EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr T Nicholas	**v**	**Menzies Aviation Ltd**

Heard at: Watford **On**: 15, 16, 17 April 2019

Before: Employment Judge R Lewis
Mr S Bury
Ms J Smith

Appearances

For the Claimant: In person
For the Respondent: Mr N Bidnell-Edwards, counsel

RESERVED JUDGMENT

1. The claimant's claims, whether of racial discrimination, or of detriment on grounds of having made a public interest disclosure, all fail and are dismissed.

REASONS

2. This was the hearing of a claim presented on 20 March 2018. Day A was 13 February and Day B was 22 February. There had been a preliminary hearing on 6 July 2018 (orders sent 24 July) at which the claimant had appeared in person and the respondent was represented by Mr Bidnell-Edwards.

3. The outline of the claim can be shortly stated. The claimant, who was born in 1963, has been an employee of the respondent since January 2010. He remains in its employment. He is a baggage handler at Heathrow.

4. In the claim, he alleged that he has been the victim of racial discrimination. He identifies as black British. He also claims to have suffered detriment on grounds of having made protected disclosures.

5. At the hearing on 6 July 2018, the matter was listed for a merits hearing of three days, including remedy.

Case management

6. It was necessary at this hearing to undertake a number of case management tasks. Inevitably, that work ate into the time available for the hearing. At the start of the hearing the judge proposed and the parties agreed that this hearing should deal with liability only. It was not possible to conclude the hearing in the available time, and therefore judgment was reserved.

7. In this judgment, and at the hearing, we have expressed concerns about case management and about case preparation. We deal with those matters briefly in order to explain the nature of the case which we heard.

8. The case management order summarised the nature of the dispute. It did not capture a list of issues. Mr Bidnell-Edwards told the tribunal that the judge on that occasion had been asked to do so. It is suggested that the respondent's representatives might, on receipt of the order, have asked the judge to reconsider the absence of a list of issues, and might at any time have put forward their own draft. Likewise, a chronology and 'who's who,' even if not ordered by the judge, are good and helpful practice.

9. The approach to the public interest disclosure claim suggested by the case management order appeared to us to risk adopting the "rolled up" approach which the EAT specifically discounted in Blackbay Ventures Ltd v Gahir UKEAT/0449-50/12.

10. The order adopted a Scott Schedule approach, but provided for no further case management or discipline after the Scott Schedule was produced. Although the order did provide for disclosure, it made no stipulation for bundles. That was another matter which the respondent's solicitors might usefully have drawn to the attention of the judge in a request for reconsideration.

11. In the absence of a list of issues endorsed by the judge, or of a draft prepared for this hearing by the respondent, it was necessary for this tribunal to take considerable time on the first morning to identify the issues, to which we come below.

12. We make no criticism of the claimant in any respect in this exercise: we accept that he prepared what he thought of as Scott Schedules to the best of his ability. He was entirely co-operative in accepting the concerns and guidance of the tribunal at this hearing.

13. The claimant had not prepared a single witness statement, but submitted as his evidence the attachment to his ET1, an opening submission, and a further summary. These were taken together as his witness evidence. He also submitted letters from a number of colleagues, who did not attend.

They were Mr Matthew Dinsdale, Mr Girish Patel, Mr Narharibhai Patel and Mr Ali Mehere. Although the statements of the other witnesses identified their grievances against the respondent, they were of little assistance to the tribunal in relation to the matters which we had to decide.

14. The respondent called three witnesses. They were in order: Mr Geoff Barfoot, Baggage Operations Manager; Mr Barry Treadaway, Ramp Support Manager; and Mr John Twyford, Deputy Manager and at all material times the claimant's immediate line manager.

15. At the start of each of his witnesses, Mr Bidnell-Edwards put to each additional questions in chief. The tribunal noted that none of these questions arose out of matters which had been put in evidence by the claimant, but were put to remedy the omissions from the witness statements served on behalf of the respondent. The most striking of these omissions (elicited through questions from the tribunal) was that Mr John Twyford said that he had not known about the alleged public interest disclosures at the time when he did the things which were alleged against him as detriments. That answer was potentially a complete defence to those parts of the claim.

16. Although the claimant presented a separate supplemental bundle, we worked from the main bundle prepared by the respondent, and all page references are to that bundle. The tribunal would have been assisted by a more thoughtfully presented bundle. It should as a matter of course have included all case management orders. As the claimant's allegations about events after 20 March 2018 were not before the tribunal, the bundle appeared to contain no documents arising after that date, although in this case, as in most others, a later document might have been useful in completing an evidential trail.

The issues

17. We summarise here the issues which were identified. The claim was presented on 20 March 2018 and the claimant had in correspondence withdrawn any allegation relating to events after that date. He had at no time requested leave to amend.

