EMPLOYMENT TRIBUNALS

Claimant: Mr A Thompson

Respondent: Wheeldon Brothers Limited

Heard at: Manchester Tribunal Hearing Centre

On: 7 – 10 October 2019
15 October 2019
17 October 2019
(In Chambers)

Before: Employment Judge McDonald
Mr S Khan
Mr J Ostrowski

REPRESENTATION:

Claimant: Mrs Thompson (wife)
Respondent: Mr F Jaffier (Employment Law Consultant and Advocate)

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim that the respondent subjected him to harassment related to race in breach of s.26 of the Equality Act 2010 succeeds in relation to incidents 3, 5, 6, 8, 10, 11, 12.
2. The claimant's claim that the respondent subjected him to harassment related to race in breach of s.26 of the Equality Act 2010 fails in relation to incidents 1 and 2 (because they were brought out of time) 4, 7, 13 and 14.
3. The claimant's claim that the respondent directly discriminated against him in breach of s.13 of the Equality Act 2010 because of race fails
4. The claimant's claim that the respondent victimised him in breach of s.27 of the Equality Act fails.
5. The claimant's claim that he was unfairly dismissed succeeds.

6. The claimant's claim that the respondent made unlawful deductions from his wages in May 2013 fails.
7. Those claims which fail are dismissed
8. The matter will be set down for a one day hearing on remedy in relation to those claims which succeeded.

REASONS

Introduction

1. The claimant worked as a labourer for the respondent. He claimed that he was subject to discrimination and harassment, in the form of derogatory and insulting racist remarks and behaviour to him by fellow workers. He claimed that his managers took no action to prevent the conduct which culminated in a physical assault upon him and led to his dismissal for gross misconduct on 17 August 2018. The respondent disputed the allegations and maintained that the claimant was dismissed for a physical altercation with a colleague. The claimant claimed that dismissal was an unfair dismissal.

2. The claimant also alleged that the respondent repeatedly failed to offer him promotional and development opportunities offered to white colleagues and that it made unlawful deductions from his wages in May 2013. The respondent denied these allegations.

The issues to be decided by the Tribunal

3. The issues to be decided by the Tribunal were clarified at a preliminary hearing on 23 May 2019 and listed at paragraphs 9 and 10 of the Case Management Summary sent to the parties on 3 June 2019.

4. During the final hearing, we made three changes to the list of issues identified at that preliminary hearing.

5. First, Mrs Thompson confirmed that it was the claimant's case that a number of the acts of harassment and/or less favourable treatment he complained about were also acts of victimisation under section 27 of the Equality Act 2010 ("the 2010 Act"). We accepted that this was clear from the Scott schedule dated 15 April 2019. For the respondent, Mr Jaffier also accepted that that was so and by consent the claimant was allowed to amend his case to add the claim of victimisation.

6. Second, Mrs Thompson said the claimant was also making a claim that the respondent had made an unlawful deduction from the claimant's wages. The claimant's claim was that he was owed three weeks' wages for the period 1 May to 23 May 2013 when the claimant's employment TUPE transferred to the respondent. The time limit for bringing a claim of unlawful deduction from wages is three months from the date of the deduction or last deduction in a

series. Mr Jaffier said that any claim based on deductions in May 2013 was out of time. A claim can be brought outside the usual time limit if the claimant can show it wasn't reasonably practicable to bring the claim within the time limit. Mrs Thompson said that she could give evidence to explain why the claim had not been brought sooner. We decided the best way to deal with this point was to hear evidence from any relevant witnesses as part of the final hearing of the claimant's other claims. We would then decide whether the claimant had shown that his claim about unlawful deduction of wages should be allowed to go ahead despite being made outside the usual three month time limit.

7. Third, during the second day of the hearing it became apparent from Mr Jaffier's approach to cross examining the claimant that the respondent was relying on the "reasonable steps" defence at section 109 of the 2010 Act. Paragraph (9)(1) of the Preliminary Hearing Case Management Summary had suggested it wasn't relying on that defence. Mr Jaffier confirmed that was no longer correct. If we decided that the respondent's employees had racially harassed, discriminated against or victimised the claimant, the respondent would say that it was not liable for their actions because it had taken all reasonably practicable steps to prevent those actions or actions of that kind taking place.

8. Taking those points into account, the issues we needed to decide were:

   (1) Unfair Dismissal

      a. Could the respondent prove a potentially fair reason for dismissal on the balance of probabilities? The respondent stated the reason was conduct – s.98(1) Employment Rights Act 1996 ("ERA"). The claimant disputed this and stated the reason was discriminatory.

      b. If so, was the decision to dismiss fair, applying s.98(4) ERA 1996?

      c. If the claimant was unfairly dismissed, did he contribute to his dismissal to any extent and/or do the 'Polkey' principles apply?

   (2) Race Discrimination

      a. Direct Discrimination/Harassment/victimisation – the claimant had identified a series of acts of harassment or less favourable treatment or victimisation in the claim form and amended particulars and 'Scott schedule' and had identified white comparators for relevant allegations in the comparator table.

         i. Did each such act occur?
         ii. Was it an act of direct discrimination, harassment and/or victimisation?

The claimant relied upon his race as Black Afro-Caribbean

b. The respondent disputed the events and argued that many of the acts were out of time. The claimant relied on the events as an act continuing over time. Were any acts out of time and, if so, should the Tribunal grant a just and equitable extension to allow the claims to be brought?

c. Was the respondent potentially liable for any acts of its employees in breach of the 2010 Act?

d. If so, did it have a defence to the claims based on its employees' acts because it took all reasonable steps to prevent the employees doing those acts or acts of that kind (s.109(4) of the 2010 Act)? In this judgment we refer to this as the "reasonable steps defence".

(3) Unlawful deduction from wages

a. Did the respondent unlawfully deduct three weeks' pay from the claimant's wages relating to the period 1 May and 2 May 2013?

b. Since the unlawful deduction claim was not brought within three months of the deductions being made should the claimant be allowed to pursue it because it was not reasonably practicable for him to bring the claim sooner than he did?

Procedure, documents and evidence heard

9. The case was heard at Manchester Tribunal Hearing Centre. This was because the Employment Tribunals were unavailable due to flood damage. We are grateful to the parties for putting up with the inconvenience that caused.

10. We heard evidence from the claimant and from Mrs Thompson in support of the claimant's case. For the respondent we heard evidence from Jonathan Wheeldon, James Wheeldon, Steven Savery and Susan Wheeldon-Gorst. Jonathan Wheeldon is a director of the respondent and manages their Oldham yard. James Wheeldon is also a director of the respondent and manages their Bury and Ramsbottom yards. Mr Savery worked for the respondent until his recent retirement. Mrs Wheeldon-Gorst is the financial director of the respondent and is also responsible for human resources issues at the respondent. Jonathan, James and Susan are siblings and Mr Savery is related to them by marriage.

11. There were written witness statements for all the witnesses apart from Mrs Thompson. Her evidence was very short and dealt only with the unlawful deductions from wages claim. Each witness was cross-examined and also answered questions from us.

12. There was an agreed bundle of documents. At the start of the hearing this was 276 pages long. However, during the hearing more documents were

added. These included the claimant's payslips relevant to his claim for unpaid wages and copies of various relevant emails between the claimant and respondent. References in this judgement to page numbers are to page numbers in that bundle of documents.

13. There was also CCTV footage of the incident on the 7 August 2018 which led to the claimant being dismissed. During the hearing we viewed that footage on a laptop. The respondent's witnesses told us that during the disciplinary and appeal process they viewed the footage on a larger screen than the laptop screen. During the chambers day we therefore took the opportunity to view the footage on a larger PC screen.

14. At the start of the hearing Mrs Thompson drew our attention to a letter from a mental health practitioner at Healthy Minds dated 29 January 2019 which said that the claimant "may have ASD [i.e. Autism Spectrum Disorder]"(p.249). Mrs Thompson told us the claimant was still waiting for tests to confirm that provisional diagnosis. However, she told us that the claimant does sometimes need to use mnemonic aids in order to remember things. In her words, that means he sometimes needs to "go back" in order to "go forward" which can lead to him needing extra time to answer questions. We did observe during the claimant's cross examination evidence that he did sometimes need more time than might have been usual for a witness to answer questions and did sometimes find it difficult to understand the questions he was asked, particularly if they were hypothetical questions. This did sometimes mean that questions had to be reworded either by Mr Jaffier or by us. This also meant that the claimant's evidence took longer than had been estimated at the preliminary hearing. In addition to the four days originally listed on the 7-10 October 2010 for the final hearing we needed an extra day on 15 October 2019 to finish the evidence and hear submissions from Mrs Thompson and from Mr Jaffier.

15. The Tribunal then met in chambers on 17 October 2019 to make our findings of fact and to reach our conclusions on the issues. The Employment Judge apologises to the parties for the delay in writing up those conclusions and providing this judgment to the parties.

Fact-finding

16. We set out our findings of fact below under five main headings:

- Incidents of harassment, discrimination and/or victimisation
- Disciplinary procedure, dismissal and appeal
- "Reasonable steps" taken by the respondent to prevent harassment, discrimination and/or victimisation
- Less favourable treatment in training and development
- Unpaid wages

Incidents of harassment, discrimination and/or victimisation

17. For the sake of convenience we use “the incidents” when we’re talking about all the incidents of harassment, discrimination or victimisation which the claimant sets out in the claimant’s Scott Schedule (pages 50-67). That document sets out the further details of his claims which he provided in response to the case management order dated 23rd of May 2019.

18. In the Scott Schedule the incidents were set out in reverse chronological order with the latest incident (the alleged assault on the claimant on 7 August 2018) coming first and the earliest (racist remarks by two of the claimant’s co-workers in May 2017) coming last. In considering the allegations it seemed to us to make more sense to deal with the incidents in the date order they happened so this judgement will start with the incident in the Scott Schedule at p.63 in May 2017 and work forward to the alleged assault at p.50 on the 7 August 2019. For convenience, we have set out the list of incidents in the order in which we considered them in the Appendix to this judgment.

19. The Scott Schedule also includes (at p.64) the allegation that the claimant was directly discriminated against because of race by being denied training and development opportunities. In this judgement we deal with that issue under the separate heading of “less favourable treatment in training and development”.

