Neutral Citation Number: [2023] EAT 165

Case No: EA-2022-000402-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane London, EC4A 1NL

Date: 28 November 2023

Before:

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between:

(1) BRITISH BUNG MANUFACTURING COMPANY LTD **Appellant**

(2) MR J KING

- and –

MR A FINN **Respondents**

- -
- -

MS G CHURCHHOUSE (instructed by **Ramsdens Solicitors LLP**) appeared for the **Appellants**
The Respondent appeared in person, assisted by his son, Mr R Finn

Hearing date: 28 November 2023

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JUDGMENT

SUMMARY

HARRASMENT; UNFAIR DISMISSAL; CONTRACT OF EMPLOYMENT

The Tribunal's conclusions to the effect that the Claimant had been harassed in relation to his sex, and unfairly and wrongfully dismissed, had displayed no error of law, including perversity. All three grounds of appeal which had been permitted to proceed to a full hearing were dismissed. In relation to ground 1, the Appellants' submission that, in order for unwanted conduct to relate to sex, it must relate to a matter which is both inherent in the gender in question and in no-one of the opposite gender was not rooted in authority and ran contrary to the purpose of section 26 of the Equality Act 2010.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

1. In this judgment, I refer to the parties by their respective statuses before the Leeds Employment Tribunal (Employment Judge Brain; Mr Dorman-Smith; and Mr Lannaman) This is the Respondents' appeal from the Tribunal's conclusions that the Claimant had been: (1) harassed for a reason related to his sex, contrary to sections 26 and 39 of the Equality Act 2010 (the 'EqA'); (2) unfairly dismissed, contrary to sections 94 and 98 of the Employment Rights Act 1996 (the 'ERA'); and (3) wrongfully dismissed. Three grounds of appeal (respectively numbered 1, 3 and 4) have been permitted to proceed to a full hearing.

The facts

2. The Claimant was employed by the First Respondent, as an electrician, between 22 September 1997 and 25 May 2021, on which date he was dismissed summarily for gross misconduct, having previously had an unblemished disciplinary record. The Tribunal found that the First Respondent was a small family business, which employed around 30 employees; a workforce which was predominantly, if not exclusively, male. "Industrial language" was found to have been commonplace on the shop floor. On 31 July 2019, following an altercation between the Claimant and the Second Respondent over the removal of covers from a machine which had been awaiting specialist repair, the Second Respondent called the Claimant a "bald cunt" and threatened him with physical violence. The Claimant provided a formal statement to his supervisor and the Second Respondent acknowledged that his behaviour had been as described. The Claimant's evidence was that he had been told that the Second Respondent

had been raising a young child on his own and that, should he (the Claimant) wish to take matters further, it could result in the Second Respondent losing his job. The Claimant, therefore, had decided to draw a line under the matter and move on. The Second Respondent had received a warning regarding his conduct. Nothing further of note happened between them until 26 March 2021. On that date, the Second Respondent became involved in a disagreement between the Claimant and the Second Respondent's line manager, on the factory floor. The Tribunal found that he had threatened the Claimant, but rejected the Claimant's evidence that he had also made pejorative remarks about the Claimant's age and appearance. In a distressed state, the Claimant had told Messrs Steer and Taylor (respectively the First Respondent's Managing Director and Company Secretary) that he had had enough of the Second Respondent's behaviour and that, should they not fire him, "that would be it". He had then left the workplace. There had been no contact between the Claimant and the First Respondent until 8 April 2021, on which date contact had been initiated by the Claimant, upon receipt of his payslip, from which it had been clear that he had been paid only statutory sick pay for the period of his absence. He had complained that he had received no communication from the First Respondent to check up on his welfare. The First Respondent's evidence was that it had received legal advice to the effect that it had been under no obligation to pay the Claimant, given that he had been absent without leave, but had decided to pay him SSP so that he would receive some remuneration. The Tribunal found that the Claimant's period on furlough had come to an end in March 2021 but that, understandably, he had considered himself to have been

working only on an ad hoc basis and might have been left uncertain as to whether he had needed to contact the First Respondent after 25 March 2021.

3. On 9 April 2021, the Claimant's son ("Robert Finn") sent an email to Mr Taylor, on behalf of the Claimant. He noted that the Claimant wanted and needed to work and expressed concern that he had been paid only SSP. He sought confirmation that the Claimant would be required to attend work on the following Monday, 12 April, alternatively that he would continue to receive furlough pay. On the same date, Mr Taylor wrote to the Claimant inviting him to attend an investigation meeting, on 13 April. The Tribunal recorded the ensuing position at paragraphs 57 to 62 of its reasons:

> **"57. The claimant's account … is that he was concerned about the prospect of attending the investigation meeting unaccompanied. The claimant and Mr Finn resolved to attend the investigation meeting together in the hope that Mr Finn may be permitted to attend. The evidence from the claimant and Mr Finn is that they apprehended that Mr Finn may not be permitted to attend the meeting as he was not a trade union representative nor an employee of the respondent. Accordingly, they decided to prepare a written statement of events to assist the claimant were he to find himself in the meeting alone. The claimant says …that he turned to his son to assist as "he has taken lots of witness accounts as he is a police officer".**
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> **58. The claimant's statement was prepared on 11 April 2013. The claimant went to Mr Finn's house. Mr Finn typed the statement on his laptop. It is in the bundle at pages 80 to 83.**
>
> **59. … Mr Finn says that, "The most obvious and structured way of [the claimant] providing a 'witness statement' was to write it up on a blank 'witness statement' template. I have a blank statement template saved on the desktop on my laptop." He goes on to say … that, "The sole purpose of the document was that dad could assist the appointed investigators by giving them a true and accurate recollection of events. We both knew if he was in the meeting alone, he may miss parts of the conversation, get confused and be of minimal help to whoever spoke to him and the workplace investigators."**

> **60. … Mr Finn says that, "The statement was made using a blank generic template. I was not on duty. It has not been attached to any crime reports. I have not countersigned it in any capacity. A rear was not completed [sic], there was no need as the document was never to be used by anyone within the police. The content of the account makes no reference to the matter being reported to or investigated by West Yorkshire Police in any way whatsoever. It was simply a structured and legible document intended to help them investigate my dad's complaints and allow him to get back to work and for them to deal with the matter internally." …Mr Finn says, "I defaulted to the only way of providing a witness account that I had used over numerous years."**
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> **61. …the witness statement is at pages 80 to 83. We can see that it is headed 'West Yorkshire Police.' As Mr Finn said, it is in a template form. The top of the form says, 'WITNESS STATEMENT' (Criminal Justice Act 1967, s9; Magistrates' Courts Act 1980 s5B; Criminal Procedure Rules, Rule 16.2).' It is signed by the claimant within a box provided for that purpose at the top of the statement which contains the following wording: "This statement (consisting of four pages) (each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true." It is then dated 11 April 2021.**
>
> **62. The body of the statement gives an account of the incident of July 2019 and the incident of March 2021 and then the aftermath from the latter incident..."**