18. The claimant made three allegations of direct race discrimination as follows:-

    18.1 Mr Mombrum, a supervisor, has on grounds of race allocated to the claimant a heavier workload than he has allocated to a comparator, Mr John Barry, who is white;

    18.2 As part of the above, Mr Mombrum has on grounds of race allocated to the claimant work on flights to and from Zurich, not Geneva, it being common knowledge (and the fact) that Zurich flights generate more and heavier work;

    18.3 The respondent purports to have a "stepping up" system of appointing acting supervisors. There is in fact no such system, and

the respondent on grounds of race appoints white workers to supervise non-white, but never the reverse. The claimant in particular has been repeatedly supervised by a white peer, Mr Mitrov.

19. In correspondence the claimant had alleged two sources of protected disclosures. The first was complaints he had made to the confidential employee hotline. In discussion at the start of the case, the claimant agreed that that system is confidential, so that a complaint or report made to it cannot be traced to him. Reports are made to an external provider, and the claimant accepted that he could not prove that any report made to the hotline by him had either been passed to any named manager of the respondent, or was traceable to him. Accordingly, he did not pursue any allegation based on any alleged protected disclosure made through the hotline.

20. The remainder of his protected disclosures were set out in their entirety in a letter of 3 July 2017 (79-86).

21. We follow the numbering subsequently adopted by the claimant, and summarise the disclosures as follows:

    21.1 Disclosure 9: managers encourage bullying of staff;

    21.2 Disclosure 10 (first use): two colleagues have lost their lives, one by suicide, one by natural causes, in consequence of events at work;

    21.3 Disclosure 10 (second use): workers who complain about events at work are punished by an increase in workload;

    21.4 Disclosure 11: this related to Mr Heron and the coffee incident;

    21.5 Disclosure 12: the respondent has shown a contempt for the rule of law, as shown by the arrest of a manager;

    21.6 Disclosure 13: Mr Twyford threatened the claimant with violence;

    21.7 Disclosure 14: Mr Green threatened the claimant for supporting a colleague, Mr Odili;

    21.8 Disclosure 15: Mr Green made his threat in the presence of managers, who were therefore aware of it and complicit in it;

    21.9 Disclosure 16: computer records in the hands of the respondent will verify that his workload has been excessive and disproportionate;

21.10 Disclosure 17: the respondent operates a procedure of requiring workers to give 12 months' notice of a request for leave, thereby endangering health and safety;

21.11 Disclosure 18: the respondent does not operate safeguards for employees who wish to raise whistle blowing issues;

21.12 Disclosure 19: related to the sick leave of a colleague, and the apparent reasons for it;

21.13 Disclosure 20: related to the promotion of a colleague.

22. These are bald headline summaries, and we deal with them in slightly greater length below. We do, however, stress one point. The single disclosure document relied upon by the claimant was densely written, spread over eight pages of small font, and was very far from analytical in its presentation. The claimant knew what he had written, but had given it little analysis in preparation for this hearing. In particular, he repeatedly failed to distinguish between a sense of grievance (legitimate or not) and that which is required to prove a public interest disclosure.

23. The claimant had in reliance on the above alleged that he was subjected to seven detriments, which we hear refer to as PID by number; a detriment relating to Mr Constant was withdrawn on the first morning of the hearing because it was plainly post-dated 20 March 2018. The seven detriments which proceeded were the following:-

23.1 PID1: that Mr Treadaway ignored letters of concern sent to him by the claimant;

23.2 PID2: that the claimant was overloaded with work by Mr Mombury, Mr Barfoot and Mr Treadaway, including the allocations of Swiss work referred to above;

23.3 PID3: Mr Twyford made a false accusation against the claimant that he was absent without leave on 30 November 2017, leading to a meeting on 18 December 2017;

23.4 PID4: Mr Twyford and Mr Kudail made a false accusation against the claimant that he was absent on 14 December 2017;

23.5 PID5: (withdrawn)

23.6 PID6: that on 18 December 2017 Mr Twyford gave the claimant a formal warning for his lateness;

23.7 PID7: that Mr Treadaway dismissed the claimant's appeal against the formal warning from Mr Twyford for lateness;

23.8 PID8: that Mr Twyford made a false accusation against the claimant on 18 February 2018, namely that he refused to accept a work instruction from Mr Mitrov.

24. Before we deal with fact finding, we remind ourselves of what is said above: Mr Twyford's assertion, that he had no knowledge of the letter of 3 July 2017, and first saw it in preparation for this hearing, was one which the claimant readily agreed he was not in a position to challenge. The respondent's evidence, which was that of all those named, only Mr Treadaway gave evidence of having seen or even known about the document before the events which were alleged detriments, was likewise agreed by the claimant to be evidence which he could not challenge or disprove.

The legal framework

25. The claim was brought under two provisions. The claimant brought a number of claims of direct race discrimination under section 13 of the Equality Act, when read together with section 39 2 (d).

26. Section 13 provides as follows, so far as material:

> "a person discriminates against another if, because of a protected characteristic A treats B less favourably than A would treat others"

27. The treatment alleged in this case was three instances of detriment, within the meaning of section 39(2)(d) which provides so far as material:

> "an employer must not discriminate against an employee …. by subjecting B to any other detriment."

28. Section 136 provides so far as material:

> "if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred."