20. For many of the incidents, the alleged perpetrators were the claimant’s fellow employees at the respondent. We did not hear evidence from any of them apart from Mr Savery. There were written statements from a number of the claimant’s former colleagues in the bundle (pages 192-195 and 198-205). These had been collected by Jonathan Wheeldon for the hearing of the claimant’s appeal against dismissal in September 2018. However, none of the statements at those pages provided any direct, specific evidence about the incidents. There was some written evidence in the bundle relating to some of the incidents but for many, the only evidence we heard was from the claimant. Because of that, we set out first our general findings about the claimant’s credibility and reliability as a witness.

The claimant’s credibility and reliability as a witness

21. In his submissions for the respondent, Mr Jaffier suggested that given the claimant’s ”poor memory” his evidence must be treated with caution. He referred in particular to the claimant denying having been sent the four relevant witness statements before his disciplinary hearing on the 15 August 2018. During the hearing we established that those documents had been sent to the claimant as attachments to an email from Susan Wheeldon-Gorst at 15.00 on the 13 August 2018. The claimant sent Mrs Wheeldon-Gorst an acknowledgment of receipt at 15.17 on the same day. We accept that the claimant was mistaken when he said he had not received the statements.

22. Mr Jaffier also submitted that the fact that the claimant had never reported many of the incidents to Jonathan Wheeldon cast doubt on them having happened. He submitted that was particularly the case because Jonathan Wheeldon's evidence was that the claimant sent him text messages highlighting what the claimant saw as racially insensitive content online, e.g. an H & M advert which showed a black child wearing a hoodie with the phrase "Coolest monkey in the jungle" (para 3-5 of Mr Wheeldon's Tribunal witness statement). Mr Wheeldon said that the claimant did so because "he knew he could confide in me and that I did not condone any form of racism" (para 6 of his statement). The claimant accepted he had sent the texts to Mr Wheeldon. However, he said that was before the incidents he complained of happened.

23. We set out specific findings about whether particular incidents were reported to Mr Wheeldon by the claimant when we deal with those incidents below. However, we accept that the claimant did not report all the incidents he told us about to Mr Wheeldon. We do not, however, find that undermines his evidence. We find that the claimant had in the past been comfortable sharing incidents of what he perceived to be racial discrimination with Mr Wheeldon but we note the examples given were of material on the web not at the claimant's workplace and involving the respondent's employees.

24. We find that throughout the incidents in this case the claimant was desperate not to lose his job. This was particularly because he and his family had experienced a period of homelessness. When he referred to this in his oral evidence at the Tribunal the claimant became distressed. That distress seemed to us genuine. We find that this fear of losing his job did inhibit the claimant from raising issues about his treatment in the workplace.

25. In assessing the claimant's credibility we have also taken into account the preliminary diagnosis that the claimant is on the Autistic Spectrum. We note that the unchallenged evidence in his Universal Credit Capability for Work questionnaire (at p.238) is that he cannot tell the time; speaks English but "doesn't always understand what is asked of [him]" and struggles with instructions. Having observed the claimant giving evidence, in general we found him to be a credible and honest witness. We accept that he made mistakes about whether he had received certain documents and, if so, when. However, we find that he made those mistakes in good faith. We observed that he sometimes faced difficulty in remembering the dates when incidents happened. However, we found that his recollection of the incidents themselves was credible and reliable.

26. With those general findings in mind, we examined each of the alleged Incidents carefully in order to reach a view on the balance of probabilities whether it happened.

Incident 1 (p.63) – canteen remarks in May 2017

27. The claimant's evidence was that in May 2017 in the works canteen two of the claimant's Polish co-workers made racist remarks to him and an agency

worker named Salim Sadjo. The claimant said the incident took place following the Manchester Arena bombing on 22 May 2017 and was fuelled by a newspaper in the canteen naming victims of the tragedy. The claimant said Dariusz Saqziak made a racist comment about Saleem Sadjo's religion saying "Fuckin' Muslims" as he left the canteen. Mariusz Grochowski then said "that's why we don't want no Blacks, no Pakistanis, no Muslims, no immigrants in our country!". The claimant said Mariusz also added "not all Muslims are terrorists, but all terrorists are Muslims" before leaving the canteen.

28. The respondent's submission was that they had no knowledge of this incident. The claimant's evidence was that it was not reported. He says that was because Saleem Sadjo was scared of reporting it because he was an agency worker and had only worked for the respondent for a few weeks.

29. We accept the claimant's evidence about this incident and find that Dariusz and Mariusz did make the remarks alleged. We find that the comments were unwanted and that the claimant experienced them as hostile and derogatory.

Incident 2 (p.62) – snapchat monkey filter incident Winter 2017

30. The claimant said that an employee he said was called Slavec Kramer (whose correct name we accept was Slavomir Klimek) was with two other employees of the respondent in the canteen. The claimant did not know the date but it was around 12.00-12.45 on the day in question. The claimant's evidence was that they were looking at filters which can be applied to pictures or people on Snapchat on a mobile phone. He said that there was a monkey filter (along with other animal filters). He said Slavomir said to show the claimant the monkey filter. The claimant said the other two, Kamil Orzechowski and Aleksander Joniak left the canteen embarrassed by Slavomir's behaviour.

31. The claimant accepted he did not raise this matter with Jonathan Wheeldon at the time but said he did so some months later after Slavec had left the respondent and returned to Poland. Jonathan Wheeldon (at para 18 of his statement) confirmed that the claimant did tell him that Slavomir had made monkey remarks towards him. Mr Wheeldon thought that was in December 2017 and some six months after the alleged remarks were made. His evidence was that he had told the claimant that the claimant should have raised the matter with him at the time so that he could have investigated the matter. Mr Wheeldon's evidence was that the claimant in response said he did not want to get Slavomir into trouble. The claimant confirmed at his disciplinary hearing (p.172) that that was the case. Mrs Wheeldon-Gorst's statement (para 14 and 15) confirms that the claimant also raised this incident in his disciplinary hearing on 15 August 2018.

32. In its response form (para 3 on p.29) the respondent suggested that it had discussed these concerns with the other employees involved and the "general consensus" was that there was a word in Polish which sounds similar to "monkey" and that the claimant could have misheard or misunderstood. The claimant's evidence (para 5 of his witness statement) was that it was the English word "monkey" which had been used.

33. We find that this incident did happen as described by the claimant. We find the incident was unwanted. We also find that the claimant experienced what Slavomir's said as a derogatory reference to the claimant's race.

34. We find that the claimant did not report the incident at the time but Jonathan Wheeldon was aware of it at the latest by December 2017. We accept that Jonathan Wheeldon did tell the claimant that he should have come to him about the incident at the time and that by the time Jonathan Wheeldon had found out about the incident, Slavomir was no longer employed by the respondent.

Incident 3 (p.60) – the banging wood and bread knife incident February 2018

35. The claimant said this incident took place in February 2018 (between 10 a.m. and noon). It took place on the picking lines. These are conveyor belts which carry rubbish to be sorted by the respondent's employees. Recyclable items, like wood, are picked off the belt and put in a recycling bay. The claimant said he was working on picking line 1 with Marcin Orzechowski when the incident happened. Dariusz Saqziak and Marius Grochowski were working on picking line 2. The claimant said that Dariusz was goading Marcin to bang pieces of wood into the recycling bay in an aggressive way. The claimant said that he felt that the aggressive behaviour was directed towards him so he reported the incident to Jonathan Wheeldon. At his disciplinary hearing on 15 August 2018 the claimant gave this incident as an example of his being provoked prior to the incident on 7 August 2018. He raised it in response to Mrs Wheeldon Gorst asking him "on the telephone you said it was racial. What things have been going on to provoked you?" (page 172).

36. In his witness statement (paras 9 and 10) Jonathan Wheeldon confirmed that in February 2018 the claimant walked into the site office and said that it was "all kicking off on the picking line". His evidence was that the claimant then picked up a bread knife and turned to head back to the picking line. He said that he challenged the claimant about what he was going to do with the knife. He said the claimant was agitated and aggressive towards him. Mr Wheeldon's evidence was that shortly afterwards another of the claimant's colleagues walked into the office and asked the claimant why he was being so aggressive. Mr Wheeldon said that he called a staff meeting shortly after that incident to get a "fuller understanding of what was going on".

37. The claimant accepted that he had picked up a bread knife from the office. He denied that he was aggressive. He said he had picked up the knife because he needed a knife for working on the picking line and that his knife had gone missing. He explained to us that the employees use knives to separate recyclable and non-recyclable waste on the picking line.

38. In its response (para 4ii on p.30) the respondent said that it was its opinion that the claimant wanted to use the knife to "scare either Jonathan [Wheeldon] into taking action or a colleague". In cross examination Mrs Thompson

suggested to Mr Wheeldon that if that were the case it was surprising that no disciplinary action was taken against the claimant. In effect, she suggested, the respondent was saying that the claimant was using the knife in a threatening manner. Mr Wheeldon said that although he wasn't sure what the claimant had in mind he didn't feel scared for himself. He said that any threat was gone once the claimant explained why he needed the knife.

39. In response to the Tribunal's question, the claimant said that he had gone to see Jonathan Wheeldon because he wanted him to check the CCTV of the picking line so that he could see what had happened. The claimant said that he had asked Jonathan Wheeldon to check the CCTV but he had not done so. Mr Wheeldon in his cross-examination evidence said he could not remember whether the claimant had asked him to look at the CCTV footage. He confirmed that he hadn't done so. When asked by Mrs Thompson why he hadn't he suggested that his immediate priority was to calm down the situation on the picking line. It would have taken time to look at the CCTV.

40. The claimant said that at the subsequent staff meeting called by Jonathan Wheeldon he was alone on one side of the room and all the Polish employees were on the other. Mr Wheeldon confirmed that was the case but said that was by accident not design. The claimant said that all the Polish employees denied that Marcin had acted as the claimant said he had. That was the case even for those employees who weren't actually on the picking line when the incident happened and so could not have actually witnessed what happened. In other words, the claimant's evidence was that the Polish employees had ganged up against him and taken Marcin's side against his. Jonathan Wheeldon's evidence was that he "learned from the meeting" that the claimant had jumped over the picking line and confronted Marcin (para 10).

41. The claimant said the Jonathan Wheeldon made no real attempt to find out why the incident had started he just said something like "lads I hope you can all get along" and left it at that. Mr Wheeldon's cross-examination evidence was that at the meeting he saw the claimant as the aggressor and Marcin as the victim. He said the claimant was agitated in the meeting and that he had had at one point to gently push the claimant back because the claimant was encroaching on Marcin's personal space. He also said that after the meeting he had spent time with the claimant to explain to him that he needed to be less aggressive in his dealings with his colleagues.