4. Robert Finn was not permitted to accompany the Claimant to the investigation meeting. The Tribunal found that his profession had not been referred to before the meeting had commenced; that he had not attended the First Respondent's premises in uniform; and that the sole basis upon which the First Respondent could have formed a view that the March incident had been a police matter had been the form of the document which the Claimant had presented at the meeting. Later that day, the Claimant was suspended on full pay. The Respondents' solicitors wrote to the Chief Constable of West Yorkshire Police enclosing a

copy of the witness statement which the Claimant had produced at the investigation hearing, stating:

> **'On its face this appears as if it were prepared by West Yorkshire Police and intended to induce our client to believe that the matters to which it refers have been reported to and [are] being dealt with by West Yorkshire Police. We have informed our client that it is unlikely that the police would involve themselves in an internal employment issue of our client, nor would there appear to be grounds to do so. We are, however, concerned to learn (from what [the Claimant] has told our client) that Mr Robert Finn is the son of the [Claimant] and employed by your Force. We should be grateful for your acknowledgment of receipt of this letter and confirmation that the matters which it raises are being investigated as we think they ought to be."**

The Respondent's solicitors also wrote to the Claimant, requesting:

> **'…. a written explanation… as to how this statement came to be made and provided to our client. In particular, we need to know how it came to be presented as if the matter was being dealt with by West Yorkshire Police with whom we understand your son is understood to have a connection. This matter..., and its implications [are] very serious which is why we are writing to you. For the same reason you should obtain immediate independent legal advice before you respond.'**

A response was requested by 4:00pm on 20 April 2021.

5. The Claimant replied on 19 April 2021. He explained that the statement had been prepared by him, with Robert Finn's assistance, in order to assist the First Respondent's investigations. He said that neither he nor Robert Finn had suggested at any point that the matter had been reported to the police and stated, *"I acknowledge now that the statement was regrettably provided via a blank template that did have three words 'West Yorkshire Police' on top of the first page. This was an oversight on my son's behalf. This was not done with the intention to mislead anyone, a fact that was emphasised to Mr Steer once he*

had noticed it". The Claimant went on to complain that the issue of threats of violence and harassment against him had still not been addressed.

6. On 12 May 2021, the Claimant was invited to attend a disciplinary hearing, convened in order to consider the following allegations, with a warning that his dismissal without notice for gross misconduct could result:

> **"1. That on 11 April 2021 in the course of an investigation of the conduct of [the Claimant] and others [the Claimant] provided a witness statement which falsely suggested on its face and by its content that it had been made to and taken by West Yorkshire Police in connection with the investigation of an alleged crime. It is alleged that [the Claimant's] intention was thereby to give the impression that there was a police investigation.**
>
> **2. It was only when you were challenged on the provenance of the statement that you admitted that it had been prepared by your son, who is understood to be a police officer.**
>
> **3. By reason thereof you have irreparably destroyed the trust and confidence which is required to exist between employer and employee."**

7. The Tribunal's findings as to the content of the meeting are set out at paragraphs 88 to 93 of its reasons:

> **"88. There is a transcript of the disciplinary meeting which is at pages 101 to 110. The transcript records that Mr Steer and Mr Taylor were present on behalf of the respondent.**
>
> **89. It appears from the document at page 95 that Mr Taylor had prepared a script with which to open the disciplinary proceedings. It appears from the transcript that Mr Taylor read the words on the script. The salient part is at pages 101 and 102 of the bundle. This records Mr Taylor saying as follows: "Ok. This is the company's grievance with [the statement at pages 80 to 83]. The company considers that the statement was presented in this way as a form of threat and intimidation towards the management investigating an employment issue. The company also considers it was also meant to purposely mislead the company that this employment issue had been reported to the police as a crime. The company does not believe that this was an honest mistake, that was premeditated. We don't find it credible that a serving police officer would make such a serious oversight as you have mentioned in your letter to our solicitors on 19 April**

of presenting such a statement involving a member of his family in an employment issue. When you were challenged about the official police witness statement and how inappropriate it was, realising your error of judgment you requested to take back the statement which the company refused. All that was required from yourself was a simple statement of facts from you about the incident on a blank piece of paper and signed by yourself. On the advice of our solicitor, a formal complaint has been made to West Yorkshire Police about this matter. The complaint has been acknowledged and logged, and we are awaiting a response". The claimant was then invited to reply.

90. The claimant had prepared his own script at pages 96 to 100. It appears from the transcript that the claimant read out the script. The salient part of the transcript is at pages 102 to 106.

91. The claimant said that he prepared the written statement in good faith and with no intention of misleading the respondent. He explained how it was that the witness statement came to be prepared on West Yorkshire Police notepaper. He says that he and Mr Finn both overlooked the fact that the template used was headed 'West Yorkshire Police' and the reference to the criminal statutes. The claimant said that he had not reported matters to West Yorkshire Police. It was not a criminal matter. He then prayed in aid his 24 years of exemplary service and submitted that dismissal would be a grossly disproportionate reaction on the part of the respondent. The claimant maintained that he had been the victim of criminal offences against him from other employees of the respondent.

92. Mr Taylor expressed scepticism about the claims of the claimant and Mr Finn that producing the statement in that form was an oversight. Mr Taylor said to the claimant that he could not understand why he (the claimant) had not simply prepared his statement upon a blank piece of paper.

93. Mr Taylor then said to the claimant that the matter had been reported to West Yorkshire Police (by the respondent). He then said (at page 109) that the respondent "will have to see what they come back with." Mr Steer reinforced what Mr Taylor was saying. He chimed in, "wait for their outcome, yeh." The claimant replied, "fair enough." Mr Taylor then reinforced the point by saying, "you know, and if they agree, then, you know, err, we'll probably have to wait for their response on that." The claimant replied "ok" to which Mr Taylor said, "we're not going to pre-empt any sort of decision at this meeting today."

8. On 25 May 2021, the First Respondent wrote to the Claimant informing him that he had been dismissed with immediate effect, stating:

> **"We are satisfied that you deliberately provided a witness statement which falsely suggested on its face and by its content that it had been made to and taken by West Yorkshire Police in connection with the investigation of an alleged crime. We are also satisfied that it was only when you were challenged on the provenance of the statement that you admitted that it had been prepared by your son, who is a police officer. We are also satisfied that you and your son then asked for the statement back. We do not accept your explanation or that you acted in good faith or that there was merely an oversight. You did not apologise. On the contrary, you said that you did not think that you had done anything wrong… We are satisfied that your actions amount to gross misconduct justifying your immediate dismissal. In light of your failure to apologise and insistence that you have done nothing wrong we are satisfied that it would be impossible to have trust and confidence in you as our employee."**

The Claimant was notified of his right to appeal, which he exercised by e-mail dated 26 May 2021.