29. When we consider the detriments alleged in this case, we must ask ourselves whether the claimant has proved facts which, in the absence of any other explanation, show that the treatment in question took place because of his race. We do not need to find that race was the only reason for the treatment, or even the major reason; it is sufficient that we find that it was a material reason.

30. Where a comparator is relied upon, section 23 provides as follows:

> "on a comparison of cases …. there must be no material difference between the circumstances relating to each case."

31. Part of the claimant's claim was brought under the public interest disclosure (whistleblowing) provisions of the Employment Rights Act 1996.

32. The claimant relied on a number of alleged disclosures. We have had to consider whether each falls within the definition set out section 43B which refers to:

> "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:"

33. There then follows a list of six matters, of which material to this case might be the following:

> " (a) that a criminal offence has been committed …
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ….
> (d) that the health and safety of any individual, has been, is being or is likely to be endangered".

34. If a protected disqualifying disclosure has taken place, section 47B provides that:

> "A worker has a right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employee, on the ground that the worker has made a protected disclosure"

35. Detriment, in context is a matter which a reasonable worker in the position of the claimant would consider to be a detriment in the work place.

36. When we consider whether a protected disclosure has been made, we must bear in mind that the test is objective. However, a protected disclosure is still a protected disclosure if the reasonable belief of the worker is reasonable, but is wrong or misplaced.

Findings of fact: setting the scene

37. We find the material facts by way of background.

38. The claimant, who was born in 1963, joined the employment of the respondent in 2010 and remains employed by it. We heard no criticism of his work. In the most recent performance review in the bundle, conducted by Mr Twyford in March 2017, he scored grade A in all nine criteria on which he was assessed (77).

39. The claimant's job was that of Ramp Service Agent. As we understood it, his task was to work air side. When luggage was delivered from the chute to the area known as the spur, where his team worked, his task was to pick the luggage assigned to the flights on which he was working, place the items in the luggage bin, and when the bin was full, to drive it to the aircraft, where other staff would unhook it and load the contents. The claimant and team members would then drive the empty truck back to the spur, where it would be hooked to the next bin. The claimant agreed that it was not complex work. The claimant had no customer contact, and at the

times with which this case was concerned, worked with a team which was assigned exclusively to cover Switzerland and Portugal flights.

40. The claimant worked in allocated teams. Teams were usually about four in number. They started at either 4am or 12 noon (although individual team members had the ability to swap shifts). Each team had to have a person in charge. The person in charge was either the supervisor, or, if no supervisor was available, a team member who "stepped up" to the role for the purposes of that shift.

41. Partly in response to issues raised by the claimant, the respondent had a shift roster (eg 142) showing who would be on duty when, and who was the supervisor or who had stepped up for the shift (142).

42. Although not complicated, we accept that the work done by the claimant could be physically demanding; it was liable to require working to speed and deadlines; and we accept that the working environment was sometimes noisy and was not a wholly indoor environment so it could be, for example, very hot or very cold.

43. The claimant had, in the years before this case arose, raised concerns, complaints and grievances about the respondent's working systems, management and colleagues. He continued to raise issues going back to 2010, and expressed some of his concerns in personalised language. We noted that a grievance about bullying was rejected by letter of 30 July 2012 (66), and that there were further issues in 2014.

44. On 9 January 2017, the claimant wrote a letter to whom it may concern, (70) setting out concerns about an incident on 18 December 2016. The letter concerned who was given supervisory responsibilities on shifts, by what procedure, and by whom. It stated that it was not a complaint against peers who had accepted the responsibilities, but against managers who had allocated them. That form of wording, which the claimant used more than once, was disingenuous. We find that it was obvious that the claimant had issues with the choice of some stepping up colleagues rather than others. He had a particular issue with those who did not speak mother tongue English, and particularly with Mr Mitrov, who is Bulgarian, whose supervision the claimant appeared actively to resent.

45. Mr Barfoot had meetings with the claimant on 16 and 23 January 2017, and on 25 January wrote to summarise the outcome. Mr Barfoot's letter (74) is important and should be read in full. It first acknowledges the need for greater clarity in the appointment of staff to step up to supervisory positions. It also dealt with training for staff who step up. It explained the particular circumstances of 18 December 2016. It concluded as follows:

> "Also at our meeting, I asked if you were interested in "stepping up" as a supervisor if required, to which you replied you did not wish to.
>
> I hope this goes someway to satisfying that there is a not a favouritism practice in place, as we have a number of staff who wish to step into the supervisory role if required, and are happy to facilitate your request should you wish.

> If in future, you wish to step into this role, then please let me or your Shift Manager know as we would be happy to start the process".

46. It was common ground that the claimant has not taken up the opportunity to express an interest in stepping up. As stated, a few weeks later, the claimant received his appraisal from his line manager, Mr Twyford, with a wholly satisfactory outcome.

47. On 3 July the claimant sent the respondent's HR team a document headed "internal memo" (79-86) which was the critical document in this case. We deal first with the process by which it was dealt.

