Mr McNicholas.

37. Mr McNicholas undertook an investigation. He exchanged a number of emails with Mr Nuttman, p177-180, and then held an investigation meeting with Mr

Tamponi. Notes of that meeting have been produced and the Tribunal accepted them as a broadly accurate record of the meeting, p181-186.

38. Essentially, Mr McNicholas suggested to Mr Tamponi that he had scrapped the bath lifts unnecessarily and without making a physical inspection. Mr Tamponi responded with the account above. He argued that he was not able to make a physical inspection, because of the risk of infection. As part of this explanation, he explained to Mr McNicholas that, in his view, the COVID policies had been breached.

39. Mr McNicholas also interviewed a number of other employees and notes of these interviews were produced, p191-197. The Tribunal accepted Mr McNicholas' evidence that these notes were broadly accurate records of his interviews.

40. The outcome of this process was that Mr McNicholas concluded that Mr Tamponi had acted wrongly in two respects. First, he concluded that it was wrong to scrap the items, because if Mr Tamponi had investigated he would have found that the items had already been decontaminated and therefore could be inspected. Second, he concluded that, since Mr Tamponi had believed that there had been a breach of the COVID policy he had been wrong not to report it. Mr McNicholas' conclusion are recorded in his investigation report, p187-9

41. On the basis of that report, Mr McNicholas recommended a formal disciplinary hearing. This was scheduled for the 3rd March 2021. It was to be conducted by Gary Kilduff, a depot manager at the Woodford Green Depot.

42. At some stage prior to the disciplinary hearing an additional allegation was raised, specifically that Mr Tamponi had not recharged for items or provided appropriate documentation in relation to recharging. The documentary material does not deal with this in detail, but it is explained by Mr McNicholas in his evidence. Essentially, he was concerned that, if the bath lifts were improperly scrapped that would mean that they were not available to be used as a repaired item in the future. This would mean that Medequip would lose the opportunity to reuse the item and to charge a client for that reuse. In substance, this was therefore a restatement of the first ground since, if items were wrongly scrapped, the consequence of this was that they could not be recharged.

2nd March 2021 email

43. On the 2nd of March 2021 Mr Tamponi wrote an email to Gary Kilduff, also copied to Nigel Cook and to Medequip HR. This is the second communication that Mr Tamponi relies upon as a protected disclosure.

44. The email raised three grievances. First, that Aditi Dave had intentionally failed to verify that the investigations and meetings held by Mr McNicholas were fair, while providing inaccurate and partial information about the process. He suggested that both Ms Dave and McNicholas has provided him with partial, contradictory and sometimes wrong information. He described this as 'a nasty form of discrimination' in that he was the only employee being disciplined in

relation to a failure to report a breach of Covid precautions when other employees also didn't inform management of the issue.

45. Second, that Richard Nuttman had fabricated false evidence against him.

46. Third, that Mr McNicholas had sought to bully and intimidate him. In part, this refers to the Mr McNicholas' action during the above meetings. But Mr Tamponi also refers to Mr McNicholas attempting to push him into defrauding Medequip's clients by charging for old parts as if they were new and charging for parts that were not used at all.

47. These later matters were the subject of some clarification during the evidence, both from Mr Tamponi and the Medequip managers. It was agreed by all concerned that Medequip's contracts permitted it to charge for parts used in repairs. Mr Tamponi explained that when he wrote about 'charging as new parts that weren't new' what he was referring to was a practice of using old parts (for example those taken from a unit that could not be repaired) and recycling them in the repair of a device. He argued that, in these circumstances it was wrong and fraudulent to charge a client as if the part was new.

48. Mr Tamponi was questioned about his understanding of this practice and why he saw it as fraudulent. It was suggested to him that Medequip's contract at the time charged its client a fixed cost for a part used in a repair, whether that part was itself new or reused. Mr Tamponi accepted that he had not seen the relevant contract, but said that he was confident that this could not be the case. He said that he based that conclusion on his common sense and his understanding of marketing and customer experience.

49. In relation to the allegation of charging for parts that were not used, Mr Tamponi said that this related to Mr McNicholas instructing him to charge for repairs that had not occurred and for parts that had not been used. In his evidence Mr McNicholas denied that he had ever given Mr Tamponi such an instruction. On this point the Tribunal preferred the evidence of Mr McNicholas. The Tribunal concluded that Mr Tamponi had become convinced that there was some form of wrongdoing because of his disagreements with Mr McNicholas. This caused him to view Mr McNicholas's statements and actions in the worse possible light. This included construing ordinary disagreements about the work that needed to be done and the way it should be charged for into these allegations. The Tribunal was satisfied that Mr McNicholas had never instructed Mr Tamponi to commit fraud or said anything that could reasonably be construed as doing so.

2nd March 2021 disciplinary meeting

50. Mr Kilduff conducted the disciplinary meeting on the 2nd March 2021. Notes of this meeting have been produced, p208-213. The Tribunal accepted these as a broadly accurate account of the meeting. Mr Tamponi later produced an edited version of these notes, to which some additions were made, p214-219. These are points of clarification and expansion, which do not suggest any real disagreement as to what occurred.

51. Mr Kilduff discussed the incident with Mr Tamponi and questioned him about his explanation.

52. At the end of the meeting Mr Kilduff announced his conclusion. He concluded that there was no case for Mr Tamponi to answer and dismissed the allegation. He concluded that Mr Tamponi's decision to scrap the bath lifts was a reasonable one in all the circumstances. He also concluded that Mr Tamponi was not the only employee to be aware of a potential breach of the COVID policy and that it would be wrong to single him out for disciplinary action. Finally, he concluded that, since the items were appropriately scrapped, there was no failure to recharge in relation to them.

EU Settled Status Letter: 9th March 2021

53. On the 9th March 2021, Medequip wrote again to EU, EEA and Swiss Nationals within its employ, p225-256. The letter states in terms that it is a follow up to the previous letter on the 12th November 2021.

54. The letter reiterates that that in employees written to may need to protect their rights to live and work in the UK by applying to the EU Settlement Scheme. It states that the deadline to apply was 30th June 2021 and provides some guidance on applying (primarily by referring the reader to government websites dealing with the scheme).

55. The letter also notes that 'While we currently do not require proof of application or the visa document until 30th June 2021, please be advised that from 1st July 2021, employers will be expected to check whether Europeans hold a right to work in the UK, including through the EUSS'. The letter goes on to say that this means that an employee who does not apply on time may be 'considered illegal in the UK' which might place their continued employment at risk.

Grievance meeting 22nd March 2021

56. On the 22nd March 2021 Mr Kilduff held a grievance meeting to consider the grievances raised by Mr Tamponi in his email of 2nd March 2021.

57. A note taker did not attend this meeting and no contemporaneous notes have been produced. Mr Kilduff produced a letter setting out his conclusions and summarising the meeting, p232-234. The Tribunal accepted that this set out a broadly accurate account of the meeting.

58. Mr Kilduff rejected the first and third of the allegations. He concluded that Ms Dave had acted properly in providing HR advice to both Mr Tamponi and Tim McNicholas during the disciplinary process. Further, he concluded that Ms Dave had not contributed in any way to Mr Tamponi being 'singled out' in the process.

59. Mr Kilduff also concluded that Mr McNicholas had not been guilty of bullying, intimidation or abuse in the way he had conducted meetings with Mr Tamponi and that he had not attempted to push Mr Tamponi into defrauding Medequips client.

60. The second allegation (that Richard Nuttman) had fabricated evidence during the process was withdrawn by Mr Tamponi during the meeting, because he accepted to Mr Kilduff that Mr Nuttman had not done this.