9. The appeal was heard by Mr Gledhill and dismissed by letter dated 18 June 2021. The Tribunal found that:

> **"102. Mr Gledhill expressed himself *'satisfied that you deliberately prepared and provided the company with a statement which was intended to suggest that it had been taken by West Yorkshire Police. I do not accept that this was a mere oversight, as you said, and find your explanation to be incredible. I agree that you did not persist in deceit once you were challenged but you did wait to be challenged before confirming that the statement had been prepared by your son and you.'* Mr Gledhill said that he had taken into account the Claimant's mitigation on account of his length of service and unblemished record. Mr Gledhill noted that the Claimant was insistent that he had done nothing wrong. In the circumstances, therefore, Mr Gledhill's decision was to uphold Mr Steer's and Mr Taylor's sanction of summary dismissal."**

10. The Tribunal went on to record, at paragraphs 103 to 105:

> **"103. On 30 September 2021 West Yorkshire Police wrote to the respondent's solicitor … West Yorkshire Police concluded**

> **that the "service level" provided by Mr Finn was acceptable under the circumstances. However, there was a finding that Mr Finn should not have used the template form to create the statement and should just have used a blank piece of paper. The recommended outcome was for Mr Finn to "learn from reflection." The report, prepared by PC Khan of the Service Review Team, directed that Mr Finn's line manager was to be made aware of matters so that consideration could be given to arranging for Mr Finn to receive words of advice about his conduct and how matters were perceived by the respondent. The respondent was given a right of review.**
>
> **104. The respondent availed themselves of this opportunity …**
>
> **105. On 18 November 2021 West Yorkshire Police notified the respondent of the outcome of the review … From this, it appears that PC Khan had emailed the respondent on 24 August 2021 with his understanding of the respondent's complaint and asking for confirmation that his understanding was correct. PC Khan received no reply to his email and therefore proceeded upon the assumption that he had understood matters correctly. The review caseworker therefore upheld PC Khan's conclusions and declined to make any further recommendations for further action to West Yorkshire Police."**

11. At paragraphs 106 to 108 of its reasons, the Tribunal found:

> **"106. In his evidence given under cross-examination Mr Steer said that had the claimant offered an apology during the course of his disciplinary hearing then that '*would change the way we were thinking*'. Mr Steer said, '*We were waiting for* [the Claimant] *to apologise and admit that he's wrong, that's all it needed.'* Mr Taylor gave similar evidence when he was cross-examined. He said that, *'It would have helped* [the Claimant] *to hold his hands up and acknowledge that it was wrong and intimidating. If he'd said that we could possibly look at matters differently.'***
>
> **107. In his cross-examination of Mr Gledhill, Mr Finn asked whether had the claimant been apologetic there may have been a different outcome. Mr Gledhill replied in the affirmative.**
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> **108. In his letter dismissing the appeal.., Mr Gledhill had said (by reference to the issue of awaiting West Yorkshire Police's report) that he was satisfied, *'that it was reasonable to conclude that there was no reason to wait, as that is a separate***

> ***issue, which would not have a direct bearing on your employment.*"**

12. Having considered the law relating to the numerous claims brought by the Claimant, the Tribunal set out its conclusions. It accepted that the reason for dismissal had been the Claimant's conduct in having presented a witness statement in the relevant format, finding that, *"There can be no question that the Respondent had reasonable grounds upon which to sustain a belief that the Claimant had committed the misconduct in question. There is no dispute that the witness statement in that format was prepared by the Claimant and was presented by him to Mr Taylor and Mr Steer."* At paragraphs 175 to 184 and 188, the Tribunal concluded:

> **"175. The issue therefore is whether the respondent could reasonably believe that the statement falsely suggested on its face and by its content that it had been made to and taken by West Yorkshire Police in connection with the investigation of an alleged crime. It is difficult to see how the Tribunal [could] conclude anything other than that it fell within the range of reasonable responses for the respondent to so conclude. As has been said several times now, the statement is headed 'West Yorkshire Police.' It makes reference to criminal statutes and rules of procedure. It is endorsed by a statement of truth signed by the claimant. The claimant has signed the statement on each page in accordance with that statement of truth. Mr Steer and Mr Taylor are not criminal lawyers. They are not police officers. In our judgment, to the educated but untrained eye, the statement has all the hallmarks of having been made to West Yorkshire Police in connection with the investigation of an alleged crime.**
>
> **176. We are also satisfied that Mr Steer and Mr Taylor could reasonably conclude that it was only when challenged upon the provenance of the statement that the claimant volunteered that the statement had been prepared by or with the assistance of Mr Finn. We found as a fact that Mr Finn was not introduced as a police officer when he and the claimant arrived at the respondent's premises and met with Mr Taylor and Mr Steer. The claimant does not say in his evidence in chief contained in his printed witness statement that he introduced the statement with any kind of pre-amble to**

explain its provenance. Had he done so, doubtless it would have been less of a shock and surprise to the respondent.

177. We are satisfied therefore that the respondent had reasonable grounds to believe that the claimant was guilty of the conduct alleged in the first and second paragraphs of the letter of 12 May 2021… which convened the disciplinary hearing. There are in reality only two allegations. Paragraph 3 of the letter of 12 May 2021 (that by reason of his conduct the claimant had irreparably destroyed trust and confidence) is not an allegation in and of itself but rather, it seems to us, a consequence of the allegations in the first two numbered paragraphs.

178. The next issue therefore is whether the respondent formed such a reasonable belief after having carried out as much investigation into the matter as was reasonable. This encompasses the carrying out of a fair procedure.

179. There was in reality little for the respondent to investigate. The claimant's conduct was plain for all to see.

180. However, there is merit in the claimant's criticism of some of the procedure carried out by the respondent. It is well established (upon the authority of Khanum v Mid Glamorgan Area Health Authority [UK EAT 1979]) that a disciplinary hearing must fulfil three basic requirements of natural justice. These are firstly that the person should know the nature of the accusation against them, secondly, that they should be given an opportunity to state their case and thirdly that the 'domestic tribunal' (i.e. the employer) should act in good faith.

181. Upon this latter requirement, we find the respondent to be wanting. There is little doubt, in our judgment, that the claimant was led to believe that no decision would be made by the respondent pending hearing from West Yorkshire Police with the outcome of their enquiries. We refer to paragraph 93. There may be some merit in Miss Churchhouse's point that whatever view the police took of matters, this did not detract from the claimant's culpability. That may be the case. The respondent will doubtless have been better not to have raised this as an issue. However, having said that they would await the outcome of the West Yorkshire Police investigations, it is in our judgment an act of bad faith to then dismiss the claimant only two working days later. Mr Gledhill accepted, in the appeal, that nothing had been heard from the police between 21 May and 25 May 2021.