48. The document was given to Mr Treadaway to deal with. We accept that Mr Twyford was not shown it, or told of it, and was not aware of its content or existence until after this claim had started. The claimant rightly said that he could not prove otherwise.

49. The claimant was invited to meetings with Mr Treadaway to discuss the document but declined to attend. It is difficult to understand his reasoning for this.

50. In due course, and without further discussion with the claimant, Mr Treadaway wrote to the claimant on 1 September setting out the respondent's reply to the 3 July memo (94). That letter should be read in full.

51. On 30 September the claimant sent a lengthy reply to Mr Treadaway (98-104) to which he never received a reply. The claimant said that he chased for one. Although the bundle contained a number of proofs of posting of correspondence subsequently sent to the respondent's postcode (but not naming an addressee), there was no other evidence that the claimant followed up the letter of 30 September.

52. On 21 December Mr Treadaway wrote to the claimant as follows (111), to which we were shown no answer. We accept it as evidence that by that date, Mr Treadaway had not received the claimant's letter of 30 September.

> "This morning I received a letter from you requesting a response from another letter of 30 September which unfortunately I never received. Could you please send me a copy of the original so I can respond as appropriate?"

53. We deal with the content of the 3 July memo in the context of the claims for protected disclosure.

54. In late 2017, and early 2018, the claimant became entangled in a number of strands of management interaction. They were separate matters, and we deal with them separately.

55. The first strand was that of three latenesses. On 11 December the claimant was instructed to attend an investigation meeting, in accordance

with usual procedure, into an allegation that he had been late for duty three times in six months. The invitation set out the three dates in question. Mr Twyford conducted the investigation meeting on 18 December (108). The claimant accepted that he had been late three times between 19 November and 8 December 2017, and gave as the reasons oversleeping and public transport difficulties. Mr Twyford's conclusion was that the matter should be referred to a disciplinary hearing (109).

56. The second strand was the disciplinary which followed. In due course, the claimant attended a disciplinary meeting on 23 January 2018 with Mr Corradini. The claimant accepted that the latenesses had happened, and relied on the same reasons. He said that lateness had not affected his operational efficiency, and that his timekeeping had subsequently improved. The outcome was a verbal warning to remain on file for six months (128). The claimant appealed and his appeal was heard on 15 February. Mr Treadaway rejected the appeal and confirmed the original six-month verbal warning (140).

57. The third strand was that on 18 December 2017, the claimant was instructed to attend a meeting with Mr Twyford. The reason was that on 30 November 2017, he had been absent from duty. The claimant explained that he had had a domestic reason for absence, and said that he had notified his absence in advance to another manager, Mr Sears. He accepted that he had been absent that day. At the end of the investigation, Mr Twyford's outcome decision was (109C) that the matter ended on the basis that,

> "I am not going to take any further action, but in the future if you require any future time off then please come to the office and speak to one of the DM's" (109c).

58. The next strand that was on 14 December 2017, the claimant arrived at work over two hours late, and in consequence of being over two hours late, and in accordance with the respondent's procedures, was sent home and deemed to have been absent for the day. The claimant was invited to an investigation meeting with Mr Corradini on 22 January 2018. He said that he had tried to make telephone contact and had in fact attended work, albeit late. He accepted the respondent's procedure was as alleged by the company.

59. Mr Corradini referred the matter for a disciplinary hearing after the claimant's interview. The disciplinary took place on 30 January before Mr Barfoot (130). The claimant's reason for lateness was that he had overslept. He challenged the designation of being absent without leave. Mr Barfoot issued a six month verbal warning, confirmed in writing on 5 February (135). The claimant appealed, and the determination of the appeal had originally been pleaded as a detriment but it was not proceeded with at this hearing.

60. The final strand before us was an incident on 18 February 2018. The roster sheet for that day (142) showed that Mr Mombrun, the supervisor, was on leave, and the sheet identified Mr G Patel as supervisor. It also

recorded that Mr Patel's shift was 12:00 – 16:00 hours, ie half a day. The sheet named Mr Mitrov as "step up". (It will be recalled that in the outcome letter of January 2017, Mr Barfoot had endorsed the claimant's request that step up supervisors be clearly designated on the roster).

61. An incident took place between the claimant and Mr Mitrov in which the claimant denied that Mr Mitrov had authority as his supervisor during that day's shift.

62. By letter dated 21 February Mr Twyford instructed the claimant to attend an investigation meeting on an allegation of "failing to follow a reasonable instruction". The claimant was interviewed about the incident by Mr Twyford on 19 March (146). The claimant was obviously angry about Mr Mitrov's role in step up. Mr Twyford concluded, after he had heard the claimant, that he wished to speak to others who had been mentioned. The meeting adjourned and a matter of weeks later Mr Twyford told the claimant that no further action would be taken. Mr Twyford wrote a few lines to that effect at the foot of the notes of the meeting of 19 March. It was common ground that he added the final few lines some weeks after 19 March.