42. Unlike with the earlier incidents, there was some written evidence about this incident. This was Jonathan Wheeldon's handwritten statement/note (p.158-159). It is signed by Mr Wheeldon and dated 2 February 2018. We had some doubts whether the document was indeed created on the 2 February 2018 and, if so, for what purpose. It was headed "witness statement" but Mr Wheeldon confirmed that he had decided that no disciplinary action was appropriate arising out of the incident. Mr Wheeldon suggested that he had written the note at the time of the staff meeting but at the earliest it was written the day after the incident (there was an added reference to the incident being "yesterday" at the top of the document). Mr Wheeldon confirmed that he had not asked either the claimant or anyone else involved in the incident or the

meeting to sign it as an accurate record of events as was now his standard practice. He confirmed it was not shown to the claimant at the time. In cross examination he also accepted that some of the chronology in the note might be wrong. Taking that into consideration our view was that we could not give the note much weight as an accurate record of events.

43. We prefer the claimant's evidence. By his own admission, Mr Wheeldon's memory "took time to get going" and at points his recollection wasn't clear. In cross-examination he told us he could not remember who he had asked to arrange the staff meeting. He also told us that he struggled to remember what was said at the meeting.

44. The only evidence from Marcin, the alleged perpetrator of the "banging wood" incident itself is in the disciplinary interview with Marcin (p.178). In that he denies banging wood in an intimidating way. We did not hear evidence from Marcin at the Tribunal.

45. We did hear from the claimant and prefer his evidence. We find that Marcin was banging wood in the aggressive manner described by the claimant and that this behaviour was directed at the claimant. We find that as a result, the claimant told Mr Wheeldon that it was all "kicking off" and that he needed to sort it out. We do accept that the claimant was agitated and find that he asked Jonathan Wheeldon to view the CCTV footage of the picking line to see what had happened. It is accepted Mr Wheeldon did not do so. It is accepted the claimant picked up a bread knife and we accept his explanation that he needed it to work on the picking line. We accept Mr Wheeldon may have told him he could not take that knife as it was the office bread knife. We do not accept that the claimant wielded the knife in a threatening way such as to scare Mr Wheeldon or to make him concerned about what the claimant might do with it. We find it implausible that no action would have been taken against the claimant if he had acted as aggressively as the respondent's response suggested.

46. When it comes to the meeting we find that the other employees did "gang up" on the claimant as he suggested. We do find it plausible that the claimant might have reacted by becoming agitated. We find that Jonathan Wheeldon's focus was on what happened at the meeting, at which he saw the claimant as "the aggressor" and Marcin as the "victim". We find that Mr Wheeldon took no steps to find out what had prompted the claimant to come and ask him to sort matters out on the picking line. We do, however, accept Mr Wheeldon's evidence that the layout of the meeting was not something that he (rather than the other employees) engineered or designed.

47. Mr Wheeldon did not check the CCTV of the picking line after the event. Neither did he ask the claimant what had triggered his behaviour. We also find, however, that the claimant did not in relation to this incident explicitly say to Mr Wheeldon that the behaviour he had experienced was related to or because of his race.

Incident 4 (p.60) – Jonathan Wheeldon failing to respond to complaints of racial harassment – February 2018

48. As we understand it, this is not a separate incident but part of incident 3. As we record above, we found that the claimant did not explicitly say to Mr Wheeldon that the complaint was one of racial harassment. We do accept that he did not take steps to fully investigate the underlying causes of the bread knife incident.

Incident(s) 5 (pg 57 – 59) – Stephen Savery - 2018

49. Although this allegation related to more than one incident it is convenient to deal with them together. At the relevant time Mr Savery was an employee of the respondent. He is now retired. One of his responsibilities was to make sure the respondent's workers had the protective equipment they required. This included protective boots. He did this for all of the respondent's yards so although not based at the Oldham yard where the claimant worked, he was a regular visitor there.

50. The claimant said that Mr Savery asked him whether it was "true what they said about black men having big feet and a big dick?" The claimant has size 13 feet. The claimant's Scott Schedule and additional information (p.35 Incident g) suggested that Mr Savery repeated the remark. In his evidence, the claimant was not able to provide a date for the incidents other than they happened in 2018.

51. The claimant said he didn't raise a complaint to Jonathan Wheeldon about it because there would have been no point – Mr Wheeldon was present on at least one occasion when Mr Savery had said this and he had laughed at the incident. The claimant said that Matthew Pickup (Yard Manager) and Les Hall (a senior mechanic) had also all laughed at the incident. The claimant said Mr Savery had also on one occasion tried to grab the claimant's private parts to assess them for himself.

52. In summary, Jonathan Wheeldon's evidence was that Mr Savery and the claimant had a bantering, jokey relationship and that he would have laughed on occasion at the things Mr Savery said to the claimant. His evidence partly corroborated the claimant's in that he said (para 24 of his witness statement) that he had witnessed both men "playing around trying to grab each other's private parts". He said this "appeared to be in humour". He did not recall Mr Savery making the remark about black men alleged by the claimant. He did, however, say that when the protective boots arrived Mr Savery would regularly say to the men (regardless of the colour of their skin) "Is it true what they say about men with big feet, big shoes?" (para 24). He did not recall Mr Savery racially mocking the claimant and said he would have intervened if he had.

53. Mr Savery denied making the remark about black men and denied grabbing the claimant's private parts. He adamantly rejected the evidence given by

Jonathan Wheeldon at para 24 of his statement about his grabbing the claimant's private parts and was equally adamant in denying the claim at para 3 (vi) of the respondent's response (p.31) that he and the claimant would pretend to be in a same-sex relationship. He said he had a good relationship with the claimant and they often joked about football and about hairstyles (the claimant often changing his).

54. However, Mr Savery's credibility as a witness was damaged by his initially telling us that he had not seen his written statement before. Having read it, he told us he "might have" seen it before. In answer to Mr Jaffier's question he confirmed that it was his signature on the statement. He also rejected part of his own witness statement. Paragraph 2 of that statement said that he "always" repeated the same comment about "blokes with big feet, big shoes". In answering the Tribunal's question, he accepted he had made that joke but said that he had only done so "once" at each yard.

55. We prefer the claimant's evidence. We find that Mr Savery did make the remark about black men to him on more than one occasion in 2018 and that he did grab his private parts. We find that conduct was unwanted. We also accept the claimant's evidence that he felt humiliated by that conduct.

56. We find that on at least one occasion Mr Savery's conduct was witnessed by Jonathan Wheeldon and other senior staff at the Oldham yard and that this explains why the claimant did not raise the matter with Mr Wheeldon. We accept the claimant's evidence that raising any issues about Mr Savery's conduct was doubly difficult since he is a family member of Mr Wheeldon's through marriage. The claimant had given persuasive evidence about the importance of his job to him, particularly given his family's previous period of homelessness. We find that this inhibited the claimant from raising issues about Mr Savery's conduct with Mr Wheeldon.

Incident 6 (p.57) – the radio incident – July 2018

57. The claimant said that in July 2018 Marcin Orzechowski threw a piece of wood at the radio which the claimant was listening to in an attempt to intimidate him. He said he had stopped the picking line and reported the matter to Matthew Pickup and that as a result Marcin was warned about his behaviour (Incident (f) at p.34). Jonathan Wheeldon confirmed that Mr Pickup oversaw matters at Oldham in his absence.

58. Jonathan Wheeldon accepted that there was an incident when wood was thrown at the radio but says that it was done by Mariusz Grochowski not Marcin. His evidence was that Mariusz was disciplined for this incident but that he did not consider it as being directed at the claimant because the claimant was one of many working on the picking line when the incident occurred (para 23 of his statement).

59. There was no documentation in the bundle relating to the warning Mr Wheeldon said had been given to Mariusz. Mr Wheeldon's knowledge of the incident was second hand and based on what had been reported to him by Mr

Pickup. The claimant referred to Marcin throwing the piece of wood in his written statement for his appeal against dismissal in August 2018 (p.196) which provides some limited corroboration for his version of events.

60. We preferred the claimant's evidence and found that the incident took place as he described. Marcin threw a piece of wood at the radio to which the claimant was listening. We accept the claimant's evidence that this was a hostile act directed at the claimant and that it made him feel intimidated.

Incident 7 (p.56) – Jonathan Wheeldon "friends" comment – July 2018

61. The claimant said that when he raised concerns about "racial incidents" with Jonathan Wheeldon he trivialised them by saying to the claimant "you do not come here to make friends". Mr Wheeldon did not deal with that issue in his statement and initially denied making the comment in his cross examination evidence. However, later in that cross examination he said he could not remember everything he said and might have said something along those lines to staff because he was getting frustrated that staff were not getting along.

62. The respondent's comments on the Scott Schedule suggested that this was a phrase used by Les Hall, the respondent's mechanic. However, the notes of the claimant's disciplinary hearing on 13 August 2018 record him saying that Mr Wheeldon ("Jonny") said that to him (p.173). We find it plausible that was Mr Wheeldon's response to the claimant raising incidents with him. It is consistent with what Marcin said in his disciplinary meeting according to the notes of that meeting. At p.177 he is recorded as saying that Mr Wheeldon's response when he raised issues with him was "don't be a child, you've got to work with each other". It also seems to us consistent with Mr Wheeldon's evidence about his getting frustrated with staff for not getting on with each other.

63. We find that Jonathan Wheeldon did make the alleged remark to the claimant. However, we also find that this was Mr Wheeldon's approach to similar matters raised with him by employees other than the claimant, including white employees. We also find that the claimant had not at this point specifically said to Mr Wheeldon that any of the incidents he was complaining about were related to his race with one exception. The exception is incident 2 (the snapchat filter incident) referred to above which involved a different perpetrator and which the claimant had (by his own evidence) raised with Mr Wheeldon at least 7 months earlier after the perpetrator had left.

Incident 8 (p.55) – "No one likes you" comment – July 2018

64. The claimant said that Dariusz Saqziak made this comment to him on the picking line in July 2018. The claimant's evidence was that Dariusz was also verbally aggressive towards two other non-white workers, Salim Sadjo (a black Muslim agency worker) and Pius Otokhina (a black agency worker). The claimant's unchallenged evidence was that Dariusz would shout at them

"agency go home" but that he never behaved that way towards white co-workers (claimant's witness statement para 9).

65. The respondent in its comment on this incident in the Scott Schedule accepted that it "could not say with any degree of certainty" whether this happened. We heard no direct evidence from Dariusz. There were two written statements from him in the bundle. The most relevant was that taken by the respondent on the 10 September 2018 before the claimant's appeal against dismissal (p.204). In it, with the aid of an employee translating for Dariusz, Jonathan Wheeldon asked him about the claimant and any incidents of racism. Dariusz is asked whether he thinks there is any racism in the yard and answers "no". When asked whether there is any racism in his relationship with the claimant, he is recorded as saying "no, I just don't like him". Given that we find it plausible that he did say to the claimant that no one liked him. We find as a fact that he did do so.