182. Such an act of bad faith does, in our judgment, take the procedure followed by the respondent outside the range of

> **reasonable management responses. The respondent ought to have waited for the outcome of the police investigation. Failing that, at the very least, they ought to have informed the claimant of their change of mind and invited any representations from him. The respondent did neither.**
>
> **183. The claimant is also, in our judgment, correct in his submission that the appeal conducted by Mr Gledhill did not cure the unfairness caused by Mr Steer and Mr Taylor proceeding to dismiss him before the police's enquiries had been concluded. Mr Gledhill, in our judgment, compounded the error by saying that he could not see that the outcome of the police enquiry would have made any difference. That may be a valid point. However, Mr Gledhill did not engage with the central issue squarely raised by the claimant in his grounds of appeal (in paragraph 9) that the respondent had agreed to defer a decision pending the outcome of the West Yorkshire Police investigations. The respondent's approach was in breach of the requirement of natural justice per Khanum.**
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> **184. We also consider there to be merit in the claimant's criticism of Mr Taylor and Mr Steer in reaching a pre-determined view. The script read out by Mr Taylor was plainly couched in terms that the respondent had reached a concluded view of matters: ... We cannot accept Miss Churchhouse's submission that Mr Taylor was simply inviting the claimant to make representations. On any view, Mr Taylor was presenting the claimant with the concluded view which had already been reached. This is consistent with the respondent's peremptory decision to dismiss the claimant just two working days later and dilatory approach to the investigation. Again, this defect was not cured on appeal. Mr Gledhill did not engage with the issue when reaching his conclusions.**
>
> **…**
>
> **188. For the reasons given in paragraphs 180 to 184, it follows that the Claimant's complaint of unfair dismissal brought under sections 94 to 98 of the 199[6] Act succeeds…."**

13. Considering the application of **Polkey**[1] principles, the Tribunal stated:

> **"189. …In our judgment, this employer acting within the range of reasonable responses would have dismissed the claimant on 15 October 2021. The West Yorkshire Police report was issued to the respondent on 30 September 2021. Acting consistently with what had been said by the respondent to the**

[1] **Polkey v AE Dayton Services Ltd [1988] ICR 142, HL**

> **claimant at the disciplinary hearing, the respondent would then have been able to take action. Nothing in the report would have caused the respondent to alter their view as to the culpability of the claimant. The respondent could not have acted in good faith other than by awaiting the outcome of the police report or informing the claimant that their position had changed. There is no evidence that the respondent sought to expedite matters by chasing West Yorkshire Police for an outcome. Indeed, the evidence is to the contrary as PC Khan observed that the respondent had not replied to his email of 28 August 2021. Upon the evidence, therefore, we take the view that the respondent was content to allow matters to take their course and await the outcome of the police investigation without chasing the police for it and would have done so had they acted fairly.**
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> **190. The Tribunal has allowed a period of two weeks to enable the convening of the disciplinary hearing in order to give the claimant fair notice of it and consider the contents of the West Yorkshire Police report. We are satisfied that the respondent had reasonable grounds to conclude that the claimant was guilty of the misconduct alleged for the reasons given in paragraphs 174-177. For these reasons, we conclude that the respondent would fairly have dismissed the claimant on 15 October 2021. His length of service and good disciplinary record does not put it outside the band of reasonableness to dismiss. Some employers may have been persuaded to hold back from the ultimate sanction on account of these factors, but it cannot be said that others would not take the respondent's approach. The claimant would have been suspended on full pay in the meantime between the date of the unfair dismissal and the date upon which a fair dismissal may have taken place."**

14. Thereafter, the Tribunal reduced the basic award by 50 per cent, and the compensatory award by 75 per cent, to take account of the Claimant's culpable and blameworthy conduct:

> **"191. …It is difficult to see, frankly, how the claimant could have anticipated anything other than an adverse reaction from the respondent. It was foolish to present [a statement] in that form, particularly without any kind of warning or preamble before it was presented. The Claimant's conduct caused his dismissal. He also acted in a bloody-minded way by refusing to countenance an apology. The respondent made it clear in the letter of dismissal …that contrition may have found**

> **favour but still the claimant persisted with his steadfast view that he had done nothing untoward. Mr Gledhill said that an apology may have saved the claimant."**

15. Turning to the complaint of wrongful dismissal, the Tribunal found, at paragraphs 194 and 195:

> **"194. We now turn to the wrongful dismissal complaint. In our judgment, the claimant did not show an intention to abandon and altogether refuse to perform the contract. The respondent was reassured no fewer than seven times by Mr Finn immediately following the meeting of 13 April 2021 that no report had been filed with West Yorkshire Police and that the matter was not within their purview. The claimant's intention in presenting the statement to the respondent was to be helpful and to preserve the relationship. The claimant was anxious to get back to work and for the respondent to investigate Jamie King's conduct. By application of the principles in Tullett Prebon we have determined that objectively considered the claimant's conduct was not intended to undermine the relationship between him and the respondent but rather to preserve it. The claimant was not therefore in repudiatory breach of contract.**
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> **195. This is, of course, a different consideration to that under investigation upon the unfair dismissal complaint. There, the question is whether the respondent.., acting within the range of reasonable response[s], could reasonably have considered that the claimant was guilty of the misconduct alleged in presenting a document which upon its face suggested that the matter was with the police. The consideration upon the wrongful dismissal complaint is whether objectively the claimant was in repudiatory breach upon that day. This is a highly context specific question. Taking into account what happened both in the meeting and immediately afterwards we have concluded that the claimant was not in repudiatory breach. The complaint of wrongful dismissal therefore succeeds."**

16. The Tribunal's conclusions in relation to the complaint of harassment were set out at paragraphs 228 to 238 of its reasons:

> **"228. The harassment complaint centres on the incident[s] of 24 July 2019 and 25 March 2021. The claimant contends that upon both occasions the second respondent Mr King**

subjected to him to harassment related to age and sex by referring to him as "an old bald cunt."

229. The complaints of age discrimination fail upon the facts. We have determined that on 24 July 2019 the word "old" was not used. We have determined that on 25 March 2021 the claimant was not called an "old bald cunt" or even a "bald cunt." (The word 'old' plainly is inherently related to the protected characteristic of age).

230. The harassment complaint related to age upon the incident of 24 July 2019 and of age and sex arising out of the incident of 25 March 2021 therefore fail on the facts.

231. This simply leaves the incident of 24 July 2019 and the reference, on our factual findings, to the claimant as a "bald cunt." We have little doubt that being referred to in this pejorative manner was unwanted conduct as far as the claimant was concerned. This is strong language. Although, as we find, industrial language was commonplace on this West Yorkshire factory floor, in our judgment Mr King crossed the line by making remarks personal to the claimant about his appearance. The conduct was therefore unwanted. There is no evidence that the claimant complained about the use of industrial language towards him other than about the epithets 'old' and 'bald' and therefore we find that the claimant was particularly affronted by them.

232. We are satisfied that Mr King's conduct towards the claimant on 24 July 2019 was unwelcome and uninvited and therefore was unwanted. It is difficult to conclude other than that Mr King uttered those words with the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal recognises that the statutory language of violation, intimidation and hostility contains strong words. Of his own admission… Mr King's intention was to threaten the claimant and to insult him. Therefore, as Mr King said the words "bald cunt" with the purpose of violating the claimant's dignity and creating an intimidating, hostile etc environment for him the Tribunal need not go on to consider whether it was reasonable of the claimant to consider it to have that effect. That the claimant often expressed himself in Anglo-Saxon terms on the shopfloor matters not where the words by Mr King used had the proscribed purpose. Having said that, for the avoidance of doubt, we consider also that the claimant reasonably considered them to also have that effect for the reasons in paragraph 231.

233. It is for the claimant to show there to be a link between the unwanted harassing words on the one hand and the protected

characteristic of sex on the other. (We are not of course concerned with the protected characteristic of age given that we have found that Mr King did not use the word "old" on the day in question.)

234. Plainly, some words or phrases would clearly be related to a protected characteristic. Where the link is less obvious then Tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any negative association between the two.