Racial discrimination

63. We now turn to the allegations of racial discrimination, which turned first on the allocation of work. The claimant had, and has, a deep conviction that he was allocated more work and heavier duties than his colleagues. It was both a general complaint, and an allegation which he had related to race. He also had, and has, the conviction that analysis of relevant computer records would make good at least the first half of this allegation.

64. The computer system in question was not property of the respondent, but was operated by the respondent on behalf of London Heathrow Airport Limited. The claimant and colleagues used hand held scanners to record the movement of individual bags. When the claimant moved a bag from the chute to the baggage bin for a flight, he scanned it, and the scanning record therefore showed that that item had been moved, and by whom. The same system applied to every piece of checked luggage on every flight every day, and therefore contained vast amounts of data. So far as we know, it recorded total numbers of bags, and the movement of each bag, but no other information. We accept that it operated on a monthly override, and that therefore, only one month's arrears of data could be found at any time.

65. The tribunal had two instances in which the data of different handlers had been compared. In mid-June 2018, and therefore well after the period with which this tribunal was concerned, the respondent undertook a random comparison between the claimant and Mr Mitrov. It regarded Mr Mitrov was suitable for comparison because he did the same job as the claimant on many of the same shifts. The information which it obtained (161-162) as provided in summary, without raw data. It showed that on a comparison of nine working days, Mr Mitrov moved more bags on seven

days. It contained no information about the nature or weight of the bags, or the flight destinations. Over the nine days the totals were 1,138 bags moved by the claimant and 1,469 by Mr Mitrov.

66. For the period September 2018 to March 2019, between six and twelve months after the period with which this tribunal was concerned, the bundle contained at pages 191-218 material produced by the claimant in the following circumstances. The claimant said that he had accessed scan information about his own work and that of Mr John Barry, another colleague. He accepted that he had no authority to access the information. It follows that he must have done so on a number of occasions, to bypass the monthly over-ride.

67. He then prepared the information in tabular form for each of the seven months, to demonstrate the comparison between the number of bags moved each month by each man. Our analysis of this data showed that in the seven months in question, the claimant and Mr Barry worked on the same days on only a total of 19 days in the first six months, and on ten days of the seventh month, March 2019.

68. If we each month divide the number of bags shown moved by each man by the number of days worked, so as to achieve a figure which might be the average number of bags worked per day, we find that the claimant's daily average was higher than that of Mr Barry in six months out of the seven, of which three were averages which were so close to each other as to seem to us immaterial, (eg 95/101; 162/172; 106/108).

69. We add the cautions that the claimant has not made available raw data upon which this material was based; it tells us nothing about the nature of bags or the weight of the bags; and we accept that any comparison between the claimant and Mr Barry is rendered unreliable by the fact that the claimant had no responsibilities other than baggage handling, whereas Mr Barry had two other responsibilities, which were training and trade union representation duties. We do not resolve the dispute as to how much time each of those responsibilities took up, which we do not think assists us.

70. The claimant asserted that as a general proposition, flights to Zurich generated more and heavier baggage than flights to Geneva, and that he was allocated to work on Zurich flights in the knowledge that that was harder work. We have no cogent evidence or reliable independent evidence to verify this, which we do not accept as a proposition in absence of such evidence.

71. We now turn to the claimant's allegations of racial discrimination. The first two allegations are those set out at paragraph 18 above and relate to the allocation of work by Mr Mombrun.

72. We find as follows:

72.1 It has not been shown to us that Mr John Barry is a comparator for the claimant in light of the application of section 23 of the Equality Act. We find that Mr Barry's circumstances, in having two responsibilities in addition to those of baggage handling, are material and therefore he is not a proper comparator;

72.2 It has not been shown to us that there is any material distinction between working on Zurich flights compared with the Geneva flights;

72.3 It has not been shown to us that the claimant has, in fact, been allocated work by Mr Mombrun in exercise of choice between the claimant and Mr Barry. An overlap of 19 working days in six months (even if it were shown, as it has not, that both worked the same shift on all 19 days) seems to us insufficient material on which to base a comparison;

72.4 It has not been shown that there is any evidence of allocation of work being tainted by race;

72.5 The only potentially true comparison which we have (the claimant and Mr Mitrov), is likewise unsupported by raw data, is a comparison with a comparator not of the claimant's choice, and is about a small number of days long after the period with which the tribunal is concerned. We do not know if they overlapped on shifts. Making all those allowances, it nevertheless shows many more bags moved by Mr Mitrov than the claimant, and is inconsistent with the claimant's case.

72.6 It has not been shown to us that a pure numerical count of bags is necessarily a reliable measure of workload for the purposes of this comparison.

73. The third allegation of racial discrimination relates to the stepping up system.

74. We find that the stepping up system operated on occasions when there was no designated supervisor present. We accept that it attracted additional pay. It was very simple. The respondent required that in every team, there was always a person who was in charge. That would usually be a rostered supervisor. If no supervisor were available, a member of the team would be asked or appointed to act up for the duration of the shift. We accept that the role of the acting up supervisor may have been more notional than real, and that, as the claimant said, experienced baggage handlers by and large managed themselves and their own work.

