



EMPLOYMENT TRIBUNALS

Claimant: Andrew Vincent

Respondent: Multi Surface Fabrications Ltd

Heard at: Newcastle Employment Tribunal

On: 2nd, 3rd, 4th, 5th and 6th March 2026

Before: Employment Judge Sweeney

Representation:

For the Claimant: in person

For the Respondent: Anu Kaura, counsel

Oral judgment having been given on **06 March 2026** and full written reasons for the Judgment having been requested by both the Respondent and the Claimant in accordance with Rule 60 of the Employment Tribunal Rules of Procedure 2024, the following reasons are provided.

WRITTEN REASONS

Claims and issues

1. The legal claims being advanced by the Claimant in these proceedings were:
 - 1.1.A complaint of automatically unfair dismissal within the meaning of section 103A Employment Rights Act 1996 ('whistleblowing' dismissal)
 - 1.2.A complaint of victimisation within the meaning of section 27 Equality Act 2010.
2. Both legal claims were based on the same factual matrix. The Claimant claimed that he was dismissed because he did a protected act (and that the dismissal was an unlawful act of victimisation). He also claimed that the protected act amounted to a protected disclosure,

that the reason for his dismissal was that he had done so and that the dismissal was also automatically unfair.

3. At a preliminary hearing held on **12 August 2025** Judge Arullendran identified the issues arising out of those complaints and the parties subsequently prepared an agreed list at **pages 46-48** of the bundle.
4. The Claimant subsequently applied to amend the Claim Form to include two further legal claims based on the same facts. These were put forward on the basis that if the dismissal was not an act of victimisation within the meaning of section 27 Equality Act 2010, it was an act of harassment related to race within the meaning of section 26 of that Act or alternatively an act of direct race discrimination within the meaning of section 13. The Respondent did not object to the amendment and Judge Jeram gave permission to amend to add those claims: The final issues were discussed and agreed at the outset of the hearing. They are attached to these reasons as an Appendix.

Evidence before the Tribunal

5. The tribunal was provided with a bundle of documents running to **243** pages. On the Claimant's side, I heard evidence from:

5.1. The Claimant himself,

5.2. Tristan Joyce, former employee of the Respondent

5.3. Devon Shaw, former employee of the Respondent.

6. On the Respondent's side, I heard evidence from:

6.1. Iain Telfer, Production Supervisor.

6.2. Shaun Swainston, Production Manager.

6.3. Graeme Kavanagh, Managing Director.

The tribunal's approach to the evidence

7. As a matter of general approach, where I make no finding on a particular point raised in these proceedings, this is not an oversight or omission. It reflects the extent to which the point was truly of assistance to the tribunal. All of my findings of fact are made on the balance of probabilities.

The credibility and reliability of the witnesses

8. This is a matter where the factual events, and the inferences that the tribunal was invited to draw from those factual events, was very much in dispute. This means that I had to consider

the credibility and reliability of the witnesses in the case. In discrimination and victimisation cases in particular, credibility and reliability play a key part in the assessment of the oral evidence, taken alongside contemporaneous documentary evidence or the lack of it.

9. I had significant concerns about both the credibility and the reliability of the evidence of all three of the Respondent's witnesses.
10. As regards the evidence of the Claimant, Mr Joyce and Mr Shaw, by contrast, I found them to be credible and reliable witnesses. The one inconsistency in Mr Joyce's evidence (regarding hearing the Claimant speak at 'Meeting 2') was not such as to lead me to doubt his overall honesty and credibility on the key points. I found him, Mr Shaw and Mr Vincent to be honest and credible witnesses on the key issues, very much in contrast to my assessment of Mr Telfer, Mr Swainston and Mr Kavanagh.

Findings of fact

11. The Claimant was employed by the Respondent as a polisher/sander from **27 February 2023 to 22 January 2025**, on which day he was dismissed for gross misconduct.
12. Tristan Joyce was also employed by the Respondent as a polisher/sander. He commenced his employment on **30 October 2023**. He started at the same time as Mr Perry ('**RP**'). Mr Joyce is Muslim and of Bengali descent. He describes himself as British Asian. He was the only Muslim employee of British Asian ethnicity working for the Respondent. From the outset of their employment, **RP** regularly referred to Mr Joyce both directly and to others as 'Mandingo', which is a racial slur. It was deliberate racial 'taunting' of Mr Joyce.
13. In late **June 2024**, Mr Vincent directly challenged **RP** about his behaviour. He told **RP** that his behaviour was racist, that he did not find it funny. He asked him to think how uncomfortable he was making Mr Joyce. Mr Joyce was indeed upset by what he saw as repeated taunting by **RP**. He was also over time becoming increasingly upset and uncomfortable by casual racist references made by other employees. It was not unusual for workers to refer to him in racially derogatory terms. In his time, he had been referred to as 'the brown one', 'Aladdin', 'carpet rider', and other particularly offensive words as described in paragraph 4 of his witness statement. I accept the description of his experience given by Mr Joyce in paragraphs 2 to 7 of his witness statement. At no point during his evidence was it put to him that he was lying about being subjected to racial harassment by being referred to in racially derogatory terms. I am satisfied and find that he was indeed subjected to racial name calling and that he perceived he had been subjected to racial harassment. Without doubt, there was a number of workers who casually used racist terms. It is more likely than not that some or many of those engaging in this casual racism regarded it as 'banter', that they acted in jest and not with malice.
14. Although disputed by Mr Telfer, the Production supervisor, I find that Mr Vincent reported to Mr Telfer **RP's** repeated use of the word 'Mandingo.' Mr Vincent told Mr Telfer that despite having challenged **RP** directly, he continued to use this racist term towards Mr Joyce. This was some time in mid to late **July 2024**, after Mr Vincent had personally challenged **RP**. Mr Telfer said to leave it with him and that he would sort it out. The Claimant believed that Mr Telfer was going to speak to Mr Joyce.

15. I rejected Mr Telfer's denial of this as untruthful. Mr Telfer never did speak to Mr Joyce or to **RP**. He let this report of racism go unchallenged and uninvestigated.
16. The Claimant was regarded by management – namely Mr Telfer, Mr Swainston and Mr Graeme Kavanagh as a strong personality. He was seen by them as being vocal among the workers, that he was prepared to speak his mind, that he was influential among the staff. In paragraph 3 of his witness statement, Mr Swainston said that, in summer 2023, he started to think that Mr Vincent was not a good fit for the business. I reject this evidence. This was the beginning of statements designed to be a general assault on the Claimant's character in an attempt to discredit him in these proceedings. What Mr Swainston stated in paragraph 3 does not sit well with the objective facts. The Claimant was regarded as a reliable worker and clearly a 'good fit', to such an extent that he was asked to take on more responsibility on the shop floor. In **March 2024**, Mr Telfer told him that he regarded him as a 'good lad and a hard worker' [page 107]. Mr Telfer, who reported to Mr Swainston, continued to see the Claimant as having a positive impact into **October 2024** [page 108] referring to him as a great bloke for whom he could see great things at the company.
17. On **12 August 2024** Mr Swainston asked Mr Vincent and Connor Mucklow to take on some supervisory responsibility, in effect assisting Mr Telfer in carrying out his production supervisor role. This entailed a supervisory element over other shop floor workers. It was seen and was described by Mr Swainston to the Claimant as a promotion. The Claimant was asked to and did keep a record of the output of each sander. He kept records of stock and maintenance records. He used his own initiative in maintaining his logs of output, as he had not been shown how to do this. None of this sits comfortably with Mr Swainston's evidence and with the Respondent's wider description of him as being someone who was having a negative influence on others' willingness to work additional hours. It was notable throughout this hearing that where the Claimant asserted that he was adaptable and flexible he gave examples. Where he asserted he was seen as reliable he cited the example of his promotion and pointed to the logs that he maintained. In contrast, where the Respondent asserted the Claimant to have a negative impact on workers from summer 2023 or asserted that he had been intimidatory or threatening towards workers, they were unable to cite a single example.
18. I am satisfied and find that the Claimant showed himself to be flexible and adaptable in his work. Although employed as a polisher/sander he travelled to the premises of clients when asked, on occasion at very short notice and sometimes driving long distances. He may not have been the only polisher/sander to deliver products to clients, but the examples given by him in evidence were significant and demonstrated his adaptability and willingness to work extended hours. This was despite him having a bowel condition which was not conducive to being on the road for lengthy periods of time. Examples of his willingness and adaptability are evident from the delivery job he agreed to do at short notice on **3 December 2024**, returning after 7pm for which Mr Telfer expressed his gratitude to the Claimant, referring to him as 'a star'. He also undertook a trip to Birmingham and Manchester on **18 December 2024**, returning at about 10pm. The following day, **19 December 2024**, he started at 4am in order to drive from Newton Aycliffe to Exeter then on to Surrey and back to Newton Aycliffe, an 18-hour day. I accept what he says in paragraphs 25 – 29 of his witness statement regarding these trips. Mr Telfer did not dispute what is said there, in any event. He accepted pinching his finger and thumb and saying: *"it's only this far on a map"* and that the Claimant

nonetheless undertook the drive. Given that the Claimant was employed as a polisher/sander and not a driver, none of this resonates with the Respondent's attempt to portray him as a worker who was not a good fit.