61. Mr Kilduff's conclusions were sent by letter to Mr Tamponi on 12th May 2021.

10th May 2021: DBS Renewal Request

62. On the 10th May 2021 Mr Tamponi had have conversation with Andy McCarthy, who told him that Medequip wanted him to renew his DBS check. This arose because Medequip was carrying out a general process of renewing / updating its employee's DBS checks. Mr Tamponi's name had been identified by Aditi Dave as being due for a renewal, p228.

63. Both parties agreed that Mr Tamponi had undergone an Enhanced DBS check when he was first employed.

64. Mr Tamponi's response was that he wanted evidence that a DBS check was required and to see Medequip's DBS policy. He was unwilling, at that stage, to agree to a renewal. This is confirmed by Mr McCarthy's email to Ms Dave, which records Mr Tamponi's refusal, his desire for confirmation, his wish to see a policy and the fact that he was unwilling to go through the DBS check pending this.

65. Ms Dave produced a document to be provided to Mr Tamponi, p230. It read as follows:

DBS Disclosure Renewals Statement for Tacredi Tamponi

You have requested a statement from Medequip as to the reason for the request for your DBS to be renewed. This request has also recently been made to over 100 other tam members in the London region without issue.

As you are aware, Medequip require all new starters to be by subject to an application for an enhanced DBS Disclosure in accordance with the Rehabilitiation of Offenders Act 1974 (Exceptions) Order 1975.

Whilst it is a contractual requirement to have a DBS certificate; it is also a requirement of the contract that Medequip have with the London Consortium that all DBS certificates are renewed every three years.

Aditi Dave
HR Business Partner
12th May 2021.

66. Mr Tamponi then had a conversation with Mr McNicholas on the 12th May 2021. Mr McNicholas provided him with Ms Dave's statement and asked him to cooperate with the DBS check. Mr Tamponi remained reluctant, without actually refusing. They agreed that Mr Tamponi should take some time to consider and seek advice.

67. Mr Tamponi emailed, on the same day, Ms Dave, requesting a copy of the contract with the London Consortium or copies of the Local Authorities comprising the Consortium individual contracts with Medequip.

13th May 2021: Suspension

68. As a result, Mr Tamponi was suspended. This was discussed between Mr McNicholas and Ms Dave. Ms Dave produced a letter suspending Mr Tamponi for what is described as a refusal to follow a reasonable request from management, which is characterised as gross insubordination, p235. The 'nature and seriousness of the allegations' are 'classed as Gross Misconduct'.

69. The letter also indicates that the this allegation will be investigated and invites Mr Tamponi to a meeting on 14th May 2021.

70. Mr McNicholas' evidence was that, in his mind, the situation was a clear refusal to follow a reasonable instruction. He had been told by HR that employees needed to undergo a DBS check and a three-year renewal. The vast majority of Medequip employees had done so (including Mr McNicholas himself). He saw no reason that Mr Tamponi should not also do so and regarded his reluctance to do so as unreasonable and obstructive.

71. On the 13th May 2021 Mr McNicholas brought the letter to Mr Tamponi. He explained that he was being suspended and handed him the letter. After reading the letter, Mr Tamponi was escorted off the premises by Mr McNicholas.

14th May 2021: Investigation Meeting

72. On the 14th May 2021 there was an investigation meeting into the allegation that Mr Tamponi had refused to comply with the request to cooperate with a DBS check. This was conducted by Neil Harryman, a Logistics Manager at the Heathrow Depot.

73. There was a notetaker at this meeting and the notes have been produced to the Tribunal, p236-240. The Tribunal accepted that these notes were a broadly accurate account of the meeting.

74. Mr Harryman opened the meeting by saying that they were having a meeting because Mr Tamponi did not want to have a DBS check and that he wanted to find out why.

75. Mr Tamponi replied that, it wasn't really that he didn't want to, but that he wanted to find out if it needed to be done and that he had concerns around personal data. He also said that he had a history of problems with Mr McNicholas and Ms Dave; that he had raised a grievance about them. He said that he had been told that it was Medequip policy for DBS checks to be renewed

each year, but this was not part of his contract and he had not seen any company policy about it. He explained that he asked to see the contracts between Medequip and its clients.

76. Mr Tamponi relies upon this conversation as the third protected disclosure. He says that he told Mr Harryman that he was the victim of retaliation by Mr McNicholas and Ms Dave.

77. Mr Harryman said that he wasn't able to resolve prior issues or comment on the grievance. He wished to focus on the DBS check. He said that he was not sure if Mr Tamponi was able to see the contracts. He wanted to resolve the DBS check and could not see why Mr Tamponi had a problem completing a new check.

78. Mr Tamponi reiterated that he wasn't saying that he was unwilling to renew his DBS check, but that he wanted to be sure that it was required. He said that if he could verify that it was required, he would have no problem complying. He said that he was on the process of seeking advice about the requirement.

79. After a short adjournment Mr Harryman announced that since Mr Tamponi was stating that he would not complete the DBS until he received notification that the contract between Medequip and its clients required him to do so and that the contractual documents could not be disclosed to him, the matter would proceed to a disciplinary hearing.

25th May 2021: Disciplinary Meeting

80. On the 20th May Mr Tamponi was sent a letter by Ms Dave inviting him to a disciplinary hearing to occur on the 25th May 2021, p243-244. The letter identified the allegation again him as failing to follow a reasonable request from management (gross insubordination) in relation to completion of a DBS application. The meeting was to be conducted by Mr Neil Harris, Operations Manager, Suffolk.

81. On 23rd May Mr Tamponi emailed Ms Dave requesting that the meeting be postponed, because he felt he would not be ready, p247. This was because Mr Taponi wished to contact Medequip's clients in order to establish whether the client contacts required a renewal of the DBS certificate every three years. He said that he had not yet done this, since the terms of the suspension prevented him from contacting colleagues or clients. He therefore requested that the suspension be revoked or that he be given permission to contract Medequip's clients for that purpose.

82. Ms Dave replied, indicating that the meeting would not be postponed, p248. She indicated that Medequip's view was that it would be inappropriate for Mr Tamponi to contact clients and requested that he not do so.

83. Mr Tamponi also emailed Mr Harris prior to the meeting, p250. That email made a number of points. First, Mr Tamponi wrote that he had not refused to complete his DBS check, but rather asked HR to send a written explanation for the need to do so. Second, he suggested that the written statement provided by Ms Dave did not provide much explanation. Third, he argued that he hadn't done

anything wrong in making his requests and his suspension was therefore an overreaction.

84. A notetaker attended the meeting and the notes have been produced, p251-259. The Tribunal accepted that the notes were a broadly accurate account of the meeting.

85. Mr Harris began the substantive part of the meeting by asking Mr Tamponi had refused a reasonable respect. Mr Tamponi responded that, in his view, it was not a reasonable request and the fact that a manger or HR had made a request did not necessarily mean it was reasonable. He then reiterated that he had not refused, but that since he had been told a check was required he wished to see evidence of the requirement. There was some discussion of whether the check was required, with Mr Harris taking the position that, whether the DBS check was 'mandatory' it was a reasonable request from Medequip which Mr Tamponi should comply with.

86. The Tribunal understood the position Mr Harris was articulating at that point was that, whether there was a formal legal requirement (such as a term in Mr Tamponi's contract or in a contract with Medequip's client) the request fell within an employer's managerial prerogative.

87. Mr Tamponi asked again where the requirement came from, in particular asking about the contract with the London Consortium. He expressed the view that, if an employer asks for a DBS check, they should provide 'loads of info about the need for the check, how your data will be processed and they should have a written copy of their DBS policy'. He suggested that, if the requirement came from the London Consortium, the Consortium should provide their DBS policy.