75. We accept that Mr Barfoot accurately recorded (74) the claimant's refusal to step up, and sincerely recorded the respondent's offer to the claimant of stepping up opportunities if he changed his mind. We also accept the claimant's oral evidence that there was at least one occasion when he was offered the opportunity of stepping up and refused it.

76. We accept that which is implicit in Mr Treadaway's letter of 9 January 2017, which is that the stepping up system may operate on an *ad hoc* basis, sometimes at very short notice, and to that extent may appear at times to be operated on an arbitrary and undocumented basis.

77. We accept also that Mr Mitrov has been chosen on many occasions to step up because he commands the regard and respect of his colleagues (with the clear exception of the claimant), and is seen by management as a reliable hard worker.

78. We have seen no evidence whatsoever that race was in the slightest respect a factor in Mr Mitrov's step up opportunities; or in those offered to other white colleagues; or in those not being offered to the claimant.

79. We find that the burden has not shifted in relation to any of the claims of racial discrimination, but to the extent that it might be said to have, we accept the evidence of how systems were operated by the respondent. The claims of racial discrimination fail.

Protected disclosure

80. We now turn to the claims of protected closure. The protected disclosures relied upon were all set out in the claimant's internal memo of 3 July 2017. We turn to that document and we find that it did make a number of the alleged protected disclosures. Before we deal with the disclosures we make a number of general findings about the document.

81. The claimant was, at this hearing, courteous and co-operative without fail. We note that he was described in his March 2017 review as a hard worker, who kept himself to himself, but was a good team worker. We accept that that was a genuine assessment, sincerely made. The internal memo was seen by the respondent in a wider history of the claimant's complaints work. We have seen from the selection before us:-

    81.1 The claimant sometimes used disproportionate and aggressive language, without insight into how it might appear, and that it undermined the credibility of his message. It is not unusual for employees to complain of partiality by management; the phrase "a bad stench of corruption" (80) is not usual. There are often disagreements with line management; when a disagreement is looked into, it is unusual for the first response to be to call the line manager "a liar" (147);

    81.2 The claimant's internal memo purported to be a follow up to his correspondence of 9 January 2017. The first page of eight dealt with events of June 2017. That page could be said to be a follow up or reply to the January material. The rest reiterated complaints and issues going back to 2010, and dealt in detail with events since then. Mr Treadaway's general response, which was, "I find it unfortunate you seem unwilling to accept past decisions and move

on", was tactful and well said (97). The claimant had little insight into this.

81.3 We go further than Mr Treadaway, and find that the claimant has become to some degree fixated by past events, and by the part played in them by certain colleagues, notably Mr Barry and Mr Mitrov. We therefore approach his evidence with caution. We find that he is not a reliable or objective narrator of events about which he feels strongly, or where either Mr Barry or Mr Mitrov is concerned. We add that this is not a finding that the claimant tried to mislead the tribunal.

81.4 The respondent's task in answering and managing the internal memo, and the tribunal's task in analysing it, is made incomparably more burdensome by the absence of a structure, whether chronological, thematic or personal. There appeared before this hearing to have been no analysis on either side of where the alleged protected disclosures were found in the document, a task undertaken by the tribunal, with some help from the parties.

81.5 Although the claimant had on 2 July 2018 set out his own analysis of the disclosures (152-154), he had not cross referred the analysis to the original letter, and not prepared well for this hearing such as to be able to give cogent evidence about each of them.

82. Within that framework, we asked where each disclosure was to be found, and whether each disclosure separately constituted a protected disclosure, following the claimant's numbering 9 – 20 inclusive. Disclosure 9 was probably the following (80):

> "I firmly believe that [6 names] are jointly responsible for all the bullying and harassment which is rife in the spur. They are the cause of the problem as far as I can see .. "
>
> "I wish to also make clear that I am not making a complaint about Mark Mombrum because his superiors were made aware of his actions, therefore shifting liability from Mark to his superiors. He, along with [3 names] are just small pawns in a bigger game. The managers mentioned have encouraged bullying and harassment."

83. We do not have find that that was protected disclosure. There is no disclosure of information. There is rather a generalised allegation, a complaint about management, using the language of general grievance.

84. Disclosure 10 (first usage) is found at pages 80 and 85. In the original, both names which we identify with an initial are given in full; emphasis added:

> "A few years ago, one of my colleagues named S had a row with his team leader and suffered a fatal heart attack on his way to work on the following day. More recently, another colleague named H who confided in me was in a bitter dispute with his team leader and ended up committing suicide on 1 June 2017. Whether it was just a coincidence that they both had problems at work or that problems at

> work was a contributory factor nobody knows but it is definitely within the realms of possibility …… Deep down in my heart I firmly believe that …… it was not just a coincidence".

85. We cannot fault the wisdom and sensitivity of Mr Treadaway's reply (96):

> "In your first internal memo correspondence, you raise concern about two members of staff who tragically lost their lives while being employees of Menzies Aviation. There may be many factors involved in these types of incident and I am not going to be drawn into speculating what they could have been. In the strongest possible way, I encourage you not to speculate about incidents like these, as rumours, ill-informed knowledge and guesswork invariably lead to false conclusions being drawn. Such speculations potentially cause unnecessary distress to those close to the people directly affected by the tragedies."