Comment about blowing the place up

19. On a day between late **June** and the end of **September 2024**, Mr Joyce arrived at work with a backpack. Mr Swainston saw him and made what he no doubt considered to be a funny joke. He said: 'bloody hell Tristan, I thought you were going to blow the place up'. Mr Joyce was shocked by the comment. He put his bag in the bait room and went to work at his workstation, near Mr Vincent. He told Mr Vincent that he was unhappy with the comment. Mr Vincent, who had been present at the time, had heard clearly what Mr Swainston said.
20. It will be clear from this finding that I accept Mr Vincent's and Mr Joyce's evidence and reject Mr Swainston's. I do not accept that this incident took place in **April 2024** as Mr Swainston contends. I find that Mr Swainston has put forward an alternative false version (i.e. that he in fact said '*bloody hell Tristan, I thought you were casing the joint*') and has timed the event to be April 2024 because there had been a break in around that time. He did this, I infer, as cover for what really happened, because he is unable to admit to having uttered a racial slur towards Mr Joyce. The best that Mr Vincent and Mr Joyce can say about the timing of this incident was that it was on a Saturday during the peak period. That is why they place it as having been said between late June 20024 and September 2024. That period covers the peak period, during which work was required on Saturdays to meet the demand.
21. I must explain why I reject Mr Swainston's version of events. Aside from my general concerns about his credibility and reliability (paragraph 3 of his witness statement being an example) the two statements '*blow the place up*' and '*casing the joint*' are very different. It is highly unlikely that one could be mistaken for the other, as Mr Swainston suggested. Unlike Mr Kavanagh, Mr Swainston did not accuse Mr Joyce of lying, only that he may have misheard him. I am satisfied that Mr Joyce did not mishear. Mr Vincent heard what Mr Swainston said and I am satisfied that he did not mishear either. When he came to give oral evidence, Mr Kavanagh asserted that Mr Joyce and Mr Vincent were lying about what they said they heard. He maintained that they had invented the allegation in bad faith, having got their heads together on **19 January 2025** and that they had done so in order to scupper an announcement that they knew Mr Telfer was going to make on **Monday 20 January 2025**.
22. This was the very first time that anything like this had been suggested. It was not pleaded. It did not feature in Mr Kavanagh's witness statement. Nothing of the sort had been put to Mr Joyce by counsel for the Respondent – Mr Joyce's evidence was complete by the time Mr Kavanagh came to the witness table and he had left the tribunal building. Mr Kavanagh was not, in my assessment, a credible or reliable witness. Further, it is inherently more likely that Mr Swainston cannot admit to using a racial slur than that Mr Joyce and Mr Vincent got their heads together some months later to 'scupper' a meeting that was to be held by Mr Telfer. I could not understand what they would gain from doing this and how it would prevent the business from clamping down on breaks and mobile phone use. What benefit could they achieve, I asked myself, by doing this? How could Mr Joyce seriously expect to prevent the business from making its announcement regarding clamping down on all staff taking excessive breaks by saying he had been subjected to racial harassment? Further, there

was no suggestion in these proceedings that Mr Joyce was someone who took more breaks than others, which begged the question why would he do this if he was not someone who took more breaks? It seemed highly improbable and I was of no doubt that Mr Kavanagh's suggestion was fanciful. More so, however it revealed his true beliefs about Mr Joyce's complaint (at the time he was supposedly independently investigating it) and further served to undermine his credibility. I address what happened on 20 January below. However, at this stage I am satisfied that Mr Joyce's account (and that of Mr Vincent) is far more likely: that they both heard the comment made by Mr Swainston; that the question of racial taunting had been raised previously' with Mr Telfer, but to no avail; that the Production Manager once engaged in similar conduct; that at the time, the comment went unchallenged by Mr Joyce as he did not believe it would achieve much; that it took some time before Mr Joyce gained sufficient confidence to raise the matter having spoken about matters at home with his family and that he was reassured in raising it having been told by Mr Vincent on 19 January that he had his support.

23. Therefore, for the avoidance of any doubt, Mr Swainston was not, I find, telling the truth about what he said. The Claimant and Mr Joyce were. I infer that Mr Swainston thought he was being funny, albeit in very bad taste. That was certainly how those on the shopfloor regarded their own casual racism, as general workplace 'banter' which people thought was funny. I include in this Andrew Kavanagh's playing of the Taliban song (see below), which Mr Shaw heard and in respect of which Mr Shaw saw Mr Kavanagh laughing. I come to that incident when setting out my findings on the events of **20 January 2025**.
24. Mr Joyce did not raise any complaint about this comment at the time because he had been subject to racist remarks before. For him, it was commonplace. He was a young employee. He understood Mr Vincent to have previously raised the matter on his behalf with Mr Telfer but despite this, no-one had come to speak to him about it. He then found himself the butt of a racist joke by the Production Manager. He felt he had no one to go to, so he took it nowhere. He confided in Mr Vincent, and he talked about the effects of the working environment on him with his family. He was prescribed antidepressants and understandably was very unhappy by the culture of racial banter at work. Eventually things got to a point where he felt that he needed to say something.
25. That point was reached after some reflection over the Christmas period. He decided that he needed to say something. He asked to speak to Mr Vincent. They met at Mr Vincent's home on **19 January 2025**. Mr Vincent agreed to support Mr Joyce if he raised his concerns at work. They did not discuss or agree what Mr Joyce would say just that he would raise the matter and that if he did, he would have Mr Vincent's support.

20 January 2025

26. At about 9am or thereabouts, on **20 January 2025**, Mr Telfer called those in the dispatch and sanding department together for a meeting. Neither Mr Joyce nor Mr Vincent knew what this meeting was to be about –I say more about this at paragraph 48 below. The purpose of the meeting was for Mr Telfer to tell all staff that management was clamping down on staff taking additional and excessive smoking/vape breaks and on excessive mobile phone use. Until this point, there had been a culture of staff taking breaks at will in between jobs. The managers had allowed and tolerated this. It was only when it started getting beyond what

management considered acceptable that they decided to put an end to the practice and to start with a fresh slate. Mr Swainston and Mr Kavanagh had been relaxed about staff taking breaks between jobs so long as the jobs got done. Over time, however, they came to believe that things had gone too far. They had given staff an inch and they had, so to speak, taken a mile. It was a common issue and not limited to one or two people. There was a belief, as I shall come to, that Mr Vincent took more breaks than others. Therefore, management decided to draw a line and to announce that in future, breaks would be limited to the official break in the morning and at lunchtime.

27. When staff were gathered together for the meeting, Mr Joyce said that *'while everyone is here, I may as well say I'm sick to death of all the racism and stuff being said to me. I've had enough'* He decided to do this at this point in front of everyone because he had little faith or trust in management given Mr Telfer's prior involvement and given that Mr Swainston had used a racial slur in the past. This was a good time, he decided, to speak up, so that others could hear what he had to say. Mr Telfer replied that he had not been racist towards him. Mr Joyce then mentioned Mr Swainston, saying that it did not help when it was even Shaun being racist. He referred to Mr Swainston saying how he thought Mr Joyce was going to blow the place up. Mr Telfer said he would speak to Mr Joyce after the meeting, which has been referred to by the parties as 'meeting one'.
28. Mr Telfer then proceeded to tell the staff that the business was clamping down on excessive smoking/vaping breaks and mobile phone use. The staff went back to their workstations. Mr Telfer spoke to Mr Swainston. Mr Telfer then went to Mr Joyce at his workstation and asked him to go with him to Mr Swainston's office. On their way, Mr Telfer himself made a casual racist comment about a Polish worker as set out in paragraph 14 of Mr Joyce's witness statement.
29. Mr Joyce's evidence about what happened in Mr Swainston's office was not challenged. I accept his account given in paragraph 15 of his witness statement. Mr Swainston told Mr Joyce that he was not racist and that he was not happy with the allegation he had made towards him. He said to Mr Joyce that he had said 'bloody hell Tristan, I thought you were casing the place'. Mr Telfer also insisted that Mr Swainston was not racist and that it was a joke that was misheard. I note that Mr Telfer said this even though there was no suggestion that he had been present when the offending comment had been made. Mr Swainston said to Mr Joyce that he would like to nip this in the bud and continue to proceed with work as normal. Mr Joyce told Mr Swainston that he was happy to continue working as normal but that he was unhappy about the comment made.
30. It is clear that Mr Telfer had updated Mr Swainston on what had happened during the meetings. He had to have done, for Mr Swainston to know about the allegation by the time that Mr Joyce was taken to see him.
31. After he left Mr Swainston's office, Mr Telfer then gathered the workers (other than Mr Joyce) together for a meeting on the shop floor. This is referred to by the parties as 'meeting two.' Mr Telfer told those gathered that there was a zero-tolerance policy towards racism and that if any more racist comments were to happen it would be instant dismissal. At this point, Mr Vincent then said that 'the person who made the racist comment isn't at the meeting'. This was clearly a reference to Mr Swainston, who had been the only person identified by Mr

Joyce moments earlier when saying he had been subjected to racial abuse by the 'blowing the place up' comment. Mr Telfer told the Claimant to 'mind his manners.'