235. In our judgment, there is a connection between the word "bald" on the one hand and the protected characteristic of sex on the other. Miss Churchhouse was right to submit that women as well as men may be bald. However, as all three members of the Tribunal will vouchsafe, baldness is much more prevalent in men than women. We find it to be inherently related to sex. (In contrast, we accept that baldness affects (predominantly) adult males of all ages so is inherently not a characteristic of age.)

236. In *InSitu Cleaning Co Limited v Heads* [1995] IRLR 4, EAT, it was held that a woman had been sexually discriminated against when a manager made a single comment to her about the size of her breasts. (The case arose before the enactment of the law of harassment and therefore had to be brought as one of sex discrimination.) The remark made was "hiya, big tits."

237. It may be thought that such a remark is inherently related to sex. However, a similar comment may be made to men with the condition of gynaecomastia. Upon Miss Churchhouse's analysis, therefore, were a complaint of harassment related to sex to be brought today by an individual in the position of the claimant in the *Insitu* case, it would fail upon the basis that it is possible for men with that medical condition to be subjected to the same remark (just as bald women may be subject to comments such as those made by Mr King) albeit that far more women than men will be liable to such harassing treatment.

238. In our judgment, this is not the correct analysis and… the proper analysis is to approach matters purposively. The object of the 2010 Act after all is to proscribe harassment within the workplace. It is much more likely that a person on the receiving end of a comment such as that which was made in the *In Situ* case would be female. So too, it is much more likely that a person on the receiving end of a remark such as that made by Mr King would be male. Mr King made the remark with a view to hurting the claimant by commenting on his appearance which is often found amongst men. The

> **Tribunal therefore determines that by referring to the claimant as a "bald cunt" on 24 July 2019 Mr King's conduct was unwanted, it was a violation of the claimant's dignity, it created an intimidating etc environment for him, it was done for that purpose, and it related to the claimant's sex.'**

17. For reasons which I need not rehearse, the Tribunal went on to hold that, for the presentation of the standalone complaint of harassment which it had found to have been made out, it was just and equitable to extend the primary limitation period.

THE GROUNDS OF APPEAL

18. On behalf of the Respondents, Ms Churchhouse advances three grounds of appeal, the first of which affecting both Respondents and the remainder the First Respondent alone:

    (a) **Ground 1:** The Tribunal erred in its approach to section 26 of the EqA in finding that the Second Respondent's use of the term "bald cunt", on 24 July 2019, constituted harassment related to sex. In particular it imported a disparate impact test which did not reflect the purpose of that provision, said to be to protect against harassment directed towards matters necessarily or inherently, but not contingently, connected to a protected characteristic. By that, Ms Churchhouse submitted, she meant that, in order to be related to sex, it would have to apply to that sex to the exclusion of the other. Even if it were the case that 99 per cent of those who were bald were male, the existence of the one percent who were female would mean that the act of which complaint was made could not be related to sex. Baldness, she contended, is not related to sex as both men and women can be bald, as, no doubt, women with alopecia, those receiving chemotherapy and others who

shave their heads for a variety of religious or cultural reasons could vouchsafe. Ms Churchhouse referred me to no authority supportive of her proposition. She relied on the absence of any indication to the contrary in the legislation and explanatory note, and sought to contrast the position with the wording of section 19(2)(b) of the EqA, relating to indirect discrimination. Ms Churchhouse submitted that, in importing the concept of disparate impact into section 26(1), the Tribunal had broadened the meaning of the words "related to" to an extent whereby the impact of the act did not have to be related to sex; if a majority of a particular sex has the characteristic to which the comment alludes, that would suffice. Had that been Parliament's intention, that would have been made clear. A woman in the circumstances giving rise to *In Situ Cleaning* would not be left without remedy because she would have a claim under section 26(2) of the EqA, which prohibits sexual harassment. Indeed, that case had been one of sexual harassment amounting to sex discrimination contrary to section 6(2)(b) of the Sex Discrimination At 1975.

(b) **Ground 3**: The Tribunal's conclusion that the Claimant's dismissal had been unfair had been perverse for four reasons:

(1) The Tribunal had concluded that, having led the Claimant to believe that it would await the outcome of the investigation by West Yorkshire Police, the First Respondent had acted in bad faith in breach of the requirement of natural justice by not awaiting that outcome, yet the police investigation had concerned the conduct of DC Robertson, not that of the Claimant, such that its outcome could

have had no bearing upon the Claimant's culpability, or, hence, the outcome of his disciplinary process. If, objectively viewed, a matter can have no causative relevance, it cannot be unfair to proceed or dismiss without having regard to it, Ms Churchhouse submitted.

(2) The Tribunal had further found, at paragraph 89 of its reasons, that the First Respondent had reached a pre-determined conclusion; it had recited the introductory remarks made by Mr Taylor at the disciplinary hearing, as apparent from the transcript of the latter. In fact, it was clear from that transcript that the wording in question had constituted introductory remarks, in fulfilment of the duty set out within the ACAS Code of Practice on disciplinary and grievance procedures, to identify the charges faced by the employee, albeit not verbatim. As the First Respondent had gone on to seek the Claimant's response to those charges, it was clear that the outcome of the process had not been pre-determined. Whilst the asking of questions would not itself establish the absence of pre-determination, it formed important context within which to assess the credibility of the First Respondent's witnesses. When questioned by the Tribunal as to whether the wording impugned demonstrated that a decision had been made, Mr Taylor's evidence had been, *"No, we were just trying to set out the reasons why he was in that meeting, nothing more and nothing less".* Mr Steer's evidence on the same point had been, *"No, that's based on the evidence we had as we awaited explanation regarding a statement by* [the Claimant]." Ms Churchhouse submitted that the Tribunal had made no reference to that evidence, nor had it provided

reasons for its rejection. On the evidence before the Tribunal, viewed in the round, there had been no basis for the Tribunal's conclusion that the decision to dismiss had been pre-determined.

(3) The Tribunal's characterisation of the dismissal as having been peremptory (paragraph 184) had been perverse, for the same reasons.

(4) The Tribunal's conclusion that the First Respondent's investigation had been dilatory had itself been perverse and had contradicted its earlier conclusion, at paragraph 179, that, *"There was in reality little for the Respondent to investigate. The Claimant's conduct was plain for all to see"*. Whilst it was not clear to what the Tribunal had been referring, it had made no other findings regarding the disciplinary investigation.

(c) **Ground 4**: It is said that the Tribunal's finding that the Claimant had been wrongfully dismissed constituted an error of law/was perverse. Ms Churchhouse submitted that the question for the Tribunal had been whether the Claimant's presentation of a witness statement on West Yorkshire Police headed notepaper, which had given the appearance of the issue having become a police matter, amounted to gross misconduct. She contended that, in accordance with **Neary & Another v Dean of Westminster [1999] IRLR 2888**, the question had been whether the Claimant's dishonesty had so undermined trust and confidence that the employer had no longer been required to retain him in its employment. **Briscoe v Lubrizol [2002] IRLR 26** required that the employer's conduct be viewed objectively, with the consequence that an employee can

repudiate the contract without an intention to do so. In reasoning that *"the claimant did not show an intention to abandon and altogether refuse to perform the contract"*, and in failing to set out and apply the test in **Briscoe** and in **Neary**, the Tribunal had erred in law. Had it addressed its mind to the correct question and considered the evidence, it could only have found that the Claimant had not been wrongfully dismissed.