86. We find that the claimant has not conveyed information but a mixture of speculation and insinuation, underpinned by his own assertion, "Nobody knows".

87. Disclosure 10 (second usage) appears to refer to page 82, and to events in about 2012 to 2014. In a long section at the start of the long paragraph on that page, the claimant makes generalised complaints and grievances about allocation of work, in which we can find no information, and nothing tending to show that any element in the statutory test has been met.

88. We agree that disclosure 11 meets the statutory test. There therefore was a protected disclosure. It is set out at page 81:

> "On one occasion he actually threatened me with violence just because I went to make a cup of coffee. When I told him that as long as it does not affect my work, nobody can stop me from making a cup of coffee, in the presence of a manager, he attempted to block my passage by holding the railings with both hands like a bouncer. He got aggressive and said that he would stop me"

89. We accept that the claimant conveyed information about a specific defined incident. He named those involved and particularised the incident. We accept that the allegation tended to show the possible commission of a criminal offence of assault and/or of danger to health and safety.

90. Disclosure 12 is set out in general terms. Although at 153 the claimant refers to the arrest of a colleague, we cannot find that person's name in the internal memo. We do find (85) the comment in the apparent context of the step up policy,

> "Throughout my whole working career I have never seen such a blatant disregard for company policy, not to mention the rule of law".

We find that that is comment. It is not information. It does not relate to any of the matters required in section 43B, and is not a protected disclosure.

91. Disclosure 13 is an allegation about an event on 28 June 2016. The claimant wrote the following: (83)

> "for example, on 28 June 2016, while having an information talk with John Twyford …… John Twyford walked towards me and came so close that our noses almost touched. Obviously, he was trying to scare me into keeping quiet about it, but unfortunately for him, intimidation does not work with me. I did not report …. I decided to give him enough rope to hang himself by making a note of the time, date and location, so if he keeps on doing that when it does blow up in his face, if there are any unintended consequences when the Police do their investigations and CCTV footage will prove that I was provoked. For both of our sakes I am glad he never did that again"

92. The actual allegation in the internal memo is to the effect that Mr Twyford invaded the claimant's personal space so that their faces nearly touched. The allegation does not state if this took place in the CCTV area. We do not accept that the claimant has made out the pleaded allegation, namely that there was a threat of violence in the CCTV area. There is no evidence of threat, or violence, or reference to CCTV.

93. Disclosures 14 and 15 run together and refer to an incident when a Mr Green told the claimant not to be involved in an investigation into a colleague, Mr Odoli, whom the claimant wished to support. This is the subject of a lengthy narrative at pages 81-82 and is not wholly consistent with the claimant's own pleading. The internal memo does not identify Mr Green as a Trade Union representative as the pleading does. The pleading refers to threats made to the claimant by Mr Green. The lengthy section set out the claimant's views about Mr Green in general, and the memo includes the following words:

> "That was not the only time that I have been threatened by somebody in front of a manager. In February 2015, I was threatened by Joe Green in the presence of the manager and a Trade Union representative just because as I added as a witness for a colleague…. Joe Green warned me that I should not have got involved and if I am not careful he will get me sacked".

94. We can see that there is information but we cannot see how it relates to any of the statutory requirements of section 43B. We cannot see the reasonable basis of belief in a criminal offence or (theoretically) a miscarriage of justice, in the absence of any further information or evidence.

95. Disclosure 16 related to a matter which gripped the claimant, which was his conviction (mistaken as we have found above) that computer records demonstrate the unfairness of his workload. There was no reasonable basis for this allegation; we accept the evidence which we have heard, which was that computer records were only retained for a month; but they showed no more than we have already described; and, as Mr Treadaway said in his reply (96) that allegations about overloading on the Cyprus contract were over three years old. We do not accept the claimant's mere assertion that after several years working at Heathrow, he was unaware of the limitations in the accessibility of computer records. We can see nothing that relates this bare assertion of wrong information to any element of section 43B.

96. Disclosure 17 was that (84) in the context of an application for annual leave, the claimant said that Mr Twyford said "what I understood to be that I must give a minimum of 13 months to guarantee that my request is accepted." The claimant's pleading was that

> "Health and safety has been compromised due to the 12 months' notice requirement for annual leave. As a result of leave are suffering with exhaustion and fatigue which is highly dangerous in the airport environment."

97. We do not accept that the respondent requires 12-13 months' notice of annual leave; we accept, from knowledge of Heathrow based cases, that there may have been particular requirements about leave being taken at peak travel times. We accept that there appears to have been some misunderstanding about leave, and that this was a protected disclosure, although not quite in the dramatic language of the pleading. We accept that by informing the respondent that managers demanded up to and over 1 year's notice of leave, the claimant told the respondent that health and safety was likely to be endangered, and of a possible breach of obligation under the Working Time Regulations. We cannot find reference to exhaustion, fatigue or the danger to the environment.