32. I do not accept Mr Telfer's evidence that he did not hear Vincent say this. I am satisfied that he did. Mr Telfer has suggested that he did not hear it because he has poor hearing, that Mr Vincent had 'heckled' him and that is why he said 'mind your manners'. I reject this. Had Mr Telfer not heard Mr Vincent, I would have expected him simply to have asked what it was that he had said. It seemed odd that Mr Telfer regarded something he apparently did not hear as a 'heckle'. If he genuinely did not hear it, I would expect him to have asked it to be repeated. After all, for all Mr Telfer knew Mr Vincent might have been making an important point. This was the second time Mr Telfer denied hearing or being told something: there was the report about 'mandingo' and now there was the comment by Mr Vincent where he questioned Mr Swainston's absence from the meeting, he having been identified as having made a racist comment. Mr Kavanagh described Mr Vincent as sometimes having a loud voice. Mr Shaw, who was present, gave evidence, which I accepted, that Mr Vincent spoke loudly enough so that everyone heard what he said. It seems very convenient for Mr Telfer to say that he had not heard this utterance at the time. I accept the evidence of Mr Vincent that the environment at the time was not particularly loud as workers were not working their machines.
33. After this second meeting finished the staff returned to their workstations. At around break time (which started at 10am), Mr Vincent and Mr Joyce made their way to the break room or the 'bait room' as it is known. As they opened the door, they heard an offensive and racist song being played loudly. This song was 'Hey Mr Taliban.' The lyrics are set out in Mr Vincent's witness statement (he found them on the internet). It is quite patently a racist song. On hearing it, Mr Vincent and Mr Joyce decided not to have their break in the bait room. They went and sat in Mr Vincent's car. As it happened, Mr Shaw was already in the bait room. He too heard the song, and he could also see who was playing it. The song was being played by Andrew Kavanagh on his mobile phone. Mr Kavanagh was laughing at the song as he played it. After the break, Mr Shaw went to see Mr Telfer. He asked Mr Telfer if he could move breaks explaining that there was a racist song being played in the bait room and he did not want to be part of it. Mr Telfer asked Mr Shaw who was playing it. Mr Shaw told Mr Telfer that he did not feel comfortable telling him as he knows nothing will happen because of who it was. This was based on previous comments made by Andrew Kavanagh in Mr Shaw's presence that he was 'untouchable' because he was a Kavanagh.
34. Despite being told that a racist song was being played in the bait room, Mr Telfer did not investigate the matter. This was despite having mentioned moments earlier that there was a zero tolerance in the company towards racism. Mr Vincent mentioned the song in his appeal against dismissal, which I shall come to in due course.
35. Although all employees had been in the habit of taking additional and excessive breaks and used their mobile phones, Mr Swainston considered the Claimant to have taken more than others. Whether he was in fact taking more breaks relative to others I cannot say, but there was a perception that this was the case. However, no-one in management had ever taken Mr Vincent to task about this or drawn to his attention that he had taken more time than others. To the extent that Mr Kavanagh and Mr Telfer said that they had, I reject their evidence. They may well have asked him once or twice to go back to his station but that is

a far cry from speaking to him about the number of breaks taken comparative to others, something they had never done.

36. Mr Swainston intended to speak to the claimant for the first time about this in the context of a disciplinary meeting. Therefore, on Tuesday **21 January 2025** at 3.50pm Mr Telfer told him that Shaun (Mr Swainston) wanted a word. He went to Mr Swainston's office. Mr Swainston said: '*I hear you're not happy*'. The Claimant said he was not. Mr Swainston handed Mr Vincent a sealed envelope. He said that it was an invitation to a disciplinary on Thursday and that they could hash it out then. The purpose of that meeting was to discuss the Claimant's attitude and behaviour at work which was set out in the letter as being 'excessive phone use, leaving the workstation without explanation and taking unapproved smoking breaks. Mr Vincent opened the letter [page 87] after he left Mr Swainston's office. Upon reading it, he was confused about the date of the meeting, which incorrectly referred to **Wednesday 23 January 2025** whereas Mr Swainston had said the meeting was to be on the **Thursday**. It was not suggested that this matter was likely to result in the Claimant's dismissal.
37. The following day, **Wednesday 22 January 2025** at 3.40pm Mr Telfer again came to see the Claimant at his workstation. He said Shaun wanted a word. As the Claimant walked with Mr Telfer he asked if this was the disciplinary meeting. He asked this due to the confusion surrounding the date given in the letter. Mr Telfer said that it was not. They went to the conference room. Mr Swainston told the Claimant that since he had been given the disciplinary letter the day before, he (that is, the claimant) had told his co-workers to slow down and stop working and that he had witness statements. Mr Vincent immediately denied this. He asked where this information came from. Mr Swainston would not tell him. The Claimant was given no names. He was shown no statements. He was provided with no details. He was told by Mr Swainston that this was insubordination. The Claimant was distressed and angry. He stood up. He asked if he was being sacked. Mr Swainston told him that he was, that he was dismissed. The taking of breaks was not a feature in the Claimant's dismissal. This only came to be asserted as a contributing factor after the event in order to bolster the Respondent's case.
38. Mr Swainston had sent Mr Telfer to fetch the Claimant in order to tell him that he was being dismissed for gross misconduct. Mr Kavanagh has maintained throughout these proceedings that he was independent of the decision to dismiss and that he carried out an independent and through appeal. Yet it emerged only in his oral evidence that he had in fact been party to the discussion with Mr Swainston whereby they agreed that the Claimant's actions amounted to insubordination and that he should be dismissed for gross misconduct. In his evidence, Mr Kavanagh attempted to explain his position to be that 'if the Claimant had done what was alleged' then this 'would' amount to insubordination. I do not accept this. The way in which his prior discussion with Mr Kavanagh about dismissal of the Claimant emerged in evidence was highly suspicious. I have no doubt that the decision had been made by Mr Swainston to dismiss and that Mr Kavanagh agreed with this. I very much doubt Mr Kavanagh considered the position in such a subtle way as he professed. After all, there was to be no investigation into the allegations to establish 'if' Mr Vincent had done anything. When it came to conducting an appeal against the dismissal, Mr Kavanagh was then anything but independent. Not only did Mr Kavanagh lack independence, I find that the so-called investigation into the dismissal (after the event) was anything but thorough, as he

professed it to be. I am satisfied and find that it was a sham exercise, designed only to bolster a prejudged decision to which Mr Kavanagh was party. There was never any prospect of Mr Vincent's appeal succeeding as it was never given any genuine consideration.