88. Mr Harris then suggested that the disciplinary wasn't about the DBS policy, which Mr Tamponi disputed, arguing that he should not be compelled to have a DBS check 'without even giving me a copy of the company's DBS policy'.

89. Mr Tamponi continued to argue that he should be provided with a DBS policy and also referred to the DBS Code of Practice, produced by the Disclosure and Barring Service. He sent Mr Harris by email a copy of the Medway Council's DBS Policy and the Code of Practice. That email was not provided to the Tribunal. In his evidence Mr Harris did not recall receiving the Code of Practice, although he recalled the Medway Council Policy. The Code was, however, referred to explicitly in the contemporaneous notes of the meeting and the Tribunal concluded that it was sent at the same time.

90. There was a short adjournment while Mr Harris considered these documents.

91. When the meeting resumed, Mr Harris sought to read some of the gov.uk guidance to Mr Tamponi. The key point he appears to have wished to make was that employees who had had a DBS check in the past might be required to carry out a further DBS check in order to update the information.

92. Unfortunately, this discussion was somewhat derailed when Mr Harris misspoke and referred to Medequip (along with the London Consortium) being an employment sector. Mr Tamponi responded by laughing and, fairly bluntly, pointing out that Medequip could not be an employment sector.

93. The Tribunal concluded that Mr Harris was doing his honest best to explain the position to Mr Tamponi as he understood it. It is unfortunate that Mr Tamponi's response appears to have cut the discussion somewhat short. At the same time, Mr Harris' difficulty and his confusion over the 'employment sector' point illustrated his lack of knowledge of the detail of the DBS regime.

94. Mr Harris then adjourned the meeting again, saying that he would send Mr Tamponi a copy of the DBS policy. Mr Tamponi responded by saying 'Thank you very much', although the Tribunal found that this was primarily meant to express frustration that it had taken so long to reach this point, following his earlier requests, rather than an expression of gratitude to Mr Harris. He suggested that it would have 'been enough' for Ms Dave to send him the policy two weeks prior.

95. Mr Harris reiterated that, in his view, Mr Tamponi had been brought to a disciplinary hearing because he had refused to comply with a reasonable request. Mr Tamponi responded that, in his view, it would only have been a reasonable request if he had been sent the policy earlier.

96. After 10 minutes Mr Harris resumed the meeting and said he would announce his decision. He then summarised his decision, which was to dismiss Mr Tamponi. He said that the allegation that he had refused to comply with a reasonable instruction was proved. He took into account Mr Tamponi's earlier written warning and concluded that dismissal was the appropriate sanction. Mr Harris wrote an outcome letter to Mr Tamponi, dated the same day, which provided the same information, p 260.

97. Mr Harris did not, either at this time or later, send Mr Tamponi a copy of a Medequip DBS policy.

Appeals

98. On 1st June 2021, Mr Tamponi submitted an appeal, p264-266. The appeal raised a number of grounds. First, that it had not been explained to him why the DBS renewal was required or how his data would be handled and that he had not been provided a copy of a DBS Policy. Second, that it had not been demonstrated that he had been repeatedly requested to undertake a DBS renewal and there was no detail about when the renewal should be done. Third, that he had been suspended following asking for a copy of the contract with the London Consortium. Fourth, that Mr Harris had suggested that Medequip was a Registered Body with the DBS when it was not. Fifth, that he had been dismissed after Mr Harris had indicated that he would provide a copy of Medequip's DBS policy, but no policy had been provided to him.

99. Mr Tamponi relies upon this appeal as his fourth protected disclosure.

100. On the 23rd June 2021 Mr Tamponi also submitted an appeal from Mr Kilduff's decision in relation to his grievance, p271.

101. Two separate meetings, heard by different managers, took place in relation to the two appeals.

102. The grievance appeal took place on the 30th June 2021. It was conducted by Ben Williams. Notes of that meeting have been produced and the Tribunal accepted that they were a broadly accurate account of the meeting, p274-277.

103. At the grievance appeal meeting Mr Tamponi reiterated his view that he should not have been subject to a disciplinary over the January bath lifts incident. He argued that Ms Dave and Mr McNicholas had colluded in an attempt to discipline him. Mr Williams wrote to Mr Tamponi on 7th July 2021, rejecting his grievance, p292-293. He concluded that Ms Dave and Mr McNicholas had acted in good faith and, while there were areas that could be improved (particularly in relation to communication) the grievance overall was not upheld.

104. The appeal meeting was rescheduled a number of times, but ultimately took place on 1st July 2021. It was heard by Steve Smith, Regional General Manager. Notes of the meeting have been produced and the Tribunal accepted these as a broadly accurate record of the meeting, p283-291.

105. In the appeal meeting, Mr Tamponi raised a number of points. The main substantive point was that, he reiterated that a request to undergo a DBS check was not a reasonable one, unless it included information about the need for the check and how confidential data would be handled, along with a DBS Policy.

106. There was some discussion around this point, with Mr Smith referring to the document previously provided by Ms Dave, p230. Mr Smith also referred to his personal knowledge of the contracts between Medequip and its clients, which he said included a requirement that employees undergo DBS checks and renewals. Mr Tamponi did not accept these assurances.

107. There was also significant discussion of the process and procedure that had been used both in the request for the DBS check and the disciplinary process. Mr Tamponi made a number of criticisms, in particular that he said there was no evidence that he had refused to undergo a DBS renewal (as distinct from requesting more information) and that he had been promised material from both Ms Dave and Mr Harris that had not been forthcoming.

108. Mr Smith wrote to Mr Tamponi, refusing his appeal, on 26th July 2021. He concluded that the information provided to Mr Tamponi was sufficient, that he had refused to have a DBS renewal and that this constituted a refusal to comply with a reasonable request.

Contractual position and Medequip's DBS Policy

109. Mr Tamponi's contract was produced to the Tribunal, p64-70. Clause 6 reads 'The nature of your employment is that of a permanent employee subject to satisfactory references and successful DBS application'. There is no reference within the contract to renewal of the DBS check.

110. No DBS Policy was produced to the Tribunal.

111. In his evidence Mr McNicholas said that he was aware that everyone needed to have a DBS check and that it needed to be renewed as necessary. When asked about the policy, he said that there probably was a policy, but he 'didn't go looking for a policy' but took it as a reasonable request when he was told Mr Tamponi needed a DBS renewal.

112. When asked by the panel about his understanding of the policy position, Mr Harris said that he understood that all employees should carry out an Enhanced DBS check at the start of the employment and that this should then be renewed on a regular basis. He said that his contract explicitly stated that his DBS check would need to be renewed.

113. When asked about where that understanding came from, Mr Harris said that it came from his experience at Medequip and his discussions from collegues. He also said that there would have been a process for managers to follow, which would be found on the Medequip's shared drive where such material was kept. He did not recall if he had referred to it in the course of Mr Tamponi's disciplinary, but said he would have had general knowledge of it from carrying out DBS checks and renewals at his own depot.

114. Similarly, Mr Smith said that he believed that there would be a policy in regard to DBS checks on Medequip's internal IT systems. He thought he had probably read it when he first started as an employee about a decade ago. He had not read it in the course of dealing with Mr Tamponi's appeal.

115. Mr Kilduff believed that there was a handbook provided to new employees which referred to the need for DBS checks and renewals.

116. None of the Respondent's witnesses had been involved in producing Medequip's DBS policy or had any knowledge of how it had been developed. Given their roles this was understandable – they were responsible for implementation of the checks and dealing with the disciplinary proceedings, rather than developing wider policy.