Incident 9 (p.54) – Jonathan Wheeldon asking the claimant why he stopped the line – July 2018

66. The claimant alleged that Jonathan Wheeldon had victimised him by asking him to explain why the picking line had been stopped. In cross examination evidence the claimant said that Mr Wheeldon had called him into the office after noticing on the CCTV that the picking line had been stopped 10-15 minutes before the scheduled lunch break. The claimant told him that some of his Polish colleagues would stop the line to go and warm their food up in the microwave. The claimant's evidence was that later that day Mariusz Grochowski called the claimant a "grasser".

67. In the notes of the disciplinary hearing on the 15 August 2018 (p.174) the claimant is recorded as saying that "Mariusz, Marcin and Dariusz started their breaks early". The claimant in those notes is recorded as saying that Jonathan Wheeldon told him to "tell [Mr Wheeldon] if things are going wrong, so I did and since then they've been funny with me". However, in the notes the claimant is recorded as saying that he "went to have a private word with Jonny, and next time I went in the canteen they called me a grasser", rather than Mr Wheeldon asking him to have a private word.

68. We find it plausible that Jonathan Wheeldon would try to establish why the picking line had been stopped. We accept the claimant's evidence that he told Mr Wheeldon that his colleagues had been stopping work early. We find it plausible that having been given that information, Mr Wheeldon would have raised it with the workers concerned and that they would, in turn, have called the claimant a "grass". We accept the claimant's evidence that this incident happened as he alleged.

Incident 10 (p.53) – Marcin middle finger gesture – July 2018

69. The claimant alleged that when he asked Marcin Orzechowski to close the door in the canteen, Marcin responded by giving him a middle finger gesture. This was not witnessed by any of the respondent's witnesses. However, in Marcin's disciplinary interview notes (p.177) he refers to the claimant "having a problem with me about not closing the canteen door" about a month earlier. We find it plausible that the event occurred as described by the claimant and accept his evidence that Marcin did give him a middle finger gesture when the claimant asked him to close the canteen door sometime in July 2018.

Incident 11 (p.53) – Marcin "we don't want black people" comment – July 2018

70. The claimant alleged that Marcin Orzechowski said to him in the canteen "we don't want black people in our country". The claimant's case is that this was Marcin's response when the claimant asked him (between 7:45 and 8:00 a.m.) why Marcin was intimidating him all the time and treating him with hostility (p.34). The claimant's evidence was that he reported this remark to Jonathan Wheeldon who told him to "leave it with him".

71. In his witness statement, Jonathan Wheeldon denied that the claimant raised this matter with him (para 32). We prefer the claimant's evidence and find that this incident did happen as described by the claimant and that he raised it with Jonathan Wheeldon who told him to leave it with him. There is no evidence that Mr Wheeldon took steps to follow up the incident with Marcin.

Incident 12 (p.52) – Incident on the stairs – 7 August 2018

72. The claimant alleged that Marcin Orzechowski shouted angrily at him in Polish then physically assaulted him by pushing the claimant against the railing on the stairs down from the picking line to the yard. According to the Scott Schedule (p.52) Marcin then grabbed hold of the claimant and pulled him down the stairs before punching the claimant in the face. According to the Scott Schedule the claimant held his arm in front of him to defend himself.

73. The only person to give oral evidence at the Tribunal hearing about this incident was the claimant. None of the respondent's witnesses at the Tribunal had seen the incident. There were, however, a number of relevant documents. There were the statements taken by Jonathan Wheeldon from the Claimant (on 8 August 2018 at p.163-164) and Marcin (on 9 August 2018 at pp.167-168) when investigating the incident. There were also statements from Brian Pearce and Janusz Kycho, (employees of the respondent who witnessed some of the incident) which were collected by Jonathan Wheeldon on 9 August 2018 (at pp.169-170). There were also the notes of the claimant's disciplinary hearing (pp.172-175) and from Marcin's (pp.176-178) and those from the claimant's appeal hearing (pp.206-2015). There is also the claimant's appeal statement (pp.196-197) and the CCTV footage of the yard.

74. Mrs Thompson for the claimant raised concerns about the accuracy and reliability of the investigation statement at pp.163-164 and the notes of his disciplinary and appeal meetings. The claimant at the hearing disputed in

particular that the investigation statement taken by Jonathan Wheeldon on 8 August 2019 (pp.163-164) should be given much weight.

75. Turning first to that statement, Mr Wheeldon accepted that that statement was taken at 5 p.m. (something which is also recorded at the top of the document) and that the claimant was in a hurry to catch a bus to go home. The claimant had to take two buses to get home and gave evidence, which we accept, that he was keen to get home and see his family. There was not much time, therefore, either to take the statement or to check it. The claimant was not given an opportunity to take the statement home to read. We accept that the claimant did sign the statement but also accept his evidence that he did not have time to check it properly. We therefore treated it with caution when it comes to its accuracy as a record of the claimant's version of events.

76. The claimant also disputed the accuracy of the disciplinary hearing notes (page 172-175). These were typed notes and the agreed evidence was that those notes had been typed by the notetaker in the disciplinary hearing. Susan Wheeldon-Gorst gave evidence, which we accept, that the claimant, herself, Mr Savery and the notetaker had re-read the notes at the meeting. She did say that she could not remember whether they had all read the notes on screen or whether she had read the notes out aloud. Her evidence was that they had made tweaks to the notes after reading through them and that the claimant had then been happy to sign the notes. It was accepted that the claimant had not been allowed to take the notes home to read them despite having asked to do so. Even so, we accept that the notes basically reflect accurately what happened at the disciplinary hearing. We find that there may be some places where the notetaker paraphrased rather than taking a verbatim note. This applies in particular to the comment attributed to the claimant on page 173 that Marcin "says we don't have ethnic minorities in our country". We accept the claimant's evidence that what he actually said was "black people" rather than "ethnic minorities".

77. The appeal hearing notes were not signed by the claimant. Those notes are handwritten, the notetaker being James Wheeldon's nephew. On page 215 at the end of those notes the notetaker has written "[the claimant] has refused to sign the document. Although he agreed he said what was said in the minutes." In fact, the claimant did not seek to challenge the contents of the appeal hearing notes. On the balance of probabilities, it seems to us that they are an accurate record of what was said at that meeting.

78. The CCTV footage does clearly show an incident involving two figures which it was agreed were the claimant and Marcin. It is footage of the whole of the yard and the incident begins in the top right-hand corner where the picking line steps lead down from the landing to the yard. That corner is very dark and, indeed, at times the participants in the incident cannot be seen at all. It is only because the two are wearing high visibility vests that they on occasion come into view.

79. The CCTV footage shows two individuals having hold of each other as they come down the stairs. The middle and bottom part of the stairs are less dark

and the figures appeared to us to be holding each other at arms' length. At times there are jerky movements by both. There is a point where there is a jerky movement of the claimant's arms which Mr James Wheeldon at the appeal hearing on 10 September saw as him drawing back his hand and then throwing a punch. Our view, however, is that the footage was inconclusive as to whether that movement was a punch or the claimant struggling to hold off Marcin. That remains our view having viewed the CCTV numerous times on a laptop screen and on a larger display monitor, The footage does show Marcin walking away from the incident and at one point he rubs his neck. James Wheeldon's view at the appeal hearing was that this corroborated Marcin's view that the claimant had punched him in the neck. Our view was that the brief rub of the neck we saw by Marcin provided little, if any, corroboration for his version of events. It was not obvious to us that he was rubbing his neck because it was sore and even if it was, his neck being sore for a reason than having been struck.

80. Given our finding that the CCTV footage was inconclusive, we have in reaching our findings about this incident carefully considered the written evidence about it referred to above. Having done so, we accept the submission made by Mrs Thompson that the claimant's version of the incident was more plausible and more consistent with that of the other witnesses than the version given by Marcin. This applies particularly to the evidence about how the incident started; when Marcin struck the claimant; and whether the claimant had struck Marcin on the neck.

81. In the investigation statement taken by Jonathan Wheeldon (pp.167-168) Marcin's evidence was that the incident started because when they went for their morning break, the claimant was standing at the top of the steps down from the picking line blocking the way down those steps. According to Marcin's statement the claimant was "at the top of the steps holding on to the bannister on both sides" and "[the claimant] definitely knew that I was there waiting and he planned to do this". Marcin then says he "sidled past" the claimant on the left hand side "facing him" and as he did so the claimant pushed him on his right shoulder. He says he grabbed the bannister with his left hand and grabbed the claimant's clothing with his right hand to stop himself falling. He says the claimant said something to him (the statement does not record what), they both fell down the stairs about half way and at that point the claimant punched him in the neck.

82. At his disciplinary hearing Marcin is recorded (at p.176) as having said that the claimant was on the steps, that Marcin tried to move and the claimant "pushed [him] from the steps as [he] tried to get past". However, he also said that the claimant was blocking him and that the claimant pushed him.

83. When Mrs Wheeldon-Gorst put to him the allegation that he pushed the claimant into the stair railings, he said that "I only touched him as I passed [the claimant]". However, he then said that he "punch[ed] the claimant on the steps as we were pushing past each other".

84. In his statement taken by Jonathan Wheeldon (pp.163-164) the claimant says that he was walking down the picking line steps and could hear Marcin approaching from behind. He says Marcin mumbled something in Polish at him “in anger”. When he was two or three steps from the picking line landing the Claimant says Marcin pushed him into the right hand bannister and pushed past him. The claimant says he pushed Marcin on the shoulder and said “why did you push me for”. He says Marcin then “ran down the stairs” and they squared up at the bottom.

85. The claimant’s description of how the incident started as recorded in the notes of his disciplinary hearing (at p.172) is consistent with this. However, there is an inconsistency about what happened next. In his investigation statement the claimant says that Marcin “ran down the stairs” but at the disciplinary hearing he is recorded as saying that Marcin ”collared up with me” and that he tried to keep him at arms length. In his appeal statement (pp.196-197) the claimant says that the incident started when Marcin pushed him in the back and grabbed on to his clothing (p.196). The claimant states that the CCTV footage confirms this though later in his statement he says he has requested a copy of the footage but been denied it, which makes it clear he did not have access to the CCTV footage at the point he was writing his appeal statement.