39. Mr Kavanagh suggested that the process in dismissing the Claimant was fair. Of course, this is not an 'ordinary' unfair dismissal claim but the way in which the Claimant was anything but fair and reasonable. Nothing that can be described as a process was carried out before deciding to dismiss. The Claimant was dismissed in flagrant breach of the ACAS Code of conduct, the Respondent's own disciplinary procedure and the most basic principles of natural justice.
40. The disciplinary procedure which was appended to the Claimant's contract of employment [page 69] at section 3 states:
- 40.1. The disciplinary procedure will be used where there are possible issues of misconduct.
 - 40.2. If any complaint of misconduct is made against you an investigation will usually be carried out by the relevant line manager to establish the facts.
 - 40.3. On completion of the investigation the investigating officer will recommend whether a disciplinary hearing should be convened, or some other step taken.
 - 40.4. You are entitled to be accompanied at any disciplinary meeting
 - 40.5. Where the investigating officer decides there is a disciplinary case to answer, disciplinary meeting will be convened while allowing you reasonable time to prepare your case.
 - 40.6. The letter will contain sufficient information about the alleged misconduct and its possible consequences to enable you to prepare to answer the case at the meeting. It will also usually provide copies of any written evidence which may include any witness statements.
 - 40.7. Where possible the meeting will be heard and chaired by a manager who was not involved in the investigation.
 - 40.8. The chair will explain the complaint and go through the evidence that has been gathered. You will have an opportunity to state your case.... to raise points about any information provided by witnesses.
41. As regards the appeal process [page 73] para 3.1 (c) provides that where possible, the appeal will be heard by a manager or director of the company who has not been involved in the investigation or disciplinary hearing. There were two other directors in addition to Mr Kavanagh. They had been appointed when a larger company acquired the Respondent back in **April 2023**.

42. The Claimant was sent a letter of confirmation of dismissal dated **23 January 2025** [page **102**] by Amy Cunningham, the Group ER Manager. The letter stated:

“... it had been brought to our attention on Wednesday 22nd January that you were instructing your colleagues to ‘slow down and stop working’.

It is evident to Shaun Swainston and Iain Telfer, who have witnessed your behaviour, that you have been attempting to influence your colleagues negatively, and you have not been following reasonable instructions asked by management. This behaviour can only be described as insubordination, and a deliberate attempt to undermine the business which we can not tolerate...”

43. When asked in cross examination, neither Mr Telfer nor Mr Swainston could provide the Claimant with any examples of his negatively influencing colleagues or refusing to follow reasonable instructions. There is nothing in their statements to this effect either.
44. The Claimant appealed the decision to dismiss him. He had indicated he was going to appeal in his letter of **22 January 2025** to Grame Kavanagh and the other two directors, Jonathan Sherry and Daren Wallis [page **98**]. He set out his grounds of appeal on **27 January 2025** [pages **116-119**].
45. Mr Kavanagh undertook what I have previously stated to be a sham investigation. The investigation was for appearance only. Some questions were prepared for the purposes of asking questions of staff [pages **146-179**]. Mr Kavanagh did not provide the Claimant with any of these documents in advance of the appeal hearing. He did not ask to interview the Claimant as part of any ‘investigation’. He did not provide the Claimant with the statements purportedly taken from John Lister and Connor Mucklow [pages **180-181**].
46. At the same time, he ‘investigated’ Mr Vincent’s appeal, Mr Kavanagh interviewed a number of staff about the culture of racism in the workplace. He did not provide the Claimant with any of the documents he had compiled in respect of the culture of racism [pages **211-239**]. Mr Kavanagh’s investigation into racism was a case of window dressing. There was no escaping the conclusion that a number of his workers engaged in unacceptable racial ‘banter’. He could not get away from that. However, Mr Kavanagh underplayed its significance. He never asked anyone what it was that they actually said when they said they had engaged in racial ‘banter’. Without doing so, he was in no position to gauge the impact of this so-called banter on Mr Joyce – and, indeed on others like Mr Vincent and Mr Shaw and other staff who, like them, who did not participate in it.
47. Mr Kavanagh’s credibility in this matter is wholly undermined by the rather shameful approach he has taken to attempt to tarnish Mr Joyce and Mr Vincent in this regard. He said that he believed Mr Joyce and Mr Vincent had concocted a complaint of racial harassment in order to get in the way of the company making an announcement. I have set out my findings on that above and noted how that seems a most extreme thing for Mr Joyce and Mr Vincent to have done. I was satisfied that it was nonsensical.
48. I have also set out my finding (paragraph 26 above) that neither Mr Joyce nor Mr Vincent knew what the meeting on **20 January 2025** was to be about before Mr Telfer called them together that morning. Mr Kavanagh said in his oral evidence that Mr Holliday had told him

during the investigation into racism that he (Mr Holliday) had told Mr Vincent and Mr Joyce on Friday **17 January 2025** that Mr Telfer was going to make an announcement on the Monday about clamping down on breaks. I do not accept this evidence. This apparent statement from Mr Holliday is not referred to in the interview notes for Mr Holliday [page **227**] or in Mr Kavanagh's report [pages **208-210**]. Mr Kavanagh said that although Mr Holliday told him this prior to producing his report, he did not make a statement on the matter until **29 April 2025**. In an attempt to understand this, I asked why Mr Holliday was making a statement after Mr Kavanagh had closed the investigation into racism. It was only then that it transpired that Mr Holliday had been approached following receipt of an employment tribunal claim by Mr Joyce and that this is when Mr Holliday apparently gave a statement to say that he had told Mr Joyce about the 'clamping down' meeting the Friday before the meeting. The way in which this evidence emerged is all very suspicious and was yet another feature that led me to doubt the credibility and reliability of Mr Kavanagh in these proceedings.

49. To the extent that it was suggested that Mr Vincent and Mr Joyce knew from Mr Holliday that Mr Telfer was going to make an announcement on **Monday 20 January 2025** I am satisfied and find that they did not. I am further satisfied that Mr Vincent and Mr Joyce did not – as Mr Kavanagh asserted - get their heads together to raise a false claim of racial discrimination. I find this to be a very weak attempt by Mr Kavanagh at discrediting both Mr Vincent and Mr Joyce, in line with the general attempt to discredit him by the Respondent. It is a significant allegation. It was not pleaded and was not set out in Mr Kavanagh's witness statements. As I have indicated, such a serious matter was not put to Mr Joyce nor was it put to Mr Vincent. This is almost certainly because it emerged for the first time in Mr Kavanagh's oral evidence.
50. I have previously referred to the playing of the Taliban song in the bait room [see paragraph 33 above]. Mr Kavanagh's statement that there was zero tolerance to racial banter is further undermined by the fact that the obviously racist and offensive song that he subsequently came to learn had been played by his nephew (Andrew Kavanagh) resulted in a verbal warning, which does not meet even the lowest level of disciplinary sanction in paragraph 3.10(b) of its disciplinary policy (page 71).
51. On **28 January 2025** Mr Kavanagh interviewed Mr Joyce. He was the only one not asked to sign the notes of interview at the end of the interview. Mr Kavanagh endeavoured to explain this by saying this was because he interviewed Mr Joyce first, to get a feel for what was being said, that he then wanted to interview others to comment on what Mr Joyce had said and then return to meet with Mr Joyce and put those matters to him. I reject this evidence. Mr Joyce was not the first to be interviewed. Sean Gidney, Neil Coles and Gary Malcolm were interviewed on **27 January 2025** [pages **211-214**]. There was no further meeting with Mr Joyce. That simply did not happen. On **31 January 2025**, whilst at his workstation, Mr Kavanagh came to Mr Joyce with a blank copy of **page 217** and asked Mr Joyce to sign that page, which he did. This was the Managing Director after all. Mr Joyce had no reason at this stage to distrust Mr Kavanagh, who had given Mr Joyce the impression on **28 January** that he was taking the complaints seriously – which he clearly was not as he disclosed in oral evidence in these proceedings that, at the time he was undertaking this 'investigation', he believed Mr Joyce to have fabricated the 'blow up' comment. Mr Joyce was, therefore, presented only with the blank **page 217**. There was no writing on it, and he

was not shown the other **pages 215-216**. He only saw these for the first time when he received them following a DSAR request, at which point he was particularly alarmed to see the answer recorded on **page 216** that he did not feel Shaun Swainston's comment about blowing the place up to be necessarily racist. Mr Kavanagh has, I find, deliberately mis-recorded Mr Joyce's answer at the bottom of the **page 216**. I find that he manipulated this so as to underplay the seriousness of the matter and to protect Mr Swainston. He deliberately kept this from Mr Joyce. The question was '*did you feel that the comment was specifically racist*'? In Mr Kavanagh's handwriting is the answer '*no, not necessarily*'.