117. The Tribunal concluded that there was insufficient evidence to conclude that Medequip had any written DBS policy at any point during Mr Tamponi's disciplinary process. No such policy was produced and none of the respondent's witnesses had any very specific recollection of such a policy. The Tribunal concluded that there was a general belief that employees needed to have a DBS check. This view was shared by all of the respondent's witnesses. The Tribunal concluded that it arose from two factors. First, all the managers had undergone DBS checks / renewals themselves and been involved in carrying out similar checks for employees. There was a general practice within. Medequip of carrying our Enhanced DBS checks. It was a matter of routine and all of the managers involved accepted it as normal practice. Second, they relied on the statement provided by Ms Dave in her role as HR support, p230. All the managers involved proceeded on the basis that if HR told them it was required, they could rely on that assertion.

118. There are numerous references in the documentary material to the contract with the London Consortium requiring that DBS checks be carried out or renewed. In his evidence Mr Kilduff said that his recollection was that the current contract with the consortium required DBS checks to be carried out and

renewed ever three years. The Tribunal accepted that Mr Kilduff was an honest witness on this point, did not find that his evidence was sufficient to draw any conclusion beyond the contract containing some provision in relation to DBS checks and their renewal. No copy of the contract was produced to the Tribunal. It would be a challenging task, in the absence of a copy, to recall the specifics of such a term, unless one was very familiar with the clause and its operation. As dealt with elsewhere in this decision, the Tribunal concluded that Mr Kildfuff did not have any great knowledge of the DBS regime. The Tribunal therefore reached no conclusions as to what the relevant contracts said about the type of DBS check to be carried out or the scope of employees to which this applied. The Tribunal concluded that these matters of detail were beyond the knowledge of any of the Medequip witnesses.

Extent of Mr Tamponi's direct involvement with End Users

119. It was agreed that, in general, Mr Tamponi's work occurred at the Mediequip facility and did not involve any contact with the End Users of Mediquip's equipment.

120. Mr Tamponi accepted, however, that on occasion he had been sent to an End Users home in order to assist with the delivery or installation of equipment. He described this as occurring in an emergency, when a large items needed to be delivered or the delivery was difficult (such as involving a narrow set of stairs).

121. Mr Tamponi agreed that, on those occasions, he would have contact with the End User, to the extent of speaking to them and being in their presence. He would not be responsible for any personal care of any kind.

122. Mr Tamponi described these occasions as being 'very seldom' and that the last occasion was around Spring 2019. He said that he did not volunteer for such tasks, preferring to work in the depot. He said that collegues in a similar role to him to take on such tasks, approximately three or four times a month.

123. The Tribunal accepted the evidence of Medequip's managers that they would have been aware that individuals employed in Mr Tamponi's role might undertake such duties from time to time.

The law

Unfair dismissal

124. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is conduct. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.

125. This claim includes what is generally termed a claim for 'automatically unfair dismissal' or a 'whistleblowing dismissal'. The stems from s103A ERA, which provides that an employee will have been unfairly dismissed if the reason (or principal reason) for the dismissal is that they made a protected disclosure.

126. A disclosure becomes protected for these purposes if a) it is a qualifying disclosure meeting the criteria set out at s43B ERA and b) it is made in accordance with the requirements of s43C to 43H (which, broadly deal with to whom a qualifying disclosure must be made if it is to be protected.

127. S43B defines a qualifying disclosure as:

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

128. Identifying a qualifying disclosure therefore requires consideration of five separate criteria:

a. Has there been a disclosure of information? This is often distinguished from a mere allegation, which contains no actual information (although this should not be allowed to suggest a simple bifurcation in which a statement can only ever be either an allegation or the provision of information).
b. Did the employee believe that the disclosure was made in the public interest?
c. If the employee did so believe, was their belief reasonably held?
d. Did the employee believe that the disclosure tended to show one of the matters listed in paragraphs (a)-(f) above?
e. If the employee did so believe, was their belief reasonably held?

129. The requirement that an employee reasonably believe that a disclosure was made in the public interest means that disclosures that concern purely private matters or disagreements between an employee and employer will not fall within the whistleblowing protection. Guidance on the meaning of public interest has been set out by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837. Lord Justice Underhill notes that it is not an issue that lends itself to absolute rules and should be approached by a Tribunal considering all the circumstances of the case. He indicates that Tribunals

should be cautious before concluding that a disclosure relating to the breach of an employee's contract could reasonably be believed to be in the public interest, but declines to suggest it could never occur. He suggests that a Tribunal could usefully consider four particular factors:

a. the numbers in the group whose interests the disclosure served;
b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
c. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
d. the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.

130. The Tribunal also had regard to the guidance given by the Employment Appeal Tribunal in *Dobbie v Felton* [2021] IRLR 679.

131. A qualifying disclosure is protected if it is made to a worker's employer, see s 43C.

132. In general the burden of proof to show the reason for the dismissal rests on the employer. Where an employee alleges that there was an automatically unfair reason for the dismissal, the Tribunal must follow the guidance given by the Court of Appeal in *Kuzel v Roche Products Ltd* [2008] IRLR 539, by addressing the following questions:

a. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent was not the true reason?
b. If so, has the employer proved his reason for dismissal?
c. If not, has the employer disproved the section 103A reason advanced by the Claimant?
d. If not, dismissal is for the s 103A reason.

133. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it considers whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the issue of fairness, which is to be approached neutrally.

134. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the

employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.

135. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether it would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

136. In the context of a conduct dismissal, it is appropriate to analyse an employer's decision to dismiss by applying the Burchill test – drawn from the case of *BHS Ltd v Burchell* [1980] ICR 303, although it has been further developed by subsequent case-law. This requires consideration of:
    a. Did the Respondent have an honest belief in the allegations?
    b. Did the Respondent have reasonable grounds to support that belief?
    c. Did the Respondent carry out a reasonable investigation into the allegations?
    d. Given all the circumstances, were the allegations sufficiently serious that dismissal fell with the range of reasonable responses open to a reasonable employer?

Direct Race discrimination

137. Following s13 and s39 of the Equality Act 2010, we must determine whether the respondent, by subjecting the claimant to a detriment, discriminated against him by treating him less favourably than it treated or would have treated someone else, because of a protected characteristic.

138. In this case the claimant relies on the protected characteristic of race and, in particular, that he was an EU citizen, but not a British National.

139. A detriment is anything that a reasonable person in the claimant's place would or might consider to their disadvantage. It does not require that there be physical or economic consequences for the claimant – but an unjustified sense of grievance is not a detriment, see *Shammon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.

140. Consideration of direct discrimination is an inherently comparative exercise. 'Less favourable treatment' requires that the complainant be treated less favourably than a comparator was or would be. The comparator may be an 'actual comparator'; that is someone in materially the same circumstances of the claimant. The tribunal may also need to consider how a 'hypothetical comparator' would have been treated. In some cases, identifying a suitable hypothetical comparator may be difficult and it may be appropriate to focus on considering why a claimant was treated in a particular way, using any evidence as to how other people are treated to inform that view, even if they are in materially different circumstances.

141. If there has been less favourable treatment, the Tribunal must go on to consider whether that was because of a protected characteristic.

142. In some circumstance, however, separating the question of whether there has been less favourable treatment from the issue of why that less favourable treatment occurred will be artificial or cumbersome. In such cases the Tribunal may consider both questions together – essentially asking whether an employee has been treated less favourably because of a protected characteristic, see *Shammon*.

143. One consequence of this comparative approach is that the fact that someone has been treated unreasonably does not mean that they have been discriminated against. For that matter, an employee who has been treated objectively reasonably may still have been discriminated against if they have nonetheless been treated less favourably than an appropriate comparator because of a protected characteristic.