86. As we have already said, we do not agree that the CCTV helps to clarify how the incident started-the footage of the top of the stairs is simply too dark. However, we find the claimant’s version of how the incident started to be more consistent over the various documents than Marcin’s. We also find the claimant’s version of events to be more plausible. If, as Marcin said in his investigation statement, the claimant was holding onto the bannister on both sides, we cannot see how Marcin could have “sidled” past him. We also do not see how the claimant could have instigated the incident by pushing Marcin when he had his back to him on the stairs (a point Mrs Wheeldon-Gorst also raised in Marcin’s disciplinary hearing). We accept the claimant’s evidence and find the incident started because Marcin said something angrily to him in Polish then pushed past him hard enough to push the claimant into the railing of the steps. We accept the claimant’s evidence that he pushed Marcin on the shoulder as he went past him and asked him why he had done that (that part of the claimant’s evidence is consistent with what Marcin says in his investigation statement).

87. As to what happened next, we have noted that the claimant’s investigation statement (pp.163-164) says that Marcin “ran down the stairs” but that is clearly not consistent with the CCTV footage. It is also not consistent with the claimant’s appeal statement and what he said at the disciplinary hearing as recorded in the notes of that hearing. We treat that investigation statement with caution because of the rushed circumstances in which it was taken and the fact the claimant was not given an opportunity to check it. We find that after he pushed past the claimant, Marcin then grabbed hold of the claimant’s clothing and that the claimant held him at arms length while they struggled down the stairs.

88. In his oral evidence at the Tribunal hearing and in his Appeal Statement (p.196-197) the claimant denied that he and Marcin were "wrestling". Our understanding of that is that he saw "wrestling" as implying that he and Marcin were equally the aggressors whereas his adamant evidence was that he acted in self-defence throughout. What we do accept is that the claimant and Marcin had hold of each other as they came down the stairs. Both he and Marcin say that Marcin shouted "Jonny" for Jonathan Wheeldon but that Mr Wheeldon did not hear.

89. The claimant's evidence was that no punches were thrown until they were both at the bottom of the steps. Marcin in his disciplinary meeting accepted that he punched the claimant (p.176). At that meeting he said that he had punched the claimant in the eye because the claimant had punched him in the neck first. His last recorded comment at that meeting (p.178) is "I know I punched him but I think that's quite normal. I know it's dangerous but if somebody tries to punch me then I retaliate".

90. Marcin also says (p.176) "I did punch him on the steps as we were pushing past each other". He does not suggest that the claimant punched him on the steps. However, in his investigation statement (p.167) he says that "we fell down the stairs about half way and [the claimant] punches me in the neck. I punched him back with my right hand in his face. We then wrestled each other to the bottom of the steps and…we wrestled and shouted at each other a bit more before Janusz came over and stood between us pushing us apart". What is consistent in those two accounts is that Marcin says he only threw one punch and that it was in retaliation to a punch thrown by the claimant.

91. The claimant in his investigation statement (p.163) says that Marcin punched him when they were at the bottom of the stairs which marked him under his left eye. He said he pushed Marcin in the chest. The claimant highlighted two particular points in the investigation statement about this part of the incident which he disagreed with. The first was the reference to him and Marcin "squaring up" to each other. The second was the reference to Marcin having caught him with a "glancing blow". He said neither of those accurately reflected what he said. We have already noted that we treat that statement with some caution.

92. At his disciplinary hearing, appeal hearing and in his Appeal Statement the claimant's consistent evidence was that he did not punch Marcin. In his cross examination evidence at the Tribunal hearing he was adamant that he did not punch Marcin but that Marcin punched him at the bottom of the steps.

93. Janusz Kycho in his investigation statement to Jonathan Wheeldon (p.170) says that Marcin and the claimant had hold of each other at the bottom of the stairs and Marcin punched the claimant in the face. Janusz said he then separated them and Brian Pearce told them to calm down and go for their break.

94. In his investigation statement (p.169) Brian Pearce's says that he was in the wagon and heard Janusz say something like "hey, hey". When he looked over

he saw Marcin and the claimant "wrestling". They had hold of each other and were "about to hit each other with the other hand". He then saw Marcin punch the claimant in the face. Janusz pushed them apart and Mr Pearce got out of the wagon and put his arm around the claimant. Mr Pearce says the incident finished then and Jonathan Wheeldon walked past but did not notice.

95. We note that Marcin refers to his having only punched the claimant once. Both Brian Pearce and Janusz refer in their investigation statements to Marcin throwing a punch at the bottom of the steps. Neither of those two witnesses say that the claimant punched Marcin. Taking into account also the inconsistencies in Marcin's evidence between his investigation statement and what he said at his disciplinary meeting, we prefer the claimant's evidence. We find that the claimant did not punch Marcin but Marcin did punch him at the bottom of the steps. We find that Marcin was the aggressor in this incident and that the claimant was seeking to hold him off and defend himself.

96. In our view those findings are not undermined by the claimant's failure to report this incident. Mr Jaffier in his written submissions said that it was difficult to understand why the claimant did not report the "fight" when he believed the assault was racially motivated. He suggested that the fact that claimant thought his job was at risk would have increased rather than decreased his motivation for reporting the incident to Jonathan Wheeldon immediately after it happened. The claimant accepted that he had simply walked away from the incident and had not reported it. It was another employee who actually reported the incident. The claimant's evidence was that there was no point reporting it as he had lost faith in Mr Wheeldon by that point.

97. We have found that the claimant was reluctant to cause any trouble at work because of the fear of losing his job. We have considered carefully whether that reason could also apply to a circumstance where the claimant was physically assaulted as a result, as he saw it, of a racial motive. We note that the evidence in Brian Pearce's investigation statement that he said to the claimant "be fighting in front of Jonathan especially" which presumably should read "<u>don't</u> be fighting". We think this would have made the claimant think he would have got into trouble and put his job at risk by reporting the incident.

98. We also take into account our findings about the earlier incidents and Jonathan Wheeldon's reaction to them. We note in particular that when it came to the incident in February 2018, Jonathan Wheeldon had accepted the evidence of the Polish workers over that of the claimant. We have found that Jonathan Wheeldon had also not take any action when the claimant reported incident 11 to him. We find it plausible that the claimant's view was that there was no point reporting matters to Jonathan Wheeldon given that he would inevitably take Marcin's side. In those circumstances, we find that the claimant's failure to report the incident did not undermine his version of events.

Incident 13 (p.51) – Suspension from work – 8 August 2018
Incident 14 (p.50) – Failure to treat 7 August incident as a racial assault – 15 August

Incident 15 (p.50) – Dismissal – 17 August 2018

99. These incidents all relate to the way the respondent carried out its disciplinary process and reached its decision to dismiss the claimant so we deal with them in the next section of our findings headed "Disciplinary procedure, dismissal and appeal".

Other workplace incidents relevant to the issues the Tribunal has to decide

100. We heard evidence about three other matters relevant to the issues in this case. They did not involve detriments to the claimant but were relevant to the claimant's assertion that the incidents which we have found occurred were because of or related to the claimant's.

101. Firstly, it was the claimant's case as set out in Mrs Thompson's submissions that Dariusz Sawziak had a physical altercation with Salim Sadjo, a non-white agency worker in Match 2018. The submission was that this was evidence to support the claimant's case that Dariusz harassed black workers at the respondent's workplace. In the bundle there were statements taken about this incident by Jonathan Wheeldon about this incident from Salim (p.161) and from Dariusz (p.162). It was agreed that the claimant had wanted to stop the picking line to do some maintenance on it. The isolation key should have been removed completely from the control box to ensure the line did not accidentally start up again while the maintenance was ongoing. Instead Salim held the key in the control box in the "off" position to prevent it starting up again.

102. It was agreed that Dariusz had pulled Salim's arm away to remove the key. There was a dispute about whether he had asked Salim to remove the key first and/or whether Salim had told him to "fuck off". The claimant said that he had gone with Salim to see Mr Wheeldon about the incident because Salim was scared to raise the issue by himself. That fear was partly because Salim was an agency worker so his job with the respondent was temporary and precarious. Mr Wheeldon in his witness statement (para 14) corroborated the claimant's involvement. His evidence was that the claimant implied the incident between Dariusz and Salim was "racial". Mr Wheeldon's evidence was that as a result he asked Salim whether there was an issue with racism and Salim replied "no I don't think so just a bad feeling in the air". That question and response is recorded in Salim's statement (p.161).

103. It was accepted that neither statement was signed by the relevant witness. Instead they are both signed by Jonathan Wheeldon. Mrs Thompson submitted that they were unreliable because written from Mr Wheeldon's memory of his conversations with the witnesses and so unreliable. Mr Wheeldon said that he wrote the notes immediately after the meetings with Salim and Dariusz and that the failure to get the witnesses to sign them were an oversight. The claimant said that he had not heard Mr Wheeldon asking Salim about racism but Mr Wheeldon said he had done so when he was alone with Salim after the claimant had left the meeting.

104. Mr Wheeldon held a "staff meeting" after this incident, his note of which is at p.160. It is a short note and in it he describes the incident and says that Salim should have removed the isolation key to comply with the rules but that Dariusz shouldn't have "laid hands" on Salim. The note says that "all the other picking line staff said Dariusz asked Salim first [to take the key out] so I believe that he did". Mrs Thompson put it to Jonathan Wheeldon in cross examination that that was not correct because the claimant did not support Dariusz's story. Mr Wheeldon accepted that maybe his note wasn't exactly correct in including the claimant and that he meant to say the "majority" of persons at the meeting agreed with Dariusz's version of events.

105. We did have doubts about the accuracy of the statements relating to this event and Mr Wheeldon himself accepted that the note of the staff meeting was inaccurate. We give them little weight but do find that Mr Wheeldon was alerted by the claimant to the fact that there might be a racial element to the incident. He asked Salim a generic question about this and his response was that he "did not think" that the incident was due to race. Mr Wheeldon did not follow this up at the staff meeting which followed, either by asking questions about why the incident happened or by reminding those attending of the respondent's approach to equal opportunities. We also find that Mr Wheeldon dismissed the claimant's evidence on the incident to the extent that he failed to record in his note that he had a different view of what happened to the majority.

106. Second, as we have noted in relation to Incident 8, the claimant in his witness statement (para 9) gave unchallenged evidence that Dariusz would try to humiliate and bully Salim and Pius, a black agency worker, by shouting aggressively at them "wood" "paper", causing Pius to tell Dariusz to "stop talking to him like he was a dog". The claimant said Dariusz would also shout "Agency go home" at Pius and Salim (but not at any white co-workers). The claimant said that as a result Pius would eat his lunch in his car. The evidence was not challenged. The respondent accepted there were some white agency workers. so we find that Dariusz's conduct was not because of the agency status of Pius and Salim and on the balance of probabilities Dariusz did treat the black agency workers in this way.