52. I accept Mr Joyce's evidence on this. It would be very surprising if he, a young man who had been subjected to racist taunts in the workplace, who had raised this specific comment publicly on **20 January** as being a racist comment, would then say that he did not necessarily feel it to be racist. I am satisfied and find that this was a deliberate manipulation by Mr Kavanagh, further undermining his credentials, credibility and reliability.
53. The culture at the workplace was that many workers would engage in racial banter. It is not suggested that this was the case with everyone and in Mr Swainston's case there is only the one instance. However, there were sufficient numbers involved for it to be concerning. It appears to be a classic situation of workers using racial slurs thinking that they are funny, that the person on the receiving end of the joke (in this case Mr Joyce) accepted it; that the jokers did not intend any malice. It is more likely than not to be a case of casual racism based on ignorance of the true effect on those who have to listen to it, like Mr Vincent and Mr Shaw and others and more importantly ignorance of the effect on Mr Joyce.
54. Aside from the evidence of Mr Joyce, Mr Vincent and Mr Shaw, examples of this casual racism can be seen in Mr Lister's text message to Mr Joyce where he refers to a Polish employee as a 'fucking Polish cunt'. Another example is the playing of the song Hey Mr Taliban in the bait room. There is no dispute that this was done by Andrew Kavanagh. This was discovered after Mr Vincent's dismissal and following a complaint made by Mr Joyce.
55. Upon discovering who played the song, Graeme Kavanagh gave Andrew a verbal warning. He said that he did so because Andrew's 'defence', as he put it, was that it was just something that came up by chance on his social media stream. That does not explain how it was that Mr Vincent and Mr Joyce heard it being played at volume. It seems a very unlikely explanation – especially in the light of Mr Shaw's evidence to this tribunal - and in any event, if true, raises some questions as to how such an obviously abhorrent and racist song would simply appear on anyone's social media stream by chance. Nevertheless, the explanation was accepted by Graeme Kavanagh, who clearly must have listened to what Andrew had to say about the matter before deciding on any action to be taken against him, in stark contrast with the case of the Claimant, who was given no opportunity to put forward an explanation in response to the 'go slow' allegation. Mr Kavanagh administered a verbal warning despite Mr Telfer telling staff at Meeting 2 on **20 January 2025** that there was a zero-tolerance policy and if any more racist comments happened it would be instant dismissal and despite this racist song having been played very shortly after that meeting.
56. I have grave suspicions about the Respondent's management protestations that they did not know of any casually racist language being used in the workplace and that they take such matters very seriously.

The statements of Mr Lister and Mr Mucklow

57. The Claimant cross-examined Mr Swainston about the statements on **pages 180-181** that bear signatures of Mr Lister and Mr Mucklow. I say more about the inferences I draw from the failure to call Mr Lister and Mr Mucklow in my conclusions.
58. Mr Swainston was generally an unreliable witness. I have already referred to his statement at paragraph 3 of his witness statement and how this did not accord with the objective facts and how he was unable to give any examples of the Claimant's unreliability or negative behaviours. His account of how he went about taking the statements from Mr Lister and Mr Mucklow on **pages 180-181** was inconsistent. He gave extremely unclear evidence about the timing of those statements:
59. In his witness statement Mr Swainston said:
- 59.1. Andrew Kavanagh approached him later on the day of **Monday 20 January 2025** (after the 2 meetings held by Mr Telfer) and said that John Lister told him that the Claimant had told him (Mr Lister) to slow down and that he (Andrew Kavanagh) had told Mr Lister to speed up (paragraph 19 Mr Swainston's statement)
- 59.2. Later on **Tuesday 21 January 2025** (after he had given Mr Vincent the disciplinary letter on **page 87**) he spoke to John Lister about what Andrew Kavanagh had told him and that he confirmed that Vinny (the Claimant) had asked Mr Lister to slow down and had been very vocal about it (paragraph 23 Mr Swainston's statement).
- 59.3. Mr Lister was reluctant to give a statement, that he would think on it overnight and they could do a statement in the morning (paragraph 24 Mr Swainston's statement)
- 59.4. That Mr Swainston typed up word for word what Mr Lister told him on Wednesday morning **22 January 2025**; that he spoke with Connor Mucklow who also agreed to sign a statement (paragraphs 25 Mr Swainston's statement).
60. In his oral evidence, he said that:
- 60.1. When he spoke to Mr Lister and Mr Mucklow, they told him more about what Mr Vincent had said to them but that they were not prepared to put this in a statement because they feared violent repercussions from the Claimant and that they were fearful of the Claimant who was intimidating and aggressive.
- 60.2. Therefore, he typed up only what they had agreed to say, not all that they said.
- 60.3. He spoke to Mr Lister before he gave Mr Vincent the disciplinary invite letter; that the timings in paragraph 23 and 24 of his statement was incorrect in that the reference to 'later that day' in paragraph 23 meant later that day on **Monday 20 January 2025**.
61. If Mr Swainston's oral evidence is to be believed that means that he spoke to Mr Lister on Monday 20 (paragraph 23) and that 'the morning' referred to in paragraph 24 was Tuesday 21 January (and not Wednesday 22nd).

62. I did not accept this evidence as credible or reliable. When Mr Vincent attended the appeal against his dismissal on **11 February 2024**, with Graeme Kavanagh, he was told by Mr Kavanagh that they had two signed statements. Mr Kavanagh told Mr Vincent that the statements were taken on the Wednesday (22 January) after he left the meeting at which he was dismissed for gross misconduct.

63. In the email of **03 February 2025** from Amy Cunningham to the Claimant, copied to Graeme Kavanagh (page 128) in reply to the Claimant's email of **22 January 2025 [page 98]** she stated:

*"I would like to make it very clear on your points regarding not being given a fair disciplinary process. You have been dismissed due to an instant [sic] that took place on **Wednesday 22 January 2025** ..."*

64. This must be read along with the letter of dismissal (paragraph 42 above) which states that the incident for which the Claimant was dismissed was brought to the Respondent's attention on **Wednesday 22 January**. If that is right, Mr Vincent could not have spoken to Mr Lister and/or Mr Mucklow on **Monday 20 January** as this was before the 'incident' in question for which the Claimant was purportedly dismissed. I have no confidence in the reliability of Mr Swainston's evidence. I have grave doubts about what he says about taking statements from Mr Lister and Mr Mucklow. First, they were 'word for word' then they were not word for word but only that which he had permission to type. They are typed in the third person, which raises the distinct possibility that they were simply presented for signature. I infer that Mr Swainston went looking for Mr Lister and Mr Mucklow to see if he could find anything on Mr Vincent. I do not rule out Mr Swainston exerting pressure on Mr Lister and Mr Mucklow given the very suspicious circumstances surrounding his evidence.

65. The only written text in Mr Lister's own words was on **page 90** of the bundle. On **22 January 2025** the Claimant texted Mr Lister to say that he had been sacked and multiple people had apparently signed statements against him. Mr Lister replied that he had heard nothing and signed nothing. The only writing in Mr Mucklow's own words was on **page 91**. Mr Vincent asked him if he had put a statement in about him. Mr Mucklow said that he had not adding '*on my lil girls life mate*'. The Respondent witnesses, Mr Kavanagh and Mr Swainston, when asked about these texts (which they had been given by the Claimant prior to his appeal hearing) said that they would not expect Mr Lister or Mr Mucklow to admit that to the claimant. I considered that possibility. However, given the overall facts and inferences that I have drawn in this case I considered it more likely that they did not give actual or genuine statements.

66. For the avoidance of doubt, I find that the Claimant did not tell or encourage John Lister or Connor Mucklow, or anyone else for that matter, to slow down or stop work. At no time did he tell Mr Lister, '*I wouldn't rush, they do fuck all for us, that 'if they are going to treat us like kids, I am going to do nothing for them*'. At no point did Mr Vincent walk towards his bench shouting to the entire polishing department, '*everyone slow down*'. I am entirely satisfied from the evidence of Mr Vincent, Mr Joyce and Mr Shaw that this simply did not happen. They were consistent and credible in their evidence on this.

Relevant Law.

Victimisation

67. Section 27 of the Equality Act 2010 provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

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

Protected acts

68. When considering whether a complainant has done a protected act, a wide interpretation should be given to the words of section 27(2)(b) and (c). An express reference by a complainant to the Equality act is not required. A complainant may allege that things have been done but not say that those things are contrary to the Equality Act. So long as the context is made clear, this may amount to a protected act: **Durrani v London Borough of Ealing** [2013] UKEAT/0454/2013; **Waters v Metropolitan Police Commissioner** [1997] ICR 1073. There must, then, be something sufficient about the complaint to show that it is a complaint that is, at least potentially, a complaint to which the Act applies. Whether an employee has done a protected act is a question of fact which will vary from case to case, depending on the circumstances and context, which (despite any reference to race) may make it plain that the employee has made a complaint in respect of which he can be victimised.

Detriment

69. When considering whether an employee has been subjected to a 'detriment' Tribunals should take their steer from the judgement of the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] I.C.R. 337, where it was held that a detriment exists '*if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment*'. It was further held in that case that 'an unjustified sense of grievance cannot amount to 'detriment'.