98. Disclosure 18 is not borne out by the reference at 84:

> "What safeguards have been put in place to ensure that people in positions of authority cannot abuse their powers to the detriment of those over whom they have power?"

It is not a disclosure of information; it is a rhetorical question about the operation of the respondent's procedures, made at a time when the claimant well knew there was a grievance procedure and an employee hotline, both of which he had used.

99. Disclosure 19 is pleaded as follows "I disclosed that a colleague named [name given] was off sick with depression for a long time due to being shouted and bullied by a manager". The memo said the following:

> "Not so long ago, one of my co-workers went off sick with depression due to being victimised by [same manager]. Should you require more information it will be supplied."

100. There was nothing in the memo about the length of the absence; and the word used was victimised, without reference to shouting or bullying. The worker was not named in the internal memo. We are not able to assess the reasonableness of the claimant's belief, save to say that it has not been made out to us and we do not find that this was a protected disclosure.

101. At disclosure 20, the claimant refers to a named individual (83),

> "who was reported on numerous occasions for threatening to beat people up, was eventually promoted to team leader status".

We accept that the disclosure of the information that the named individual had threatened violence in the workplace was a protected disclosure.

102. It follows from the above that we find that in a number of respects, the claimant made protected disclosures. That may have been more by accident than by design, but that does not make any difference.

Detriments

103. The claimant relied on seven separate detriments. Four of them were allegations against Mr Twyford. We repeat what we have said above; we accept Mr Twyford's evidence that he had not had sight or knowledge of any protected disclosure at the times complained of, and therefore on that basis alone, the claims about his conduct fail. We add that the claimant very fairly replied that he was not in the position to challenge the evidence about Mr Twyford's lack of knowledge. However, we add the following findings, in which we accept that it has been shown by the respondent that there was a reason for the alleged detriments which was unrelated to the disclosures.

104. Detriment 3 was that Mr Twyford made a false accusation about the claimant's absence on 30 November 2017. We disagree that that allegation has been made out on the facts, as set out above at paragraph 57. We find that Mr Twyford had the information that the claimant had not attended work. When he looked into the matter he realised that it merited no further action. The decision to look into the matter was reasonable and legitimate on the material before him, and wholly untainted by any extraneous or improper consideration.

105. Detriment 4 was the allegation that Mr Twyford made a false accusation that the claimant was absent from work on 14 December 2017. For reasons set out at paragraph 58 above, we disagree. The decision to investigate an allegation was reasonable and legitimate on the material before him, and wholly untainted by any extraneous or improper consideration.

106. Detriment 6 was that Mr Twyford gave the claimant a formal warning for his lateness on 18 December 2017. We disagree: in fact Mr Twyford referred the allegation for disciplinary consideration by another manager, on the footing that the claimant agreed that he had contravened the lateness policy. That was a reasonable and legitimate exercise of management discretion, wholly untainted by any improper or extraneous consideration. It was also an indication of Mr Twyford's good faith, in surrendering the final decision making authority about the matter to another manager.

107. The final allegation against Mr Twyford related to the incident on 18 February 2018. For reasons set out at paragraphs 60-62 above, we repeat our disagreement that Mr Twyford's actions were in any respect tainted by an improper or extraneous consideration.

108. Detriment 2 related to the overload of work by Mr Mombrun, Mr Barfoot and Mr Treadaway. There was no evidence that Mr Mombrun knew of any protected disclosure and the claimant readily agreed that he was not in a

position to prove it. Mr Barfoot also said that he did not know that, and the claimant likewise conceded that he could not prove the contrary. We accept the denials given by each individual.

109. Mr Treadaway's evidence was as that he works in a different operational area from the claimant, he has no authority whatsoever over the spur staff and therefore, even if he wanted to, could not give any direction about the claimant's workload. We accept the truth of that evidence, and it follows therefore that the claim in relation to detriment 2 fails.

110. For avoidance of doubt, each element fails; we find that the claimant was not improperly overloaded with work; we find that Mr Mombrun and Mr Barfoot were unaware of the protected disclosure; and we find that Mr Treadaway, who was aware of the protected disclosure, could not have influenced the amount of the claimant's workload and did not do so.

111. That leaves two final allegations against Mr Treadaway. The first was that he ignored the claimant's letter of 30 September 2017. The claimant could not prove this allegation. The evidence was that when he became aware of the existence of the letter of 30 September, Mr Treadaway immediately notified the claimant and asked for a fresh copy. We can attach no evidential weight against that evidence in favour of the claimant's proof of posting slips, which simply show that the letters were sent to Menzies Aviation at the correct postcode. The claim fails because it has not been shown that Mr Treadaway received the letter which he was alleged to have ignored.

112. The final detriment is that Mr Treadaway dismissed the client's appeal against a verbal warning. We repeat what we have said at paragraph 56 above.

113. It follows that the claimant's claims fail and are dismissed.

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Employment Judge R Lewis

Date: …9 May 2019……..

Sent to the parties on: .....

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For the Tribunal Office