107. Third, Mr Jaffier submitted that there was evidence that it was the claimant rather than his co-workers who had made racist remarks. The evidence for that, he submitted, were the investigation statements taken by Jonathan Wheeldon from 11 workers at the Oldham yard before the claimant's appeal hearing. The respondent's submission was that the statements were evidence that it investigated the claimant's allegation of racial incidents against him. The statements from those 11 employees were included at pages 192-195 and 199-205 of the bundle.

108. The appeal hearing took place on 10 September 2018. 4 of the statements are dated the 7 September 2018 but the other 7 are dated the 10 September, i.e. the date of the appeal hearing. When it comes to the "investigation" this consisted of asking the witnesses a single question about whether there was any racism at the yard. There was no specific question about specific

incidents. In addition to denying that there was racism at the yard three of the statements say that it was the claimant who was racist, making remarks about "English pigs". The Tribunal noted that this remark was made in the statements which involved a translator. We were concerned that this cast some doubt on the credibility of that allegation, particularly given that those witness statements which did not involve the translator did not make that allegation. We heard no oral evidence from the co-workers. The claimant in his oral evidence adamantly denied making the “English Pigs” remark. Jonathan Wheeldon in his evidence said he had never heard the claimant use that phrase. We prefer the claimant’s evidence. We find that he did not make those remarks.

109. More generally, we find that we can give those statements little weight as evidence of an absence of race related behaviour at the respondent’s Oldham yard. It is apparent both from the timescale over which they were taken and the brevity of the statements that they represent at best a cursory attempt to investigate the issue.

Summary of our findings about the incidents prior to the claimant’s suspension

110. In summary, we found that there had been an incident in May 2017 when Dariusz Saqziak and Mariusz Grochowski made explicitly racial remarks to the claimant and Salim Sadjo (Incident 1). There was then an incident in around Autumn/Winter 2017 when Slavomir Kramer made the snapchat monkey filter remark (Incident 2) which the claimant reported to Jonathan Wheeldon in Winter 2017.

111. The incidents involving Marcin and Dariusz which we have found were hostile acts targeted at the claimant began in February 2018 (Incident 3 – banging wood) with most of them happening in July 2018 (incidents 6,8,10 and 11) culminating in the incident on the stairs on 7 August 2018 (incident 12) which we found was instigated by Marcin and led to his and the claimant’s suspensions.

112. The claimant raised complaints with Jonathan Wheeldon about the snapchat filter incident (Incident 2) in 2017 and about the banging wood incident in February 2018 (incident 3). The complaints about inaction by Jonathan Wheeldon start in relation to the incident in February 2018 (Incident 4) and then occur in July 2018 (incidents 7 and 9). We also found that Jonathan Wheeldon witnessed Mr Savery making a comment about black men to the claimant sometime in 2018 (Incident(s) 5), something which we found Mr Savery did on more than one occasion.

113. We found that the claimant did report the banging wood incident in February 2018 (incident 3) but did not say explicitly to Jonathan Wheeldon that it was racially motivated. We find that the claimant did say to Jonathan Wheeldon that the incident which occurred to Salim in March 2018 was racially motivated and that he reported a racially explicit comment (incident 11) to Jonathan Wheeldon in July 2018.

Disciplinary procedure, dismissal and appeal

114. On 8 August 2018 Jonathan Wheeldon wrote a letter to the claimant telling him he was suspended from work on full pay (pp.165-166). The letter said the suspension was pending the results of an investigation into the allegation that on 7 August 2018 the claimant "was involved in a physical altercation with a colleague". It is not disputed that Marcin was also suspended. The claimant in his cross examination evidence accepted that he and Marcin were treated the same when they were suspended and that suspension was in accordance with the respondent's disciplinary procedure.

115. The process leading to the decision to suspend was not clear from the respondent's evidence. Jonathan Wheeldon's witness statement was very brief when it came to this, simply saying that he took statements from the claimant and Marcin and two other members of staff and then "played no further part in proceedings" (para 16).

116. In answer to our questions, however, he confirmed that Matthew Pickup (also known as Matthew Bee) had reported the incident between Marcin and the claimant to him on the 8 August 2018. Jonathan Wheeldon said he had then viewed the CCTV. He said his view of the CCTV was that the evidence was inconclusive about whether a punch was thrown and if so by who.

117. In answer to our questions at the hearing, Mr Wheeldon clarified that he had sent his handwritten statements to Mrs Wheeldon-Gorst at the Bury office. He confirmed that he sent the four statements (from the claimant, Marcin, Janusz and Brian) but that he did not send any kind of investigation report or summary of his conclusions.

118. Mrs Wheeldon-Gorst's witness statement was unclear on how the outcome of the investigation was reported to her. In oral evidence she suggested that Jonathan Wheeldon would not have discussed the case with her in case he was biased in any way. We asked Jonathan Wheeldon what conversations he had had with Mrs Wheeldon-Gorst about the incident prior to the claimant's disciplinary hearing. His evidence on this point was unclear and unsatisfactory. At one point in his evidence he said that he had not had any real conversations with her about it. However, in answer to another question from the Tribunal he said that he had conveyed his opinion to her, that opinion being that Marcin's version of events was more credible than the claimant's. We find that he did convey his opinion in this way rather than leaving it to Mrs Wheeldon-Gorst to make a decision on the statements alone.

119. We also find that Mrs Wheeldon-Gorst had read Jonathan Wheeldon's written statement dated 2 February 2018 (p.158) relating to the "bread knife incident" in February 2018. She says in the claimant's disciplinary meeting (p.173) that "there was an incident in February when you came into the canteen and picked up the breadknife. Jonathan's statement says you were aggressive

and agitated". It seems to us that can only be referring to that written statement.

120. On 13 August 2018 the claimant was sent a letter advising him to attend a disciplinary hearing on 13 August 2018. Although Mrs Wheeldon-Gorst's witness statement does not refer to it, she accepted in cross examination that she was telephoned by the claimant on receipt of that letter because he was anxious that it seemed to require him to attend a disciplinary hearing on the same day. She clarified to him that that was an error and that it should have referred to a hearing on 15 August 2018.

121. From the notes of the disciplinary hearing, it is also clear that during this conversation the claimant raised the allegation that the incident on 7 August was a racist incident. Again, Mrs Wheeldon-Gorst made no reference to this in her witness statement but in answer to our question she confirmed that the claimant did raise the issue during that conversation. We find that the claimant did, during a conversation with Mrs Wheeldon-Gorst on 13 August 2018, say that there was a racial or racist background to the incident on 7 August. Mrs Wheeldon-Gorst did not seek further information from the claimant at that point. She also told us that she could not remember whether she had at that point gone back to Jonathan Wheeldon to ask him whether there was other relevant information she should be taking into account but did not think she had done so. We find that she did not do so.

The disciplinary hearing

122. On 15 August 2018 the claimant attended the disciplinary meeting chaired by Mrs Wheeldon-Gorst. Robert Wallis was the notetaker, and the other person present was Mr Savery.

123. There is a dispute about Mr Savery's involvement. The respondent says that he was appointed as the claimant's representative. The claimant said that that was not the case. His explanation was that he rang Jonathan Wheeldon to ask for a lift to the meeting because he does not drive. Mr Savery was called by Jonathan Wheeldon and asked to give the claimant a lift to Bury. The claimant's evidence, which we accept, was that he was surprised that Mr Savery came into the meeting with him.

124. Mr Savery's evidence was that he played the role of a representative for the claimant but that he was neither for the employer nor for the employee in such matters. We note that there is nothing in the notes of the disciplinary meeting which record the claimant raising concerns about Mr Savery's involvement. On the other hand, we have found that the claimant was subject to unwanted conduct by Mr Savery and had not raised complaints about that because of Mr Savery's family connections with the Wheeldon family. We find it plausible, therefore, that the claimant would have been inhibited from raising concerns about Mr Savery's involvement. We also note that the record of the meeting (at p.172) records Mrs Wheeldon-Gorst opening the meeting by saying "thanks for coming. Steve's your representative" and Mr Savery then explaining his role to the claimant. That seems to us more consistent with Mr

Savery having been effectively "appointed" the claimant's representative by the respondent rather than the claimant having asked him to fulfil that role.

125. On balance, therefore, we prefer the claimant's evidence that he did not ask Mr Savery to attend as his representative but was merely expecting him to give him a lift to the meeting.

126. Mrs Wheeldon-Gorst's statement (paragraph 10) suggests that the claimant confirmed at the start of the meeting that he had received all the documents relating to the disciplinary procedures. In her submissions for the claimant, Mrs Thompson submitted that before the disciplinary hearing the claimant had not seen the four witness statements relevant to it. However, during the hearing we were shown an email dated 13 August 2018 which made clear that the statements had been sent to the claimant. We accept, therefore, that he had been sent the statements although we also accept his evidence that he had no recollection of having read them before the disciplinary hearing. The respondent did not suggest that the claimant had seen Jonathan Wheeldon's statement of 2 February 2018 about the bread knife incident (p.158-159) which Mrs Wheeldon-Gorst referred to at the meeting at any point.

127. Mrs Wheeldon-Gorst's statement suggests that the claimant was advised that he could stop the hearing at any time if he wanted to go outside and have a private discussion with Mr Savery (who she refers to as "his representative"). She said that she believed the claimant was afforded every opportunity to provide a response to the allegations made against him.

128. It is clear from the notes that within the first few minutes of the hearing (p.172) the claimant said "it's like racial abuse it's being going on a while". Mrs Wheeldon-Gorst notes that "on the telephone you said it was racial" and asks what things have been going on to provoke him. The claimant starts telling her about the banging wood incident (incident 3 above) and says "it has been going on a long time and I just keep ignoring him".

129. However, Mrs Wheeldon-Gorst then says "let's stick to the statement and talk about the incident [on the 7 August 2018]". We have already discussed above the evidence given by the claimant at the meeting about the incident and do not repeat it here. Mrs Wheeldon-Gorst then (p.173) talks about "the incident in February when you came into the canteen and picked up the breadknife". She says that the is just "trying to understand the relationship" and suggests that people think the claimant is aggressive even if he does not think he is. The claimant explains that he talks fast when he is excited (something we witnessed at the hearing) but he is only trying to get his story across. Mrs Wheeldon-Gorst's response is "what I am trying to say is that you can be aggressive".