70. In complaints of victimisation, the detriment must be because of the protected act. It is common to refer to this underlying issue as the "reason why" issue'. Therefore, if the employee has been subjected to a detriment, the question for an employment tribunal will

be 'why?'. In cases where the reason is not immediately apparent, it is necessary to explore the mental processes, conscious or unconscious, of the alleged discriminator to discover what facts operated on their mind. In considering whether the necessary link has been established, it is enough that the protected act had a significant influence on the perpetrator's acts. Therefore, the protected act need not be the only reason for the treatment provided it is 'a' cause.

Burden of proof

71. Discrimination and victimisation can be subtle. The law recognises that there is rarely evidence of these things. Much depends on inferences to be drawn from the facts. People usually do not admit to discrimination, not even to themselves. To assist complainants in establishing discrimination, the Equality Act 2010 provides for a reversal of the burden of proof in certain circumstances.

72. Section 136 Equality Act 2010 provides that:

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

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

73. This section, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision: **Hewage v Grampian Health Board** [2012] I.C.R. 1054.

74. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had failed to make reasonable adjustments or harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. This requires the Respondent to prove, on the balance of probabilities, that its treatment of the Claimant was in no sense whatsoever based on the protected ground: **Igen Ltd v Wong** [2005] I.C.R 931, CA. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

Automatically unfair dismissal: section 103A ERA

75. Section 103A Employment Rights Act 1996 ('ERA') provides that:

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

76. Firstly, there needs to be a 'qualifying disclosure' within the meaning of section 43B ERA. Secondly, it must be made in a manner which accords with the scheme of the Act set out in s43C to s43H. In this way it becomes a 'protected' disclosure.

What is a qualifying disclosure?

Information

77. The worker must disclose information: **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT. In **Kilraine v Wandsworth Borough Council** UKEAT/0260/15/JOJ Langstaff J observed that tribunals should observe the principle in **Cavendish Munro** with caution to the extent that it must not be 'seduced' into thinking that it must decide whether something is either 'information' or an 'allegation'. Information may be provided in the course of making an allegation. However, the requirement is still for information to be disclosed. If there is a disclosure, it is necessary to consider whether that disclosure is a qualifying disclosure. This will depend on the nature of the information disclosed.

The information must, in the reasonable belief of the worker, tend to show a relevant failure.

78. Section 43B identifies 6 things which the disclosed information must, in the belief of the worker, 'tend to show'. Each of the six categories involves some form of malpractice or wrongdoing and are referred to as the 'relevant failures'. The worker is not required to establish that the information is true. He must establish that at the time he made the disclosure, he/she held a reasonable belief that the information disclosed tended to show. It is not a question of whether a hypothetical reasonable employee held a reasonable belief, but whether the particular worker's belief was reasonable.

79. There is a subtle but vital distinction, in that it is not a case of asking whether the worker reasonably believed that a breach of a legal obligation had occurred, is occurring or is likely to occur. Rather, it is a case of asking whether he/she held a reasonable belief that the information they were disclosing tended to show that such a breach had occurred, is occurring or is likely to occur. In cases where a claimant relies on breach of a legal obligation, the source of the legal obligation must be identified before going on to assess the reasonableness of the belief of the employee.

Public interest

80. The worker must reasonably believe that he is making the disclosure in the public interest. That aspect is to be determined in accordance with the guidance of the Court of Appeal in **Chesterton Global Ltd (t/a Chestertons) v Nurmohamed** [2018] I.C.R 731. The question of what is 'in the public interest' does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest, but what could reasonably be believed to be.

81. In **Chesterton Global**, Underhill LJ, at paras 36-37 said:

*"I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the **Parkins v Sodexho** kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of **private workplace disputes** should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never."*

82. His lordship added:

"where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.... "

83. He identified four 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

84. It is important to note that the mental element involves a two-stage test: (i) did the claimant have a **genuine belief at the time** that the disclosure was in the public interest, then (ii) if so, did he or she have **reasonable grounds** for so believing?

85. As to the requirement of **reasonableness** of the belief in public interest this may (in an atypical case) arise on later contemplation by the employee and need not have been present at the time of making the disclosure. However, not so with the actual belief. The employee must at the time actually and genuinely believe that she is raising the matter in the public interest.
86. The law protects the worker only against **the act of disclosure**. If the principal reason for dismissal is not the act or fact of disclosure, then there can be no unfair dismissal contrary to s103A ERA.

Protection

87. If a disclosure is a qualifying disclosure, then it becomes 'protected' if (among other things) it is made to the employer (s43(c)(1)(a)). A disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the employer.

Burden of proof

88. Where the employee lacks the requisite continuous service to claim ordinary unfair dismissal (i.e. two years), he or she will acquire the legal burden of proving, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason: **Ross v Eddie Stobart Ltd** EAT 0068/13. An employee will only succeed in a claim of s103A unfair dismissal if the tribunal is satisfied, on the evidence that the reason or 'principal' reason is that the employee made a protected disclosure. A principal reason is the reason that operated in the employer's mind at the time of the dismissal.
89. If the fact that an employee made a protected disclosure(s) was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under s103A will fail.

Discussion and Conclusion

Victimisation

90. I begin by setting out my conclusions on the claim of victimisation.

Did the Claimant do a protected act?

91. The answer to this is that he did. On **20 January 2025**, the Claimant did something in connection with the Equality Act and/or he made an allegation that Mr Swainston had contravened the Equality Act. He did either or both of these things by referring to the fact that Mr Swainston was the person whom Mr Joyce had just mentioned as having racially abused him and that he was not (and by implication should be) at the meeting at which racism in the workplace was being discussed and where it was being said racism would not be tolerated and would result in instant dismissal. This falls under both section 27(2)(c) and (d) of the Act. An express reference to the Equality Act is not required. What he said was,

in context, sufficient to show that he had raised a complaint that Mr Swainston had done something to which the Act applies, namely that he had made a racist comment. The assertion that Mr Swainston, the production manager, was the person who had made the racist comment referred to only moments before by Mr Joyce and that he was not present to be told that there was zero tolerance to racism plainly amounts to an allegation of an infringement of the Equality Act (harassment related to race/direct discrimination by the employer). The context here was clear to all (see paragraph 67 of the above legal principles).

Detriment

92. The next question is whether he was subjected to a detriment. He clearly was. He was dismissed, about which there is no dispute.

Causation

93. The real question is whether the Claimant was dismissed because he did the protected act. This is the causation point. This requires an examination of the mental processes, conscious or unconscious of the decision makers, in particular, Mr Swainston and Mr Kavanagh.
94. It is at this stage that the burden of proof provision in section 136 is of assistance. I must first ask:

Are there facts from which I could decide, in the absence of any other explanation, that the Respondent contravened section 27 of the Act?

If so, I must hold that the contravention occurred unless the Respondent shows that it did not contravene the provision.

95. The Claimant has established the following facts:

- 95.1. There was a culture of racist comments in the workplace.
- 95.2. Mr Vincent raised with Mr Telfer the matter of racial abuse of Mr Joyce by one particular employee, **RP**.
- 95.3. Mr Telfer did nothing about this.
- 95.4. Mr Telfer lied to the Tribunal by saying he had not been made aware of this.
- 95.5. Mr Telfer himself made a racially derogatory comment to Mr Joyce about a Polish employee.
- 95.6. Mr Swainston directed a racial slur at Mr Joyce.

- 95.7. Mr Swainston lied to the Tribunal about what he said.
- 95.8. The Claimant spoke out about racism in the workplace by directly referring to Mr Swainston on **20 January 2025**
- 95.9. Mr Telfer heard what the Claimant said and lied to the Tribunal about this.
- 95.10. The Claimant never told anyone to slow down or to stop work. What is said apparently by Mr Lister on **page 180** bears no relation to fact.
- 95.11. The Claimant was a flexible and adaptable worker. He had been sufficiently regarded to be asked to take on more responsibility, yet the Respondent sought to portray him as unreliable and a negative influence.
- 95.12. Very shortly after he did the protected act, Mr Swainston spoke to Mr Lister from where the allegation at page 180 emerged.
- 95.13. Mr Swainston called the Claimant to a meeting and told him he was being sacked for insubordination. There was no attempt to follow any kind of fair process. The Claimant has established that the process was unfair. Indeed, it was blatantly unreasonable. The only explanation proffered for not providing the Claimant with witness statements was that Mr Lister and Mr Mucklow were intimidated by the Claimant and afraid of physical violence, of which there was not the slightest evidence (other than the assertions in oral evidence of witnesses of dubious credibility and reliability) and which explanation I rejected as a false explanation.
- 95.14. Mr Swainston has given inconsistent and unreliable explanations about the date on which he spoke to Mr Lister and Mr Mucklow and an inconsistent account of how he took the statements. They were not, as he first maintained, word for word'.
- 95.15. Although Mr Swainston had intended to discuss what he believed to be the Claimant's excessive breaks and mobile phone use on Thursday 23 January 2026 and they had arranged to do this before he did the protected act on 20 January, there was no suggestion that this was likely to result in dismissal and in fact was not the reason for his dismissal.
- 95.16. Mr Kavanagh presented Mr Joyce with a blank page to sign [**page 217**]. He manipulated the answers of Mr Joyce when he interviewed him deliberately to underplay the incident regarding Shaun Swainston. He lied to the Tribunal about having a second meeting with Mr Joyce.