144. Direct discrimination is not necessarily conscious or deliberate. The tribunal must decide 'what, consciously or unconsciously, was the reason for the treatment', see *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48. For there to be direct discrimination it is sufficient that the protected characteristic be a material influence on the reason for the treatment. It does not need to be the only or main reason for the treatment.

145. In relation to all of this, the burden of proof is on the claimant initially to establish facts form which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, see *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is for the respondent to show that they did not discriminate.

146. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.

147. The protected characteristic of 'race' is defined at s9 of the Equality Act 2010. It includes colour, nationality and ethnic / national origins. The Supreme Court in *Onu v Akwiwu* [2016] IRLR 719 concluded that there is a distinction between immigration status and race. This is because they are related but not coterminous characteristics. Members of the same race do not invariably have the same immigration status within the UK. This is most self-evident in relation to colour. But it is also true in relation to nationality or national origin since different people with the same nationality do not inveriably share the same immigration status within the UK. The Supreme Court therefore concluded that less favourable treatment on grounds of immigration status does not amount to direct race discrimination.

DBS Checks

148. Since this is a case that relates to an employer's request that an employee undergo a DBS check it is appropriate to summarise the relevant law. This is not a case about the DBS system itself and this is not intended to be a complete account of the applicable law. Rather is a summary of the legal rules relevant to this claim and which are necessary to understand the Tribunal's decision.

149. The rules around DBS checks must be understood from the starting point that employers would not generally expect to have easy access to information about their employees' full criminal records. Such information is plainly highly sensitive and private. Processing of personal date relating to criminal convictions is controlled, in particular by s10 Data Protection Act 2018. It also involves significant interference with an individual's right to private life.

150. At the same time, employers have a genuine and legitimate interest in the criminal records of their employees in certain circumstances. It is also important that, where it is relevant, employers can obtain accurate information which they can confidently rely on.

151. Also relevant are the rehabilitation protections contained in the Rehabilitation of Offenders Act 1974. In brief, they allow for all but the most serious convictions to become spent after a period of time. Once a conviction is spent an individual is not generally required to disclose it and should not be prejudiced, in relation to their employment, by their criminal record. There is a power public policy rational for this system, which allows offenders to put their conviction behind them.

152. These rehabilitation provisions must be balanced with other public interests, in particular the need to protect members of the public, particularly children and vulnerable adults. This requires a wide range of exceptions to the general approach, that apply in certain situations.

153. All of this has resulted in UK's DBS Check system. In the widest sense, this aims to both allow employers (and others) to carry out appropriate checks in relation to an employee's criminal records, while also limiting the nature and scope of those checks to what is appropriate.

154. DBS checks are carried out through the Disclosure and Barring Service (DBS). There are three levels of DBS check:

a. Basic DBS check
b. Standard DBS check
c. Enhanced DBS check

155. A Basic DBS check contains details of convictions and conditional cautions that are considered to be unspent under the Rehabilitation of Offenders Act. An individual may apply for a basic check or an employer may apply if they have the individual's consent. Individuals may apply directly the DBS, while employers must apply through a Responsible Organisation, i.e. an organisation registered with the DBS to submit basic checks.

156. A Standard DBS check will contain, in addition to unspent convictions, spent convictions, cautions, reprimands and warnings. It is not possible for an

individual to apply for a standard DBS check. An employer may apply through a Registered Body. A Registered Body is an organisation that is registered with DBS to submit Standard, Enhanced and Enhanced with Barred Lists DBS checks and is legally permitted to request someone to reveal their full criminal history.

157. An Enhanced DBS check includes the information contained in a Standard DBS check, but also contains information recorded by police forces which the Chief Constable believe is relevant. This information may include arrests that have not lead to prosecutions, acquittals and, what might broadly be described as 'police intelligence'. Information should only be disclosed where a Chief Constable believes that it is relevant and should be disclosed. This exercise requires consideration of the rights of the individual and, in particular, their right to privacy. See, in particular, *R (L) v Metropolitan Police Commissioner* [2009] UKSC 3. A request for an Enhanced DBS check may also include a request to check the child barred list and / or the adults barred list (which identifies those individuals who may not work with children or vulnerable adults).

158. The legislative framework for this system begins in s4 of the Rehabilitation of Offenders Act 1974. This provides that if any question seeking information in relation to previous convictions etc is asked, either of the relevant individual or another person (outside judicial proceedings) the question must be treated as not relating to spent convictions.

159. That provision, however, is subject to the exceptions set out in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. There are myriad potential exceptions, many of which are plainly not relevant to the circumstances of this case. The key possible exceptions that might be relevant is that contained in Schedule 1, Part 2 and relate to vulnerable adults.

160. These include paragraph 12, which provides for an exception in relation to:

> *Any office or employment which is concerned with:*
>
> *(a) the provision of care services to vulnerable adults; or*
>
> *(b) the representation of, or advocacy services for, vulnerable adults by a service that has been approved by the Secretary of State or created under any enactment;*
>
> *and which is of such a kind as to enable a person, in the course of his normal duties to have access to vulnerable adults in receipt of such services.*

161. As well as paragraph 12A, which relates to regulated activity relating to vulnerable adults under the Safeguarding Vulnerable Groups Act 2006.

162. And paragraph 13, which provides for an exception in relation to:

> *Any employment or other work which is concerned with the provision of health services and which is of such a kind as to enable the holder of that*

employment or the person engaged in that work to have access to persons in receipt of such services in the course of his normal duties.

163. The requirements of the Rehabilitation of Offenders Act and the Exceptions Order are then reflected in equivalent provisions within the Police Act 1997 and the Police Act 1997 (Criminal Records) Regulations 2002, which deal with the operation of the DBS system itself.

164. In particular, s113A and 113B of the Police Act 1997 introduces the concept of an 'exempted question'. This, broadly, is a question that, applies to matters that would be excluded by the Rehabilitation of Offenders Act and therefore should only be asked in a circumstance which falls within one of the exceptions.

165. S113B, which deals with enhanced DBS checks, requires that any request for an enhanced DBS check must include a statement by the registered person that the certificate is required, for the purposes for a prescribed purpose. This is because, given the nature of an Enhanced DBS check it inevitable involves the asking (and answering) of an exempted question.

166. Prescribed purpose is then defined within the Police Act 1997 (Criminal Records) Regulations 2002. As with the Exceptions Order, there are myriad possible prescribed purposes, reflecting the wide range of different situations in which an Enhanced DBS check may be appropriate. The key possible prescribed purposes in relation to this case are set out at regulation 5B Work with Adults and, in particular, 5B(1)(b) and (c) which identify has prescribed purposes:

(b) the provision to an adult of regulated activity relating to vulnerable adults within the meaning of Part 2 of Schedule 4 to the Safeguarding Vulnerable Groups Act 2006;

(c) the provision of any activity mentioned in paragraph (6) to an adult who receives a health or social care service within the meaning of paragraph (9) or a specified activity within the meaning of paragraph (10), provided that the person carrying out the activity does so—

(i) at any time on more than three days in any period of 30 days;
(ii) at any time between 2 am and 6 am and the activity gives the person the opportunity to have face-to-face contact with the adult; or
(iii) at least once a week on an ongoing basis;

167. The s5(B)(6) definition of activity includes:

(a) any form of care or supervision;
(b) any form of treatment or therapy;
(c) any form of training, teaching, instruction, assistance, advice or guidance provided wholly or mainly for adults who receive a health or social care service within the meaning of paragraph (9) or a specified activity within the meaning of paragraph (10);

168. It was not in dispute that the end users of the respondent's services were receiving care from their local authorities and thereby receiving a health or social care service for these purposes.