130. Mrs Wheeldon-Gorst then asks the claimant to explain how Marcin is aggressive to him and his response is "he talks about me in Polish and is quite racist. He says we don't have ethnic minorities in our country". He then refers to the Snapchat filter incident but says "this was nothing to do with

Marcin". The claimant is asked whether he told Jonathan Wheeldon about the racism and says he did tell him about Slavek after Slavek had gone back to Poland ("because he wasn't trying to get him the sack"). Mrs Wheeldon-Gorst responds by saying "if you don't report it people might think it is okay and continue to do it".

131. Mrs Wheeldon-Gorst then says again "going back to the incident" and asks whether the claimant swore at Marcin earlier in the day. He denies he did so but says Marcin gave him the finger. He says that there was no falling down the steps and no wrestling other than keeping Marcin at arms length at the bottom of the steps. He says Marcin hit him but he definitely did not punch Marcin.

132. We find that although the claimant at the disciplinary hearing raised the allegation that the incident being investigated was the culmination of an ongoing series of incidents linked to race, Mrs Wheeldon-Gorst did not take time to thoroughly explore that with the claimant. Her evidence was (to quote her statement) that she "was not able to investigate the claims made by the claimant". In her oral evidence she said that when she did ask the claimant about the racial incidents he "did not come back with credible evidence" and that she felt the allegation was "something thrown in at the last minute".

133. Mrs Wheeldon-Gorst's evidence was that she did not make her decision immediately after the disciplinary hearing but mulled it over overnight. The letter confirming the claimant's dismissal for gross misconduct (p.179) was sent on the 17 August 2018. In it Mrs Wheeldon-Gorst confirms the dismissal. The letter notes the claimant had said that "it was like 'racial abuse' as called you a 'monkey' in Polish" and summarised the claimant's version of the incident in three lines. It says that "this was deemed unsatisfactory because along with the witness statements we viewed CCTV coverage which showed both of you fighting. I therefore have a reasonable belief that you physically and verbally assaulted a fellow worker which is totally unacceptable behaviour as violence can never be tolerated in the workplace".

134. At paragraph 19 of her witness statement Mrs Wheeldon-Gorst set out the factors that she took into account in coming to her decision. She said that she took into account all the statements from the investigation and what the claimant and Marcin had to say. She said that she noted that the "claimant by his own admission confirmed in the disciplinary that he had a good relationship with everyone". She said that she also took into account that "both the claimant and Marcin admitted they were involved in an altercation and, therefore, it was not in dispute that both men were fighting. This was further highlighted on the CCTV footage".

135. However, in her oral evidence she suggested that one factor which she felt was important in her finding Marcin's version of events more credible was that Marcin had incriminated himself by admitting that there had been a tussle on the stairs and that he had punched the claimant. In contrast the claimant had refused to accept his part in the incident. She said that increased the credibility of Marcin's version of events. We had some difficulty in following

that since it seemed to suggest that the only way the claimant could have made himself more credible was to admit that he had been fighting which he had adamantly denied. It also seemed to us to contradict the reference in her witness statement to both men having admitted they were involved in an altercation.

136. We asked Mrs Wheeldon-Gorst about the inconsistencies between Marcin's statement and that of Brian and Janusz as to where Marcin had punched the claimant, her response was that did not think that was important – she was not bothered where in the yard things happened but what happened. We find that Mrs Wheeldon-Gorst did not give much weight to the written statements and the inconsistences between Marcin's statement and those of the other witnesses in reaching her decision.

137. Mrs Wheeldon-Gorst notes that the claimant did not in his investigation statement (pp.163-164) make any reference to racial abuse. In her witness statement she said that the omission of that factor from his statement was significant because she did not believe the claimant would stand by and be racially abused and do nothing about it.

The appeal hearing

138. By a letter dated 18 August 2018 the claimant lodged an appeal (p.180). In the letter he said that he was "the victim of ongoing provocation which culminated in a racially aggravated assault against me on 7 August 2018". In his appeal statement (pp.196-197) he challenges the respondent's interpretation of the incident on 7 August 2018, highlighting the fact that the evidence from Brian Pearce and Janusz Kycho gives no account of his assaulting Marcin; challenging the clarity of the CCTV footage and stating that the incident is not an isolated one but part of an ongoing situation involving racial slurs; and finally refers to the banging wood incident (incident 3).

139. The appeal hearing was held by Mr James Wheeldon who is another director of the respondent company. In his letter dated 18 August 2018 the claimant requested a copy of the CCTV footage and witness statements relied upon in the disciplinary hearing. The claimant had by then reported the incident to the police as a racially aggravated assault. In passing, we note that that seems to us to provide some further corroboration for his version of events when it comes to his having suffered racial abuse from Marcin.

140. By a letter of 22 August 2018 (p.181) Mr James Wheeldon invited the claimant to attend an appeal hearing on 10 September 2018. The claimant was told that the respondent could not send him a copy of the CCTV footage but had no objections to him viewing the footage. On 30 August 2018 Mr James Wheeldon emailed the claimant (p.183) explaining that they were not able to view the CCTV footage with him because he turned up on a day they had not agreed. The respondent would not let the claimant's wife attend the appeal hearing. We find that would have put the claimant at a disadvantage because he at times finds it difficult to articulate and order his thoughts.

141. In his witness statement (paragraph 6) James Wheeldon said that on receipt of the claimant's appeal letter he understood the grounds of appeal to be that the claimant was the victim of ongoing provocation which he claimed was racially aggravated. James Wheeldon said he therefore instructed Jonathan Wheeldon to "carry out further investigations to get an understanding as to whether there were racial issues in the workplace". As a result (paragraph 7 of James Wheeldon's witness statement) Jonathan Wheeldon carried out a number of interviews with existing employees. These are the statements which we referred to at paras 108-109 above and which were included at pages 192-195 and 199-205 of the bundle. James Wheeldon accepted the claimant was not provided with copies of those statements in advance of the appeal hearing.

142. The appeal hearing took place on 10 September 2018. As we have noted already, the "investigation" carried out by Jonathan Wheeldon did not start until the 7 September 2018 when the first four statements (pp.192-195) were taken. The remaining 7 statements are dated the 10 September 2018, i.e. the same day as the appeal hearing. James Wheeldon confirmed that the appeal hearing took place at 14.00. He initially said that he read the statements sent over by Jonathan Wheeldon when he got in that morning at around 6.30-6.45 a.m. However, in answer to our question he accepted that that could not be right since 7 of the statements were not taken until the morning of the hearing. Given the time it would have taken to take them they could not all have been ready for him to read at 6.45 a.m. He then suggested that he must have read the statements later that morning and that Jonathan Wheeldon emailed them over to him. There was no email in the bundle to that effect. We find that at best James Wheeldon would have had limited time to consider the significant number of statements which had been sent through to him by Jonathan Wheeldon.

143. James Wheeldon confirmed in response to our questions that he also spoke to Jonathan Wheeldon to chase up the statements and when he asked him whether there was any racism at the yard he said he “did not think there was”. He conceded that he could not help but be influenced by that to some extent. He told us that his position was that he expected the claimant to bring evidence to substantiate his case and support his appeal (that is reflected in the dialogue recorded in the notes of the appeal hearing at pp.206-215).

144. By James Wheeldon’s own admission, the primary focus of the appeal hearing was viewing the CCTV footage. His interpretation of that footage was that the claimant struck Marcin on the stairs. He accepted that the footage was unclear (certainly at the top of the stairs) but nonetheless said that after repeated viewing he was satisfied that the claimant did punch Marcin on the way down the stairs. The claimant suggested that this was inconsistent with the statements but Mr Wheeldon reiterated that he could only say what he saw and that was the claimant striking Marcin. He was also of the view (as we have mentioned above when discussing incident 12) that the footage of Marcin rubbing his neck after the incident supported the view that the claimant had punched Marcin in the neck.

145. There was discussion at the appeal hearing of the claimant's allegation that the incident was the culmination of a series of incidents linked to race. At p.210 the claimant is quoted as saying that he has evidence of those who say they have received racial abuse at the Oldham site. James Wheeldon says that "we currently don't believe there is racism" and that Jonathan Wheeldon has "spoken to numerous employees at Oldham from all different backgrounds and ethnic groups and none suggested there was racism there". The claimant suggested that the two former employees (presumably Salim and Pius) could be contacted to ask their views.

146. James Wheeldon also referred at the appeal hearing to the claimant being aggressive at work, citing in particular the incident with a knife (presumably incident 3 above in February 2018). We find that in part because of Jonathan Wheeldon's statement about that incident (p.158-159) which was on the client's "file" James Wheeldon had formed the view that the claimant was the aggressor in the incident with Marcin on 7 August 2018.

147. On the 11 September 2018 James Wheeldon wrote to the claimant to confirm that his appeal had been rejected (p.216). The letter acknowledged that the claimant had raised three points of appeal: that the incident on 7 August 2018 was a racially aggravated assault; that the claimant had acted in self defence; and that he had not punched Marcin but had pushed him.

148. In relation to the first point, Mr Wheeldon acknowledged in the letter that the claimant had identified two additional witnesses during the investigation, neither of whom worked for the respondent any longer. According to the letter "whilst attempts have been made to contact the individuals following our meeting, I have been unable to speak with them. I have not found any evidence to suggest the incident on 7 August was a racially aggravated assault on you". We asked James Wheeldon what the "attempts" referred to consisted of. He said that Mrs Wheeldon-Gorst had, he thought, phoned or written a letter of some description. However, Mrs Wheeldon-Gorst in her oral evidence said that James Wheeldon had not asked her to contact the former agency workers and she had not taken steps to do so. She suggested that Jonathan Wheeldon might have done so but he gave no evidence to suggest that was the case. We also note that the appeal outcome letter was sent the day after the appeal hearing (which took place in the afternoon) which allowed very limited time for any follow up steps to be taken. We find that, contrary to what the appeal letter says, the respondent did not take any steps to contact the agency workers identified by the claimant.

149. In relation to the second point, James Wheeldon said that the statements from Brian Pearce and Janusz Kycho indicated that the claimant and Marcin "both had hold of each other" and in his view this does not support the suggestion that the claimant was acting in self-defence "but rather supports the view that he also acted aggressively during he altercation".

150. In relation to the third point, James Wheeldon referred to having reviewed the CCTV footage and on reviewing it "reasonably conclude[d] that the claimant

does strike [Marcin] on the neck." The letter does not refer to the inconsistences between Marcin's statement and those of Brian and Janusz as to where any punch by the claimant was struck which we refer to above in relation to Incident 12.