- 95.17. Mr Kavanagh was not an independent appeal investigator as he professed to be. He had been party to the discussion with Mr Swainston at which the decision to dismiss the Claimant was made and he was in agreement that the Claimant be dismissed for insubordination, something that emerged only in oral evidence.
- 95.18. The Respondent has attempted to traduce the Claimant's character by accusing him of concocting an allegation of racism to get in the way of a company announcement, of being intimidating and aggressive and asserting that people were afraid of violent repercussions without being able to offer up a single example and without producing any evidence in support.
- 95.19. The Respondent has not called Mr Lister or Mr Mucklow in circumstances where they had known from the very beginning that Mr Vincent denied saying to anyone that he had told them to slow down or stop working. The Respondent has not called Mr Holliday even though Mr Kavanagh says he had been told by him in April 2025 that Mr Joyce and Mr Vincent were told in advance what the 20 meeting was to be about.
96. From those primary facts taken together I could conclude, in the absence of an explanation, that the decision to dismiss the claimant was because he had done the protected act on **20 January 2025**.
97. That means the burden passes to the Respondent to satisfy me on the balance of probabilities that it was not in any sense whatsoever motivated by the fact that the Claimant did the protected act.
98. The explanation that is said to be non-discriminatory (or 'non-victimising') is that the Respondent (Mr Swainston and Mr Kavanagh) believed that the Claimant had told two workers, Mr Lister and Mr Mucklow to slow down and stop working.
99. The Respondent has failed to satisfy me of this.
100. I conclude that the Claimant was dismissed for doing a protected act. I infer that he was dismissed as he was (without applying the basic rules of natural justice) so as to deprive him of any opportunity to defend himself because Mr Swainston and Mr Kavanagh knew that he would. The Claimant was believed to be someone who would speak up against a perceived wrong. By calling him to the room and telling him he was being dismissed for gross misconduct this prevented him from doing so. I infer from my findings of fact that this was deliberate.
101. The Respondent's evidence was inconsistent and unreliable (I refer especially, but not only to, the supposed taking of statements from Mr Lister and Mucklow). Mr Swainston and Mr Kavanagh lacked credibility. The Respondent was aware from the very beginning, even before proceedings were started that:

101.1. The Claimant maintained that neither M Lister nor Mr Mucklow gave statements against him and that he had submitted texts/messages from them to him in support of them prior to these proceedings commencing as part of his appeal [see **pages 90-91**].

101.2. That he maintained that his dismissal was victimisation for speaking out about racism and not because he had done anything wrong.

102. Despite knowing of the centrality of the Lister/Mucklow evidence, the Respondent did not call either. When I asked counsel early in the proceedings whether there was a reason they were not being called, she could give none. She said she would take instructions. However, no reason was stated through counsel. Nothing was advanced until Mr Kavanagh's oral evidence, when unsolicited he said that he had personally asked Mr Lister and Mr Mucklow to give evidence but that they declined as they were afraid of violent repercussions from the claimant. I did not accept this as a genuine explanation. There is no statement from either to the effect that they were scared of Mr Vincent. The suggestion that they believed he may resort to violence was made by Mr Kavanagh, himself an unreliable witness whose credibility is severely questionable. Mr Kavanagh was aware of my question to counsel, raised early in the proceedings about whether there was a reason the individuals were not being called. He had time to think of a reason by the time he came to the witness table. I simply do not accept what he says regarding asking Mr Lister and Mr Mucklow to give evidence given the extremely suspicious way in which he proffered this information. I am very dubious about Mr Kavanagh's description of Mr Lister and Mr Mucklow as 'submissive' individuals as he described them. Certainly that does not appear to be the case with Mr Lister, who has it is plain to see engaged in the making of racial slurs. Mr Kavanagh said by 'submissive' he meant nervous types. That does not sound to me like a good reason not to call a witness given the serious allegations against the claimant.

103. The messages sent to the Claimant by Mr Lister and Mr Mucklow that they did not make any statements against the claimant is the only written material in their own words. As set out in my findings of fact, the statements at **page 180-181** were typed by Mr Swainston and are in the third person. It is right that they bear signatures, but then again so does **page 217** and I have found as a fact that Mr Joyce did not sign that page as an accurate record of the content of pages **215-217**. He signed simply because he had been asked to and was not provided with an opportunity to read them.

104. In light of the above, I draw the inference that Mr Lister and Mr Mucklow were not called because Mr Swainston and Mr Kavanagh know the truth to be that which Mr Vincent asserts: which is that he did not tell anyone, including Mr Lister or Mr Mucklow to slow down or stop work or to say the things on **pages 180-181**. I conclude Mr Swainston and Mr Kavanagh never had a genuine belief that he did so. This was a sham reason to disguise the truth, which was that the Claimant's employment was terminated because he had done a protected act by calling out a racist comment by the production manager. I accept Mr Vincent's argument that Mr Swainston sought out Mr Lister and Mr Mucklow, to seize the opportunity to dismiss the claimant because he had done a protected act on **20 January 2025**.

105. As the Respondent has not satisfied me of a non-discriminatory reason for dismissing the claimant, by which I mean that it has not satisfied me that the explanation or reason for

dismissal was not that he had done a protected act, I must conclude that Mr Swainston dismissed the claimant because he did a protected act. This amounts to unlawful victimisation.

106. I need not go on to consider the other Equality Act complaints as they are all founded on the same factual basis and were advanced as alternatives, should the dismissal not amount to an act of victimisation. As it does, I need not go on to consider them.

107. I now turn to the complaint of automatically unfair dismissal.

Did the Claimant make a qualifying disclosure?

108. The Claimant relies on the statement he made at meeting 2, which is the same statement that constitutes the protected act for the purposes of his victimisation complaint.

109. I conclude that he disclosed information to the Respondent, namely that Shaun Swainston was the person who made a racist comment regarding blowing the place up and that he was not present at a meeting at which it was stated that there would be zero tolerance to racism in the workplace. As made clear by the authorities, there is no bright line between an allegation and the provision of information (see case of Kilraine, para 76 above). There was sufficient information provided in the making of the allegation of racism, namely that it was Mr Swainston who had made the comment about which Mr Joyce complained and he was not present at the meeting at which people were being told that racism would not be tolerated.

Did the Claimant believe that this information tended to show a failure to comply with a legal obligation?

110. The Claimant genuinely believed that the information he gave tended to show that there had been a breach of a legal obligation, namely the obligation on the employer and its employees to refrain from racial discrimination and harassment related to race at work.

Was the Claimant's belief reasonable?

111. I conclude that it was a reasonable belief. He was aware that there was a culture of racism in the workplace. He was aware that he had reported one particular employee but that this resulted in no action. He had personally witnessed Mr Swainston's racial remark. Mr Swainston was not in fact present at meeting 2.

When he disclosed the information did the Claimant believe he was doing so in the public interest?

112. The answer to this is yes. It is clear from what I have seen and heard that the Claimant is a man of some conviction. He was troubled by the prevalence of racial comments in the workplace, and he believed the matter to be of some importance not just to Mr Joyce but to him, Mr Shaw, other workers and also new staff who would come into the business. When he raised it, he believed racism in the workplace to be a matter of public interest.

Was that belief a reasonable belief?

113. Having regard to the subject matter and culture of the workplace, I conclude that the Claimant's belief was reasonably held. Before arriving at this conclusion, I had regard to the guidance in the case of **Chesterton Global** (see paras 80-83 above). I note that the guidance by Underhill LJ was given in the context where *'the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character')* whereas the disclosure in this case is about the insidious subject matter of racism at work. In any event, having considered the factors, they are all applicable here, save perhaps for the last one, namely the identity of the wrongdoer. The Respondent organisation is not a household name, but it is a company that supplies its products to Mosques. In raising the matter as he did, the Claimant was not acting in his own personal interests but the interests of all workers who did not engage in racism and on behalf of the not only the direct subject of the slurs, Mr Joyce. The wrongdoing was deliberate and the nature of the interest, racism at work is an important issue and one of public interest.