(d) Additionally, it is said, the Tribunal came to a perverse conclusion that *''the claimant's intention in presenting the statement to the respondent was to be helpful and to preserve the relationship.''* That finding is said to be perverse in light of:

(1) the Tribunal's findings (at paragraphs 175 and 176 of its reasons) to the effect that the Claimant had known that the document had been submitted on West Yorkshire Police's headed notepaper, by which he was found to have submitted that there had been a live police investigation; and

(2) Mr Steer's and Mr Taylor's evidence, respectively at paragraphs 11 and 15 of the relevant witness statement, that, during the disciplinary meeting, when asked whether it was a police statement, the Claimant had said, *"So what if it is?"* (It is said that paragraph 78 of the Tribunal's reasons (considered below) did not reject that evidence.) Further, it is said, Mr Steer had been clear in his witness statement (at paragraph 26) that he had believed *"that the witness statement was prepared to deliberately and falsely suggest that it had been made to and taken by the West Yorkshire Police in investigating the company*

and Jamie… Tony was unapologetic during the disciplinary meeting for his actions. I remain satisfied that Tony's actions amount to gross misconduct" and that Mr Taylor had also been clear in his witness statement (at paragraph 23) that he had *"….believe[d] that the witness statement was prepared to deliberately and falsely suggest that it had been made to and taken by the West Yorkshire Police in investigating the company and Jamie… As a result of Tony's actions and him failing to acknowledge or apologise for his actions, we lost all trust and confidence in him as an employee. I remain satisfied that Tony's actions amount to gross misconduct."* Ms Churchhouse resiled from her original submission that Mr Gledhill's evidence, at paragraph 13 of his witness statement, that he had been *"….satisfied that the witness statement was deliberately prepared and provided to the company to intimidate and suggest that it had been taken by West Yorkshire Police"* was also of relevance to the claim of wrongful dismissal. Nevertheless, it was her submission that the Tribunal had failed to engage with, and provide reasons for disregarding, the First Respondent's case and supporting evidence that the Claimant had presented the document on West Yorkshire Police headed notepaper to intimidate and threaten the Respondents and that that conduct, in addition to his failure to apologise, had led to the breakdown in mutual trust and confidence justifying his summary dismissal.

THE CLAIMANT'S RESPONSE

19. As he was before the Tribunal, the Claimant was represented by Robert Finn, who sought to uphold each of the impugned findings on the basis of the Tribunal's own reasoning. In connection with Grounds 3 and 4, he made the following additional oral submissions, in reply to those of Ms Churchhouse:

(a) In relation to Ground 3, the outcome of the police investigation into his own conduct had not been irrelevant. The entire disciplinary process and the dismissal itself had been based upon the submission of a statement in the particular form. The only enquiries made by the Claimant's employer to understand its true provenance had been those made of West Yorkshire Police. Had the outcome of the police inquiry been awaited, and had there been a finding of serious misconduct on his (Robert Finn's) part, that would likely have been taken into account by the Claimant's employer. The enquiry made on the First Respondent's behalf by its solicitors had been set out at paragraph 80 of the Tribunal's reasons and had included a statement that its solicitors did not believe that the police ought to involve themselves in employment matters. That was important in demonstrating the view which they had taken that the issue was not a police matter but ought to be drawn to the attention of the Chief Constable in order to ascertain why the statement had been presented in the manner in which it had been. Furthermore, nothing in the arguments advanced by Ms Churchhouse before the EAT had demonstrated any error by the Tribunal, including perversity, in its conclusion that the First Respondent had reached a pre-meditated decision as to dismissal. As to the Tribunal's reference to a

dilatory investigation, whilst the Tribunal had not expanded upon the matters to which it had been alluding, it was probable that the finding had cross-referred to those made at paragraphs 53, 54 and 65 of its reasons, to the effect that the First Respondent had failed to speak to, and take statements from, key witnesses such as Mr Steel, who had been present at the relevant time; contact the Claimant before he had contacted his employer; and document or record the original investigation meeting into the events of 25 March 2021:

> **"53. Upon the same day as the claimant's email was received, Mr Hardcastle gave a contemporaneous statement about the events of 25 March 2021. That document… is consistent with Mr Hardcastle's printed witness statement. Mr King's contemporaneous witness statement following the 25 March 2021 incident is… dated 20 April 2021. Again, it is consistent with Mr King's printed witness statement. There was no satisfactory explanation as to why Mr King's statement was not taken until almost a month after the incident or why Mr Hardcastle's account was only given two weeks after the event.**
>
> **54. There is no evidence that the respondent undertook any investigation on or after 25 March 2021 until the claimant got in touch on 8 April 2021. It can, in our judgment, be no coincidence that Mr Hardcastle's witness statement was created upon the same day as the claimant's email. We have already seen that Mr Steel was not asked for a witness statement. The respondent's enquiries of him just seemed to fizzle out: see paragraph 32. The claimant could not know what, if anything, was happening with an investigation as he was not in work. However, he did of course know that no contact had been made with him by the respondent to enquire about the incident.**
>
> **…**
>
> **65. There are no contemporaneous notes of the investigation meeting. The claimant's account is in paragraph 30 of his witness statement. He says that Mr Taylor accused the claimant "of leaving the building without informing a supervisor on the last day I have**

> **been in work." The claimant says that he was somewhat discomfited by this remark as he understood that the purpose of the meeting was to investigate the claimant's complaint. The claimant says that Mr Steer remarked, "We had no idea why you left." The claimant says that as far as he was concerned he was "here to sort out the matter I'd reported to them regarding Jamie King." He then said that he had "written everything down in a statement to help them with their investigation" and handed over the document at pages 80 to 83. There were challenges by Ms Churchhouse to parts of paragraph 30 of the claimant's witness statement but not to his contentions that Mr Taylor asked him in accusatory fashion as to why he had left site on 25 March 2021 or of Mr Steer's observation that they had no idea why he had left the site.'**

(b) In relation to Ground 4, Robert Finn submitted that none of the transcribed comments upon which Ms Churchhouse had relied in her submissions provided strong evidence of any error by the Tribunal, or served to undermine its conclusion that the Claimant's intention had been to preserve the employment relationship. The Tribunal had itself highlighted inaccuracies in the evidence of Messrs Steer and Taylor, which had led it to reject their evidence in certain respects, and its conclusion had been justified by the evidence recited in its reasons.

THE RESPONDENTS' SUBMISSIONS IN REPLY

20. Ms Churchhouse made two submissions in reply, each in relation to Ground 3. She observed that the complaint made by the First Respondent's solicitors, as understood by West Yorkshire Police, had been set out in its response, dated 30 September 2021:

> **"The [First Respondent] complain[s] that DC Finn has inappropriately taken a statement from his father in relation to an**

> **internal dispute at his father's place of employment. The [First Respondent] consider[s] that this has been done to make the company believe that a criminal investigation has taken place into its actions."**

Thus, the focus has been on the actions of Robert Finn and not on those of his father. Further, she submitted that the criticisms made by paragraphs 53 and 54 of the Tribunal's reasons had related to the investigation of the altercation which had taken place between the Claimant and Mr King on 25 March 2021, rather than to the disciplinary investigation. By contrast, its findings at paragraph 184 must have related to the investigation preceding his dismissal because they had formed part of the Tribunal's consideration of that matter, which had commenced at paragraph 180, and related to the disciplinary charges which the Claimant had faced, themselves set out at paragraph 80 of the Tribunal's reasons.