169. The seriousness of the regulation of the various forms of DBS check is also apparent from the possible criminal liability that may arise. S123 Police Act 1997 provides for a number of offences. These includes knowingly making a false statement for the purpose of obtaining, or enabling another person to obtain, a certificate. Conviction of this offence may lead to imprisonment for up to six months.

Conclusions

170. The Tribunal reached the following conclusions.

Conclusions: Protective disclosures

171. Mr Tamponi relied upon four disclosures in relation to his automatically unfair dismissal claim:

a. His email of 13th January 2021 to Nigel Cook, raising concerns about the approach to Covid precautions
b. His email of 2nd March 2021 to Mr Kilduff, raising matters relating to the investigation / disciplinary process against him
c. Statements made to Mr Harryman, during the investigation meeting on 14th May 2021, relating to his allegation that he was being victimised by Mr McNicholas and Ms Dave.
d. His appeal from his dismissal, sent to Mr Mark Varley on 1st June 2021, p264-266

172. *13th January 2021 email*: The Tribunal concluded that the concerns Mr Tamponi raised in relation to Covid procedures were qualifying disclosures. Mr Tamponi genuinely believed that there were significant issues with the way that Medequip was dealing with the Covid risk. The Tribunal accepted Mr Tamponi's evidence that there was some confusion about the processing being applied and, in practice, the process of dealing with Covid items. That is also apparent from Mr Kilduff's conclusions in relation to the late January incident. The Tribunal concluded that Mr Tamponi had a reasonable belief that there were sufficiently serious problems that the health and safety of those working in the depot might be endangered and, in the context of the Covid pandemic, that this might risk others being infected. For the purposes of this case it is not necessary to resolve whether Mr Tamponi was correct. Medequip would no doubt say that their measures, while not perfect, were proportionate and sufficient. It is sufficient that the Tribunal was satisfied that the more negative view held by Mr Tamponi was one he reasonably held.

173. The Tribunal also concluded that Mr Tamponi reasonably believed that these issues were a matter of public interest. They were not issues that affected him alone, but all employees working in or attending the depot. Further, if appropriate Covid precautions were not taken there would be an increased risk not only to those individuals, but others that might be infected by them. This would include the public at large, but also Medequip's end users. These are

matters of wider public interest, that meant that Mr Tamponi's belief was reasonable.

174. The Tribunal concluded that the concerns raised by Mr Tamponi in relation to his subject access request were not a qualifying disclosure. This was because he did not hold a reasonable belief that the disclosure was made in the public interest. It related solely to the private disagreement between Mr Tamponi and Medequip. It did not sffect anyone else or raise any matter of public significance.

175. *2nd March 2021 email to Mr Kilduff:* The Tribunal concluded that the majority of this communication was not a qualifying disclosure, because it related only to the dispute between Mr Tamponi and Medequip. This was a private dispute with no wider implications and Mr Tamponi could not have reasonably believed that his communications were in the public interest.

176. The Tribunal carefully considered whether the allegations that Mr Tamponi made in relation to Mr McNicholas instructing him to commit fraud in relation to Medequip's contracts amounted to qualifying disclosures. The Tribunal conclude that they did not. In relation to the charging for reused parts, the Tribunal concluded that Mr Tamponi did not have a reasonable belief that this amounted to a breach of contract or fraud. The explanation provided by Medequip's managers was that parts used in repairs were charged at a fixed rate regardless of whether they were new or repaired. Mr Tamponi accepted in his evidence that he had not seen the contracts between Medequip and its clients. His explanation for his belief that he was being instructed to commit fraud was that such a clause was so commercially implausible that he could be confident that it did not exist in this form.

177. The Tribunal accepted that, in certain circumstances, such an inference alone could found a reasonable belief. But, in the circumstances of this case the Tribunal concluded there was nothing implausible or even particularly unusual for such a contract to operate on a fixed fee. Mr Tamponi's belief was therefore not reasonable.

178. In relation to charging for items unnecessarily, the Tribunal did not accept that Mr Tamponi had a reasonable belief that Mr McNicholas had acted in this way. The Tribunal accepted Mr McNicholas' evidence that he had never done so or said anything that might be understood as such. The Tribunal concluded that the more general disagreement with Mr McNicholas had led Mr Tamponi to view his actions and words in an unreasonably negative light. This can be seen, for example, by his unreasonable assumption that the contract could not possible involve a fixed fee for parts. This has led him to construe ordinary disagreement about the appropriate way of dealing with certain repairs / charging as Mr McNicholas instructing him to engage in fraud. There was, however, no basis to reach such a conclusion.

179. *14th May 2021 statements to Mr Harryman*: The Tribunal concluded that these were not qualifying disclosures because Mr Tamponi did not reasonably believe that they were in the public interest. They related solely to the private dispute between Mr Tamponi and Medequip, in that they were his allegations that he was being victimised by Mr McNicholas and Ms Dave. There was no wider public interest.

180. *1st 2021 appeal to Mr Varley*: The Tribunal concluded that these were not qualifying disclosures because Mr Tamponi did not reasonably believe that they were in the public interest. Again, they relate only to his private dispute between him and Medequip.

181. All of these communications were made by Mr Tamponi to his employer. To the extent that they were qualifying disclosures they were therefore protected disclosures pursuant to s43C ERA 1996.

Conclusions: Unfair dismissal

What was the principal reason for the claimant's dismissal?

182. The Tribunal concluded that the reason for Mr Tamponi's dismissal was that he had refused to undergo a DBS check, in contravention of his manager's instructions. This was a matter related to his conduct and therefore a potentially fair reason for the purposes of s 98(1).

183. Although the Tribunal accepted that Mr Tamponi had made a number of protected disclosures, as set out above, the Tribunal concluded that these were not the reason or principle reason for his dismissal. Indeed, none of the matters raised as potential disclosures had any impact on the decision to dismiss Mr Tamponi.

184. The Tribunal accepted the evidence of Mr Harris who made the decision to dismiss, that his conclusion was based on his view that that Mr Tamponi had refused and was refusing to undergo a DBS check. Mr Harris had not had previous contact with Mr Tamponi. During cross-examination, it was not suggested to Mr Harris that he was aware of the detail of the disclosures. Even if he had been aware, there is no apparent reason why they would have motivated his decision to dismiss. There was no information relating to him personally and no suggestion he was in any way implicated in any of the matters raised by Mr Tamponi. As a matter of chronology, he could not have been influenced by the fourth alleged disclosure, since that was made later in the course of the appeal from his decision.

185. Similarly, the Tribunal accepted that evidence of Mr Smith, who heard the appeal that his conclusion focused solely on the grounds of appeal and his assessment of Mr Harris' decision, rather than taking any account of Mr Tamponi's disclosures. Mr Smith had not been involved with any of the disclosures previously and it was not suggested to him in cross-examination that he was aware of them.

186. In both Mr Harris and Mr Smith's case there was a clear and straightforward explanation of their decision to dismiss. They had had been asked to deal with a disciplinary hearing and an appeal respectively, on the basis that Mr Tamponi was refusing the cooperate with a DBS check. DBS checks were routine within the employer and they had been told by HR that Mr Tamponi was required to have one. They proceeded to deal with the situation on that footing. It is inherently plausible that they would do so and nothing in

these circumstances suggests that their decision requires some ulterior motive to be explicable.

187. On this basis the Tribunal concluded that Mr Tamponi had not shown that there is a real issue as to whether the reason put forward by Medequip was not the true reason. If the Tribunal had concluded that this initial hurdle had been met, it would have concluded that the Respondent had established that the reason for dismissal was the refusal to undergo a DBS check.