Was the qualifying disclosure protected?

114. The information was given to Mr Telfer, a production supervisor. It was therefore a qualifying and protected disclosure (see paragraph 87 above).

Was the principal reason for the Claimant's dismissal that he had made the protected disclosure?

115. The burden here was on the Claimant. He has more than satisfied me on the evidence – as he must do – that the principal reason for terminating his employment was that he had made this disclosure. I refer to my findings of fact set out above, including but not limited to:

115.1. The timing of the disclosure and decision to dismiss.

115.2. The manner of the dismissal.

115.3. The inconsistent and unreliable evidence given by the Respondent witnesses as to the reason.

115.4. My finding that the Claimant did not tell anyone to show down or stop work.

115.5. My finding that the investigation into the dismissal after the event by Mr Kavanagh who purported to be but was not independent of the decision to dismiss, was a sham.

115.6. The attempt to traduce the Claimant's character and to make him out to be an unreliable employee and a threat to potential witnesses.

115.7. My rejection of the Respondent's purportedly genuine reason for dismissal.

116. Therefore, not only was the Claimant victimised by being dismissed, the principal reason for that dismissal was the making of the protected disclosure (which also amounted to the doing of a protected act) resulting in a finding of automatically unfair dismissal.

REMEDY

Facts

117. The Claimant was shocked, angry and upset when he lost his job. He felt humiliated and embarrassed by having to walk through the factory in front of his colleagues. He felt a sense of betrayal by the respondent and a sense of injustice at his treatment for speaking up on behalf of someone who had been the victim of racial taunts. His treatment had a negative effect on him in that he became withdrawn and distant from his family and partner. Although he secured new employment, he continued to feel anxious in his new position, worrying about losing his job despite assurances from his new employer. His treatment has left him feeling fearful of challenging discriminatory or unlawful behaviour in the workplace again, should it arise. He experienced ongoing anxiety for at least six months during which time he was on probation in his new employment. He has had disturbed sleep and from time to time suffered panic attacks. He has suffered no financial loss following his dismissal as he secured better paid work fairly shortly after dismissal.

Submissions

118. The Claimant submitted that a reasonable award for injury to feelings was at the higher end of the lower band of the Vento guidelines, although he felt that perhaps in light of my findings on the conduct of the Respondent, it perhaps should be a bit higher.
119. Mrs Kaura submitted that the Claimant had pitched his claim for injury to feelings about right and that an award of £10,000 was appropriate.
120. As regards the ACAS uplift, Mrs Kaura accepted that there should be an uplift and that it should be towards the higher end but not as high as 25%.
121. Mrs Kaura confirmed that interest on the victimisation injury to feelings award ran from the date of the act (the dismissal) to the last day of the hearing (being the calculation date) and at the rate of 8%.

Relevant law

122. An award for injury to feelings is intended to compensate for the anger, distress and upset caused by the unlawful treatment a worker has received. It is compensatory, not punitive. Tribunals must focus on the actual injury suffered by the Claimant and not the gravity of the acts of the Respondent: **Komeng v Creative Support Ltd** (UKEAT/0275/18/JOJ). Tribunals have a broad discretion as to the level of award but must apply that discretion judicially according to general principles and guidelines. The general principles were stated by the EAT in **Prison Service v Johnson** [1997] IRLR 162, para 27. The sort of things compensated for covers feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression. There are well known 'bands' of awards known as the 'Vento' bands: **Vento v Chief Constable of West Yorkshire Police (No2)** [2003] IRLR 102: the top, middle and lower bands. The boundaries of the bands have been revised. As of 06 April 2025, they were as follows:

122.1.1. Upper Band: £36,400 to £60,700.

122.1.2. Middle Band: £12,100 to £36,400.

122.1.3. Lower Band: £1,200 to £12,100.

Interest

123. A tribunal may award interest on awards of compensation in discrimination claims in respect of past financial loss and injury to feelings. Interest is calculated as simple interest: Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 3(1). The current interest rate is 8%. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation (regulation 6(1)(a) of the 1996 Regulations).

ACAS Uplift

124. The power to increase or decrease compensation awards by up to 25 per cent in cases where there has been an unreasonable failure to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures is found in section 207A Trade Union and Labour Relations (Consolidation) Act 1992:

(1)

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent

Conclusions

Injury to feelings

125. I considered the effects of the discriminatory treatment on the Claimant as set out in paragraph 116 above. In my judgement the appropriate level of award was indeed **£10,000**. I also noted that counsel for the Respondent agreed. From my findings it is clear that the effect of the victimisation/discrimination on the Claimant has been significant.

ACAS Uplift

126. It was not in dispute that the ACAS Code of Practice on disciplinary procedures applied in this case. There was a breach of the following parts of the Code:

126.1. Paragraph 4 (bullets 3, 4 and 5)

126.2. Paragraph 4, bullet 6 in respect of the appeal which was not genuinely investigated.

126.3. Paragraphs 5 (there was no investigation)

126.4. Paragraph 6 ((insofar as Mr Swainston purported to carry out an investigation and conducted the dismissal hearing)

127. Mrs Kaura confirmed that the Respondent was not advancing any case that the reason for not following either the ACAS Code or the Respondent's own policies was that the Claimant had less than two years' employment. That was not pleaded and not stated by anyone in evidence. In any event, the Code applies whether or not an employee has two years' continuous employment. The failures were in my judgement unreasonable. I found there to be flagrant breaches of the Code and deliberate in the sense that it was decided not to give the Claimant any opportunity to speak before terminating his employment. No reasonable explanation was or could be advanced.

128. In the absence of any mitigating circumstances by the Respondent for such flagrant failures, I considered it just and equitable to uplift the injury to feelings award by 25%. I did not consider this to result in an overall disproportionate sum of money to the Claimant.

129. Therefore, the injury to feelings award of £10,000 is uplifted by 25% to £12,500.

Interest calculation

- Principal sum **£12,500**

- Period of interest: date of act = **22 January 2025**; calculation date = **06 March 2026**

- Total days: **408 days**

- Interest formula: $\text{Interest} = \text{Principal} \times 0.08 \times \frac{\text{Days}}{365}$

- Interest: £1,117.81 (rounded to nearest penny)

130. This gives a total award of **£13,617.81**.

Employment Judge Sweeney

Case number: 2500239/2025

Date: 17 March 2026

APPENDIX

1. Unfair Dismissal

1.1. Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

2. Protected Disclosure

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

2.1.1. What did the claimant say or write? When? To whom? The claimant says they made disclosures on these occasions:

2.1.1.1. 20 January 2025 – verbally said to Iain Telford that the person who made the racist comments (Shaun Swainston) was not even at the meeting;

2.1.2. Did they disclose information?

2.1.3. Did they believe the disclosure of information was made in the public interest?

2.1.4. Was that belief reasonable?

2.1.5. Did they believe that it tended to show that:

2.1.5.1. A person had failed, was failing or was likely to fail to comply with any legal obligation, i.e. the requirement under the Equality Act 2010 to prevent race discrimination in the workplace.

2.1.6. Was that belief reasonable?

2.2. If the claimant made the protected disclosure, was it a protected disclosure because it was made to the claimant's employer?

If so, it was a protected disclosure

3. Remedy for unfair dismissal

3.1. If there is a compensatory award [there was no claim for a compensatory award]

3.2. What basic award is payable to the Claimant, if any? [no basic award was claimed or payable]

4. Victimisation

4.1. Did the claimant do a protected act as follows?

4.1.1. On 20 January 2025 did the claimant support his colleague, Tristan Joyce, when he made complaints of race discrimination against Shaun Swainston?

4.1.2. On 20 January 2025 did the claimant say that the person making the racist comments, Shaun Swainston, was not even present at the meeting where the workers were warned about making racist comments?

4.2. Did the Respondent do the following things:

4.2.1. Dismiss the claimant on 22 January 2025?

4.2.2. By doing so, did it subject the claimant to detriment?

4.2.3. If so, was it because the claimant did a protected act?

4.2.4. Was it because the respondent believed the claimant had done, or might do, a protected act?

5. Remedy for discrimination or victimisation

5.1. What injury to feelings has the discrimination/victimisation caused the claimant and how much compensation should be awarded for that?

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

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

5.4. Did the respondent or the claimant unreasonably fail to comply with it by failing to provide the claimant with the outcome of any investigation and failing to invite the claimant to a disciplinary hearing or allowing him to be accompanied?

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

5.6. By what proportion, up to 25%?

5.7. Should interest be awarded? How much?