DISCUSSION AND CONCLUSIONS

Ground 1: harassment related to sex

21. In my judgement, this ground of appeal lacks merit.

22. Subsections 26(1) and (2) of the EqA provide:

> **(1) A person harasses another (B) if —**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of —**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if —**
>
> **(a) A engages in unwanted conduct of a sexual nature, and**

> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**

The only issue on appeal is whether the Tribunal erred in law and/or reached a perverse conclusion in finding that Mr King's use of the term "bald cunt" had been related to a relevant protected characteristic; sex.

23. The Respondents' submission that, in order for the unwanted conduct to relate to sex, it must relate to a matter which is both inherent in the gender in question and in no-one of the opposite gender was not rooted in authority and, in my judgement, runs contrary to the purpose of section 26. In concluding, rightly, that baldness is more prevalent in men, the Tribunal was not importing questions of disparate adverse ***impact*** into its reasoning; rather it was recognising the fact that the characteristic by reference to which Mr King had chosen to abuse the Claimant was more prevalent in people of the Claimant's gender, more likely to be directed at such people, and, as such, inherently related to sex. By contrast, section 19 of the EqA is concerned with the application of a discriminatory provision, criterion or practice ("PCP") in relation to a relevant protected characteristic, as defined by subsection 19(2). A PCP is discriminatory if 'A' applies, or would apply, it to persons with whom 'B' does not share the relevant characteristic; it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; it puts or would put B at that disadvantage; and A cannot show it to be a proportionate means of achieving a legitimate aim. Nothing in the Tribunal's analysis indicated the adoption of such an approach.

24. I reject Ms Churchhouse's submission that the Tribunal's analysis of the position in **In Situ Cleaning** constituted a non sequitur undermined by the fact

that, under successor legislation, a claim would lie, for women in the same circumstances, under section 26(2) of the EqA. Nor was the Tribunal focused on whether such a claimant would be left without a remedy. The Tribunal was, pertinently, pointing out that the logic of the Respondents' position was that the fact that men who had a certain medical condition would also have the characteristic to which the comment made in that case had related, meant that it could not be said that the term "Hiya Big Tits" was related to sex. Whether or not such a claim would or could now be advanced under section 26(2) of the EqA, that was a position which the Tribunal rightly rejected, as a matter of law and common sense.

25. In the course of the hearing, I gave the parties time to consider **Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481**, in which this Tribunal, per Slade J, held (at paragraph 31):

> **"31. In my judgment, the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race….' in the Race Relations Act 1976 section 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice in the EqA 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment, the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant. It was said that without such evidence the ET should have found the complaint of harassment established. However, such evidence from the**

> **alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."**

26. Ms Churchhouse submitted that the context in this case was the fact that the abusive language used by Mr King had arisen in the course of an altercation, a context which shed no light on whether it had related to sex. In **Bakkali** itself, the context had been found to have been an earlier conversation between the two employees. Robert Finn's submission was that he could see nothing in **Bakkali** which enabled him to comment on whether it was relevant to the instant case. In my judgement, in a case such as this, the context of a remark said to constitute harassment within the meaning of section 26(1) of the EqA encompasses the prevalence amongst persons having the relevant protected characteristic of the feature to which that remark alludes and the absence of any other factor or circumstances said to explain the remark. From paragraph 234 of its reasons, it is clear that that is the analysis in which the Tribunal engaged, following which it concluded that [238], *"It is much more likely that a person on the receiving end of a comment such as that which was made in the In Situ case would be female, so too it is much more likely that a person on the receiving end of a remark such as that made by Mr King would be male. Mr King made the remark with a view to hurting the Claimant by commenting on his appearance, which is often found amongst men"*. Those were findings which it was open to the Tribunal to make, the appeal from which is dismissed.

Ground 3: unfair dismissal

27. Rightly, the First Respondent does not attack the Tribunal's finding that it (the First Respondent) had proceeded to dismiss, contrary to its earlier stated

position that it would await the outcome of the investigation by West Yorkshire Police. That finding was based upon the Tribunal's analysis of that which had been said to the Claimant at the disciplinary meeting and could not be said to be perverse. An employer's obligation, amongst others, to act in good faith includes that to deal fairly and openly with the employees. The First Respondent did not deal with the Claimant in such a way. It told him that it would adopt a particular course and then did not do so. No opportunity was afforded to the Claimant to address the employer's change of heart; the need to await the outcome of the police investigation; or its potential relevance to the disciplinary process. Ms Churchhouse's submissions elide the potential (lack of) relevance of the information to be yielded from the police investigation with the independent need for an employer to act in good faith. It may well be that the First Respondent could not have been criticised had it decided, at the outset, to proceed whilst the police investigation had been ongoing. I acknowledge, as did the Tribunal, that an investigation into Robert Finn's conduct might well have been likely to have yielded nothing, or very little, of relevance to the Claimant's own conduct, though it might have shed light on his motivation, and I note the First Respondent's solicitors' statement, when raising their complaint with the police, that, *"The [First Respondent] considers that this has been done to make the company believe that a criminal investigation has taken place into [its] actions."* Nevertheless, in my judgement, irrespective of its separate findings as to the pre-determination of the outcome, the Tribunal was entitled to conclude that, having first taken the view that the outcome of the police investigation ought to be awaited and informed the Claimant accordingly, and having then proceeded to dismiss him contrary to that decision and without

having sought representations as to the way forward, the First Respondent had acted in bad faith and that the disciplinary process had been flawed for that reason. The high hurdle for a perversity appeal is not surmounted. The Tribunal's conclusion that it would have taken until 15 October 2021 for a fair procedure, culminating in dismissal, to have run its course is not itself subject to challenge.