188. For similar reasons, the Tribunal did not accept Mr Tamponi's suggestion that the decision to dismiss him was related to his complaint of discrimination on the 2nd March 2021. It was not suggested to Mr Harris or Mr Smith that they were aware of this complaint or that it had any influence on their decision. The Tribunal concluded that they were not and that it did not.

Did the Respondent have a genuine belief, reasonably held, that the Claimant had committed the alleged misconduct?

189. The Tribunal concluded that the respondent's belief that Mr Tamponi was refusing to undergo a DBS check was made on reasonable grounds. The underlying factual background to the allegation was not really in dispute. Mr Tamponi had clearly been asked to cooperate with a DBS check and he had objected. There was some significant dispute over the appropriate terminology, with Mr Tamponi objecting to the term 'refusal' on the basis that he was not making a categorical refusal, but rather wishing to receive further information and to see the Medequip DBS policy before agreeing. This, however, was a largely semantic dispute, rather than substantive one. It was clear to both Mr Harris and Mr Smith that Mr Tamponi had been asked to cooperate with a DBS check, that he had not done so, and that he was raising objections to doing so until he had received the information he requested.

Did the Respondent follow a fair procedure in dismissing the Claimant?

Was the decision to dismiss the Claimant within the range of reasonable responses open to a reasonable employer in the circumstances?

190. It is convenient to take these issues together, given the circumstances of the case.

191. In relation to establishing the facts of Mr Tamponi's actions, Medequip's investigation was fair. For the reasons set out above, the underlying facts were not substantially in dispute. During the process Mr Tamponi sought to raise a number of matters related to the actions or behaviour of other individuals, in particular Mr McNicholas and Ms Dave. But these were tangential to the point that Mr Harris and Mr Smith needed to resolve; namely whether Mr Tamponi had been instructed to undergo a DBS check and whether his refusal to do so warranted disciplinary action. It was legitimate and within the range of reasonable responses for both Mr Harris and Mr Smith to avoid being drawn into those peripheral matters in order to focus on the DBS check issue.

192. The Tribunal concluded, however, that in considering the DBS check the Respondent failed to act fairly. The fundamental problem with the approach

taken by both Mr Harris and Mr Smith was to regard the carrying out of a Enhanced DBS check as a matter of routine, which was little different to any other common management instruction. Neither appreciated that they were dealing with the operation of a carefully regulated statutory regime, which seeks to place strong controls on the use of DBS checks.

193. In this context, the concerns being raised by Mr Tamponi in relation to the DBS check were reasonable. It is clear from the evidence from Medequip's witnesses that the vast majority of Medequip employees did not raise concerns and appear to have been happy to cooperate with these checks. That does not, however, mean that Mr Tamponi's concerns were unreasonable. There will inevitably be a range of views on such matters within a workplace. Matters like privacy rights, data protection or the proper use of DBS checks may be a minority interest in many workplaces. This does not make those important rights less significant.

194. Neither Mr Harris or Mr Smith appreciated the strict limitations on the use of Enhanced DBS checks. Nor did they appreciate the extent that Enhanced checks involved substantial interference with both the default operation of the Rehabilitation of Offenders Act and, most importantly, with anindividual's rights. For that matter, neither Mr Harris or Mr Smith appreciated the distinction between the different types of DBS checks. It is fundamental to the operation of the DBS system that Enhanced DBS Checks can only be conducted in extremely limited circumstances. That is not a technicality to be taken lightly, but an important principle of the DBS regime.

195. This approach meant that both Mr Harris and Mr Smith approached the issue on the basis that the instruction to Mr Tamponi to undergo an Enhanced DBS check was self-evidently a reasonable one. They may have appreciated that there were some limitations on the use of DBS checks – both referred in their evidence to their requirement stemming from Medequip's work with vulnerable adults. But they did not have any knowledge of the detail of the exceptions or their basis. That meant that they did not carry out any analysis of whether Mr Tamponi, in fact, fell within one of the exceptions.

196. This was at the very least a contestable issue. The Tribunal's own view, on the basis of the evidence that it heard, was that Mr Tamponi would probably not have fallen within any of the exceptions. In submissions, Medequip sought to argue that he would have fallen within regulation 5B(1)(c) of the Police Act 1997 (Criminal Records) Regulations 2002, pursuant to subsection (6) (c) – which deals with training, instruction, assistance, advice or guidance provided to adults receiving health and social care. There are two difficulties with this argument. First, it is not clear that Mr Tamponi's actions when helping deliver or collect equipment, which might involve short discussions with an end user, would amount to such training, instruction, etc. Second, on the basis of Mr Tamponi's uncontested evidence, he was not undertaking such work with the frequency required by 5B(1)(c).

197. It is not, however, necessary to resolve this issue for the purposes of this case. The point is that neither Mr Harris or Mr Smith undertook any consideration of this issue, because they did not appreciate it was necessary. Nor did they (or anyone else) give a clear explanation to Mr Tamponi, beyond the assertion that the check was required because HR and / or the contract with

Medequip's clients required it. It is particularly notable that Mr Tamponi was told that there was a DBS Policy and told that he would be provided with it, but was not.

198. From the perspective of both Mr Harris and Mr Smith, their position was somewhat understandable. They are both operational managers, not lawyers or HR professionals. They both relied upon the information provided to them by HR and, in particular, from Ms Dave in her note prepared for Mr Tamponi.

199. The Tribunal must, however, judge the fairness of the employer's action as the employer as a whole. An employer making decisions in a difficult and complex area of law can only do so fairly if reasonable steps are taken to ensure that those charged with the decisions are adequately informed so that they are in a position to take a reasonable decision. The focus must be on the employer's decision and its fairness, not whether an individual manager has themselves acted reasonably.

200. Put another way, in order to act reasonably, an employer carrying out DBS checks (including disciplining an employee for refusing to undergo one) must collectively give some thought to the legal basis on which they wish to carry out the check and communicate that basis to their employee. And those charged with making the ultimate decision in relation to a dismissal must have sufficient understanding of the statutory regime to be able to properly consider the issues and make fair decisions.

201. This does not mean that a) individual managers taking such decisions are expected to have a complete legal understanding of applicable law in the same way that a lawyer does or b) that an employer will act unfairly if, on a difficult or ambiguous issue, they reach a different conclusion to a Tribunal.

202. In relation to individual managers, it would place a whole unrealistic burden on them if they were expected to deal directly with the Statutes, Regulations and Orders concerned. They are likely to make decisions based on policies, guidance and advice provided to them by HR advisors or similar functions within their business – or from the government guidance. It is certainly not necessary for there to be formal legal advice, either in a particular case or on the policy generally. It may be based on guidance or general HR advice. They extent of detailed consideration of the statutory regime that is required for fairness will depend on the circumstances of any individual case. In particular it is likely to depend on the resources of the employer and the extent to which DBS checks are an important part of their operations. In short, a small organisation dealing with the DBS system on an ad hoc or one-off basis is not the same as a large organisation that deals with the DBS system often. In this context, Medquip is a substantial business that routinely carries out DBS checks for hundreds of employees.

203. To some degree, that appears to have occurred at Medequip. Ms Dave's statement, with its reference to the Rehabilitation of Offenders Act 1974 (Exceptions) Order suggests that she may have had a more detailed understanding of the statutory regime than either Mr Harris or Mr Smith. If she did, however, it was not communicated to them or to Mr Tamponi. If there was a DBS policy that provided more information about Medequip's view, they did not consider it. Ultimately, neither Mr Harris or Mr Smith, despite their best

efforts, was in a position to reach a fair decision when they had no real understanding of the DBS scheme or the way in which it was said to apply to Mr Tamponi.