28. I turn to Ms Churchhouse's submissions relating to the Tribunal's finding of a pre-determined conclusion, which may be taken briefly. The transcribed introduction to the disciplinary hearing, recorded at paragraph 89 of the Tribunal's reasons and recited above, extended far beyond an explanation of the complaint against the Claimant and clearly set out the First Respondent's conclusions. It cannot be said that the Tribunal's finding to that effect was perverse. Nothing in the exchanges which followed, or the fact that the Claimant had then been asked questions, detracted from that. Furthermore, a flavour of the "questions" asked, consistent with Mr Taylor's introductory words, may be gleaned from the following extract from the transcript:

> **"AF (Claimant): There's nothing, there's nothing wrong or illegal with it, it's, it's a statement.**
>
> **DT (Douglas Taylor): Well, there is….**
>
> **MS (Michael Steer): It is because it's intimidating as soon as I see West Yorkshire police.**
>
> **AF: No, it's just a statement.**
>
> **MS: No, it's not….**
>
> **DT: But why would you, why would you do it on a West Yorkshire Police witness statement, why didn't you just do it on a, a blank piece of paper and just sign it?**

> **AF: We've explained, we've explained that reason, it's all been explained to you.**
>
> **DT: But, but, but there's, there's some thinking going on by doing it in that format.**
>
> **AF: It's all been explained why it's been done like that.**
>
> **MF: Well I find it intimidating when someone…**
>
> **AF: Well that's your interpretation, but it's never meant to be…**
>
> **MS: Something with the criminal act….**
>
> **AF: It was never meant to be intimidating.**
>
> **MS: And West Yorkshire Police statement.**
>
> **AF: No, it was just simply a statement and my son helped me with.**
>
> **DT: Well, I think you know it's been done, as Mick says, to intimidate, I think it's been pre-meditated to present it in that way….**
>
> **AF: No. No, it hasn't.**
>
> **DT: And we view it as, er, a sort of threat.**
>
> **…"**

29. Whether or not the Tribunal recited the evidence given by Messrs Taylor and Steer, to the effect that they had simply been setting out the reason for the disciplinary meeting and seeking the Claimant's explanation, it permissibly reached the conclusion which it did; indeed, Ms Churchhouse's primary submission before me as to the nature of the introductory wording, as transcribed, was that it spoke for itself. I agree, though I reject her interpretation of it and conclude that the Tribunal was entitled to do so. Ms Churchhouse's attack on the Tribunal's characterisation of the Claimant's dismissal as peremptory is based upon the same analysis and advances matters no further.

30. The Tribunal's reference to "the investigation" as having been dilatory is said to have been "consistent with" its finding of predetermination, from which it

follows that it did not itself constitute the primary basis of the Tribunal's finding that the First Respondent had reached a concluded view of matters by the outset of the disciplinary hearing. The framing of paragraph 184 makes that clear. Whilst it is not clear to which investigation the Tribunal had been referring, I accept Robert Finn's submission that the intended reference was to the investigation into the Claimant's own grievance against the Second Respondent. The word dilatory means slow to act, or tending to delay. That was the effect of the findings which the Tribunal had made at paragraphs 53 and 54 of its reasons, which were not themselves said to be, or arguably, perverse. In any event, the reference to a dilatory investigation was itself said to be "consistent with" the Tribunal's finding of pre-determination, the latter independently founded on the First Respondent's conduct at the disciplinary hearing.

31. Finally, the Tribunal's finding of unfair dismissal rested upon the act of bad faith and on the First Respondent's pre-determined view. In order to succeed on Ground 3 of this appeal, both findings would need to be the subject of successful challenge. In the event, neither succeeds. There is nothing in any of the limbs of this Ground of Appeal.

Ground 4: wrongful dismissal

32. This ground may also be dealt with briefly. The thrust of Ms Churchhouse's submissions was that the Tribunal's finding that the Claimant had been wrongfully dismissed had resulted from its failure properly to have applied the applicable legal principles to the evidence before it; evidence from which it had also drawn perverse conclusions.

33. In the course of discussion, Ms Churchhouse acknowledged that no issue was to be taken with the Tribunal's summary of the applicable legal principles, at paragraphs 138 to 141 of its reasons:

> **"138. Again, whether the employee was guilty of repudiatory conduct is a question of fact. It is for the Tribunal to make its own determination as to whether objectively the employee was in repudiatory breach entitling the employer to bring the contract to an end summarily. Upon [a] wrongful dismissal complaint, therefore, it follows that the Tribunal may substitute its own view for that of the employer.**
>
> **139. What is meant by a repudiatory breach? There has been extensive case law upon this issue and the test has been expressed in a number of different ways. The essence of matters however is that there must be conduct inimical to trust and confidence or a deliberate flouting of the essential contractual conditions or which is sufficiently serious and injurious to the relationship such as to lead to a conclusion that the defaulting party no longer intends to be bound by the contract.**
>
> **140. During the course of her closing submissions, the Tribunal asked Miss Churchhouses' observations upon the issue of the intention of the putative contract breaker. In other words, is it legitimate for the Tribunal to take into account the claimant's intentions? The Tribunal referred the parties to the case of *Tullett Prebon Plc v BGC Brokers* [2011] EWCA Civ 131. In this case, the employees claimed that the employer was in repudiatory breach of contract by the way in which the employer sought to enforce contractual obligations against the employees. Kay LJ said that the question of whether the employer's conduct was sufficiently serious to be repudiatory is highly context specific. An objective assessment of the true intention of the employer's management was warranted.**
>
> **141. The issue of repudiation (by showing an intention no longer to be bound by the contract) has to be judged objectively in all the circumstances as known to a reasonable observer. The Court of Appeal in *Tullett Prebon* therefore held that in these circumstances the court was entitled to look at the employer's intentions in judging what was the employer's objectively assessed intention. The motive of the contract breaker may be relevant if it reflects something of which the innocent party was aware (or of which a reasonable person in their position should have been aware) and which**

> **throws light on how the alleged repudiatory conduct would have been viewed by such a reasonable person. The test is whether looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and all together refuse to perform a contract. It was therefore held that the employer's intention objectively assessed was to preserve the relationship rather than to repudiate it. All of the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker as to whether or not they were abandoning and refusing to perform the contract and acting in repudiatory breach of it."**

34. It follows that the Tribunal directed itself towards the correct legal principles and Ms Churchhouse's submission to the contrary is untenable. Applying those principles to the facts as found, it permissibly reached the context-specific conclusions set out at paragraphs 194 and 195 of its reasons, recited at paragraph 15, above. Its conclusions as to the Claimant's intention, objectively assessed, are not undermined by the circumstances in which the Claimant came to submit a section 9[2] statement, or by the evidence called on behalf of the First Respondent of the subjective belief and conclusions of Messrs Steer and Taylor. As it noted, its conclusions at paragraphs 175 and 176 of its reasons had been directed towards a different question, namely the reasonableness of the employer's belief and conclusions for the purposes of the claim of unfair dismissal.

35. At paragraph 78 of its reasons, upon which Ms Churchhouse relies, the Tribunal found:

> **"78. Neither party made notes of the meeting between Mr Steer and Mr Taylor on the one hand and the claimant on the other. This is perhaps unsurprising on the part of the claimant but**

[2] section 9 of the Criminal Justice Act 1967

> **perhaps less so upon the part of the respondent as the employer. This omission has certainly not helped the respondent. Given that Mr Steer's and Mr Taylor's credibility has been tainted by the contrast between the recording on the one hand and their version of events in their printed statements on the other, we do not accept that the claimant said, "so what if I have?" (in reply to a question from Mr Steer during the meeting asking whether he had gone to the police). It follows therefore that the sole basis upon which the respondent could have formed a belief that it was a police matter is from the form of the document presented by the claimant that morning."**

Acknowledging that the Tribunal made no direct reference in that paragraph to the separate statement attributed to the Claimant, *"So what if it is?"*, that does not serve to undermine the analysis above, and, as Ms Churchhouse acknowledged in discussion, the final sentence of paragraph 78 is not itself the subject of challenge in the grounds of appeal.

36. It follows that this ground of appeal also fails.

DISPOSAL

37. Accordingly, all grounds of appeal are dismissed.