204. In relation to a situation where an employer reaches a different conclusion to that a Tribunal does, the Tribunal's focus must be on whether the employee has acted reasonably. If an employer has acted in good faith and reached a reasonable view about the applicable law the fact that a Tribunal might reach a different view would not render the dismissal unfair. The Tribunal accepted Medequip's submissions, following both *Farrant v The Woodroffe School* [1998] IRLR 176 and *Ford v Libra Fair Trades Ltd* (UKEAT/0077/08), that in considering a dismissal relating to the scope of an employee's duties, the Tribunal must focus on the genuine belief of the employer, not the Tribunal's view of the contractual position. This applies equally to considering the scope of a statutory regime, such as the DBS check system. The Tribunal may, however, (and in appropriate cases must) consider whether an employer's belief is reasonable – both in the sense of one that a reasonable employer might hold and one that has been reasonable investigated.

205. Here the Tribunal acted that the employer (in the form of Mr Harris and Mr Smith) genuinely believed the instruction to Mr Tamponi was reasonable. That conclusion, however, did not fall within the range of reasonable responses for the reasons above.

206. The Tribunal also regarded it as unfair that, in the disciplinary meeting with Mr Harris, Mr Tamponi was told that he would be provided with the policy, only then to be dismissed following an adjournment without either being provided with that policy or told that Mr Harris had reconsidered that issue. It was unfair, if Mr Harris had changed his mind not to explain that to Mr Tamponi and give him the opportunity to consider his position. No reasonable employer in these circumstances, faced with an employee who wishes to see a policy before taking action, would promise to provide it only to dismiss them without either providing the policy as promised or informing them of the change of mind, with some explanation.

207. In submissions, Medequip argued that many of Mr Tamponi's objections were the actions of an uncooperative individual, who wished to use the process to rehash and reargue other complaints. These points, however, were relevant to remedy, not liability. The Tribunal's focus must be on the fairness of the employer's decision, not the reasonableness of the employee's actions or their motives. An uncooperative or unreasonable employee remains entitled to a fair decision. The Tribunal accepted that an employee's actions may be an important part of the context of an employer's decision. But, in the circumstances of this case, even if all of Medequip's criticisms of Mr Tamponi in this regard were accepted, the failures to properly consider the legal position in relation to DBS checks or to provide any proper explanation of the respondent's view of that position to Mr Tamponi, remained sufficiently serious that dismissal fell outside the range of reasonable responses.

208. The Tribunal also accepted that Mr Tamponi was subject to a final written warning and that this was relevant to whether dismissal was within the range of reasonable responses. Mr Tamponi being subject to the warning was not, however, sufficient to render the dismissal fair. The Tribunal concluded that

that a written warning is primarily relevant when judging the appropriateness of the sanction of dismissal, given the severity of an employee's misconduct. It did not mean that Mr Tamponi was not entitled to have the issue of the DBS check properly considered or to be provided with a proper explanation. In this case, these were the primary causes of potential unfairness. This meant that the written warning was less significant factor than it might have been in different circumstances, although it might be relevant to decisions on remedy.

Conclusions: Race discrimination

Did the respondent a) request information from the claimant about his settled status; b) request evidence of his application for settled status by 15.01.2021, c) warn him that the continuity of his employment would be at risk if he failed to do so.

209. The Tribunal accepted that Medequip did request information from Mr Tamponi as alleged and did warn him that the continuity of his employment might be at risk.

Did the respondent discipline the Claimant?

210. It is common ground that the respondent did subject Mr Tamponi to a disciplinary process in relation to the January 2021 scrapping incident.

Did this amount to a detriment?

211. In relation to the communications around settled status, the Tribunal concluded that this was not a detriment. The respondent's communications about the settled status position were entirely innocuous. It was not a detriment to communicate in this way with Mr Tamponi.

212. If Mr Tamponi had been singled out in some way or subjected to hostile or badgering communication in some manner, that might have amounted to a detriment. But that was simply not the nature of the communication that took place. The respondent sought to inform its employees as to its understanding of their immigration position, give guidance about the appropriate steps they would need to take and request that it be kept informed. The references to continued employment being at risk were not threats from Medequip, but an explanation of the potential risks if an employee lost their right to work in the UK as a result of the changes arising from Brexit.

213. Mr Tamponi has criticised the account of the law provided by the respondent. The Tribunal has not considered these criticisms in detail, because in its view they take the matter no further. Even if the respondent was mistaken in the detail of the advice it gave, an attempt in good faith to give advice of this nature does not become a detriment by reason of such an error. Even if some of the detail could be criticised, the fundamental message: that employees working in the UK pursuant to EU rights were likely to need to make an application for settled status in order to retain those rights was correct.

214. Subjecting Mr Tamponi to a disciplinary process was, self-evidently a detriment.

Was it because of Mr Tamponi's race?

215. It is plain that the communications about EU settled status occurred because of Mr Tamponi being an EU National. In context, however, this was in connection to his immigration status as an EU National; not his nationality or national origin separate to its consequences for his immigration status. Following the Supreme Court's guidance in *Onu* therefore, the Tribunal concluded that this was not because of his race.

216. In relation to subjecting Mr Tamponi to a disciplinary process, the Tribunal concluded that this had nothing to do with his race or his immigration status.

217. In relation to disciplinary action relating to the January 2021 scrapping incident, the Tribunal accepted Mr McNicholas' evidence that he had begun his investigation because he had received a complaint from Mr Nuttman. The Tribunal also concluded that his investigation was carried out honestly. Mr McNicholas' decision to conduct the investigation and its outcome was all made in good faith. It was not, as Mr Tamponi argued, an attempt to scapegoat or retaliate against him.

218. In relation to the fact that Mr Tamponi was subject to a disciplinary process in relation to his failure to report a breach of the Covid procedures, when other employees were not, the Tribunal concluded that this was unrelated to his race. It arose from a number of unrelated factors. The issue of Mr Tamponi's conduct had been raised with Mr McNicholas by Mr Nuttman and he acted on that basis. No similar complaint or issue had been raised in relation to other employees. The other employees told Mr McNicholas during his investigation that they did not believe there had such a breach. This was a significantly different position to Mr Tamponi's. Finally, other employees were not facing a separate disciplinary charge. The Tribunal concluded that these significantly different circumstances were the cause of the difference in treatment, which was unrelated to Mr Tamponi's race.

219. Even if the Tribunal had accepted Mr Tamponi's evidence that Mr McNicholas and Ms Dave had been motived by dislike of him or that their actions had been unreasonable, that would not have been sufficient to reverse the burden of proof. The Tribunal did not consider that any of the evidence suggested that their opinion of Mr Tamponi or their actions was influenced in any way by his race. There was no 'something more' as required by *Madarassy v Nomura International*.

220. The Tribunal rejected Mr Tamponi's argument that the Tribunal should draw an inference from the communications around EU settled status. As set out above the Tribunal concluded that these were innocuous and could not support any such negative inference.

Time limits

221. The ACAS Early Conciliation period was between 17th August 2021 to 28th September 2021. The claim was lodged on 15th October 2021. This means that the claims of race discrimination were brought outside the statutory time limit. Given the findings of above and that Mr Tamponi has not presented any good reason for the delay in bringing his claims, the Tribunal concluded that it was not just and equitable to extend time.

Next steps

222. The case will now be listed a one-day hearing to consider remedy. The Tribunal notes that, at this stage, no conclusions have been reached in relation to remedy, including the issues of potential reductions for contributory fault and Polkey reduction set out in the list of issues.

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Employment Judge Reed

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Date: **10th January 2024**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: **19th January 2024**

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FOR EMPLOYMENT TRIBUNALS

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