151. Having reviewed the notes of the appeal hearing and heard the evidence of James Wheeldon we find that he had decided based on viewing the CCTV footage that the claimant had struck Marcin and consequently gave very little, if any, weight to the other evidence relating to the incident itself or to the claimant's evidence as to the background circumstances leading to the incident on the 7 August 2018.

Suspension and dismissal of Marcin

152. It was part of the claimant's case that he was treated less favourably than Marcin because of race by being suspended and dismissed. As a matter of fact, we find that both the claimant and Marcin were treated the same when it came to the disciplinary procedure. They were both suspended and subsequently dismissed without notice due to gross misconduct.

"Reasonable steps" taken by the respondent to prevent harassment, discrimination and/or victimisation

153. The respondent presented very limited evidence about the steps it took to prevent breaches of the 2010 Act. The respondent's "Equal Opportunity Policy Statement" ("the Policy") was included in the bundle (p.157). It is a single page statement that the respondent is committed to recruitment, selection and training on basis of merit only and to providing a working environment free from harassment. In his cross-examination evidence, Jonathan Wheeldon said the Policy was kept at the Bury yard and was not on display at the Oldham yard. Given that, he conceded that he did not know how the employees at the Oldham yard would know the Policy existed. He could not say when the claimant first saw it.

154. Jonathan Wheeldon's evidence was that he himself had never received any training on equal opportunities, preventing discrimination or the 2010 Act. There was no evidence that any of the other employees at Oldham had received training on those issues. Mrs Wheeldon-Gorst said that she had received some training on equality and diversity from the employment consultancy firm the respondent uses to advise it on HR matters. She also said that the respondet's employee handbooks did include equal opportunities policies (something confirmed by the handbooks in the bundle). However, she conceded that she did not know how employees would know about those policies unless they asked for them. She also confirmed that the handbooks are not translated into Polish. Given the need for some employees to use translators in meetings (as evidenced when written statements were taken from them prior to the claimant's appeal hearing in September 2018) we find that this means at least some of their employees would have difficulty in understating the policies even if they could physically access them.

Less favourable treatment in training and development

155. The claimant alleged that he was treated less favourably because of race by being denied training and promotion opportunities. Specifically, he said he had been denied any management responsibilities or the opportunity to be trained on the various machines operated at the respondent's yard.

156. The claimant had produced a table showing the workers at the Oldham yard and identifying those who had (and had not) received training (p.37). Of the 16 workers listed, the claimant's table suggested that only 5 had received no training on the machines at the yard. According to that table all of those (one of whom was the claimant) were black African or black Afro-caribbean workers. The other workers listed were white (either white Polish or white British). Of those 11 the table stated that all had been trained apart from one where the claimant was "unsure" whether they have been given training or promotion opportunities.

157. Jonathan Wheeldon denied that race played any part in his decisions about training and promotion. There was some inconsistency in his evidence. Initially he suggested (in response to Mrs Thompson's cross examination) that the apparent race bias suggested by the claimant's table was because the non-white workers were agency workers and that agency workers were not given the opportunity to train on the machines. However, he subsequently accepted that there was a white agency worker (called Ben) who had been given the chance to train on a machine even though he had been employed for only 3-4 weeks.

158. Mr Wheeldon subsequently explained that it was his policy to give training to those employees who asked for training and promotion. His evidence was that the claimant had not asked for such training or promotion.

159. The claimant's oral evidence was that he had repeatedly asked for such training (but had stopped doing so in 2018 when Andresz Breza was trained on the machines in the yard). However, his evidence on that point was vague and unspecific-he did not refer to specific incidents when he had asked for training but said in a generalised way that he had repeatedly done so. There was no reference to his asking for training or promotion in his disciplinary hearings or other documents.

160. We heard no evidence about how many (if any) of the workers in the claimant's table at p.37 had asked for training or promotion. We heard no evidence of any of the other black workers having asked for training or promotion.

161. On this aspect of the case we prefer the evidence of Jonathan Wheeldon. We find that the reactive approach to who received training and promotion he described consistent with the evidence we heard about his approach to the other incidents which we have found occurred. We do note that there was evidence that the claimant did at times take proactive steps, e.g. to maintain the picking line. We also note that there was some evidence from the claimant

and Jonathan Wheeldon that Mr Wheeldon asked the claimant to keep him informed of what was going on on the picking line. However on balance we prefer Jonathan Wheeldon's evidence that the claimant did not put himself forward for training on the machine nor for promotion and that this was the reason he was not trained on the machine or promoted.

Unpaid Wages

162. The claimant's case was that he was owed three weeks' money for the 1-22 May 2013, i.e. from when his employment TUPE transferred to the respondent. During the hearing wage slips dated 13 May 2013 to 17 June 2013 were added to the bundle at pages 277-283.

163. The unchallenged evidence from Mrs Wheeldon-Gorst was that the respondent pays its employees weekly in arrears. The wages are done on Thursday covering work done up to the previous Wednesday. Payment of wages is made by BACS on the Monday. This meant, she told us, that employees' pay was always a week in arrears.

164. The first payslip the claimant received from the respondent was dated Monday 13 May 2013. It was for £57.60 which we find was one day's pay. Mrs Wheeldon-Gorst's evidence was that this was payment for Wednesday 1 May, i.e. a one day week. The second payslip dated 20 May 2013 was for a full week's pay (in this case £294.50). It was paid on Monday 20 May 2013 and we find it covered Thursday 2 May 2013 until Wednesday 8 May 2013. The subsequent payslips showed full weeks' wages being paid on the same basis.

165. We heard evidence from Mrs Thompson and from Mrs Wheeldon-Gorst about a conversation that they had around 13 May 2013 when the claimant received his first payslip from the respondent. Mrs Thompson was ringing up to query why the payslip was only for £57.50. Mrs Thompson and Mrs Wheeldon-Gorst agreed that what Mrs Wheeldon-Gorst had said during that conversation was that because the wages were paid in arrears, the claimant would get the "missing" week's money at the end of his employment.

166. Turning to what happened at the end of his employment, that was set out in the claimant's Schedule of Loss at pages 43-49 of the bundle. On Monday 20 August 2018 he received £266.03, a full week's wages. Based on Mrs Wheeldon-Gorst's unchallenged evidence as to how the payment system at the respondent worked, we find this was payment for the week Thursday 2 August 2018 until Wednesday 8 August 2018. On Monday 27 August 2018 the claimant received a further payment of a full week's wages (£258.42). We find that was payment of wages for the week Thursday 9 August 2018 until Wednesday 15 August 2018. There was then a further payment on Monday 3 September 2018. This consisted of a payment of accrued holiday pay of £453.55 but also basic pay of £118.95. We find that £118.95 was two days' pay for 16 and 17 August 2018, the last two days of the claimant's

employment. The final payment was made on Monday 10 September 2018. It consisted of a tax refund and a bonus.

167. We are satisfied from that evidence that the claimant was paid for all the weeks he worked at the respondent. The confusion, it seems to us, arises because the weekly wage payment was always made over a week after the working days to which it related. That explains why the claimant received a payment of a full week's wages on 27 August, 10 days after his employment with the respondent had ended. We therefore find that the respondent did not make any unlawful deductions from the claimant's wages.

The Relevant Law

Unfair dismissal

168. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service, which the claimant has in this case.

169. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal. In this case the respondent says the reason for dismissal was the claimant's (mis)conduct which s.98(2)(b) says is a potentially fair reason for dismissal. The claimant disputes that that is the real reason for dismissal

170. Where an employer has shown a potentially fair reason for dismissal, whether the dismissal was fair or unfair depends on whether in the circumstances of the case the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The tribunal has to decide that in accordance with equity and the substantive merits of the case. (S.98(4) ERA).

171. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely –

(1) Did the employer have a genuine belief in the employee's guilt?
(2) Was that belief based on reasonable grounds?
(3) Were those grounds formed from a reasonable investigation?

172. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted.

173. That "band of reasonable responses test" also applies in assessing the reasonableness of the investigation carried out into a conduct matter (**Sainsbury's Supermarkets v Hitt [2003] IRLR 23**).

174. Remedy if the dismissal is unfair

175. If a tribunal finds that a dismissal was unfair the compensation it should award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

176. A just and equitable reduction can be made where the unfairly dismissed employee could have been dismissed at a later date if a proper procedure had been followed (the so-called Polkey reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd 1988 ICR 142**).

177. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

178. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

<u>The Equality Act 2010 claims</u>

179. The complaints of race discrimination, harassment and victimisation were brought under the 2010 Act. Section 39(2)(c) prohibits discrimination against an employee by dismissing him. Section 39(2)(d) prohibits discrimination against an employee by subjecting him to a detriment. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

180. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

"(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."

181. This means that it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the 2010 Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

182. The Employment Appeal Tribunal ("EAT") summarised the proper approach to the facts in cases under the 2010 Act in **Talbot v Costain Oil, Gas & Process Ltd and others [2017] I.C.R. D11:**

> "(1) It is very unusual to find direct evidence of discrimination;
>
> (2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;
>
> (3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;
>
> (4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
>
> (5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;
>
> (6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;
>
> (7) If it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination."

Direct race discrimination

183. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

184. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

185. **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

186. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken.

Harassment

187. The definition of harassment appears in section 26 of the 2010 Act which so far as material reads as follows:

"(1) A person (A) harasses another (B) if -

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

188. The Equality and Human Rights Commission gives more detail on the factors relevant in deciding whether conduct has the effect referred to in s.26(1)(b) at paragraph 7.18 of its Statutory Code of Practice on Employment ("the EHRC Code"):

"7.18 In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.

b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

Victimisation

189. S.27 of the 2010 Act makes victimisation unlawful:

"(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.

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

190. This means that for a victimisation claim to succeed, the claimant has to show two things. First, that he did a protected and, second, that he was subjected to a detriment because of it.

191. S.27(1)(a) refers to detriment because of a protected act but does not refer to "less favourable treatment". There is therefore no absolute need for a tribunal to construct an appropriate comparator in victimisation claims. The EHRC Code at para 9.11 states: 'The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act'.

192. Where it is not entirely obvious that the claimant has suffered a detriment, the situation must be examined from the claimant's point of view. **Shamoon v**

Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. In **Derbyshire and ors v St Helens Metropolitan Borough Council and ors [2007] UKHL 16** the House of Lords stressed that the test is not satisfied merely by the claimant showing that he or she has suffered mental distress: it would have to be objectively reasonable in all the circumstances. Accordingly, the test of detriment has both subjective and objective elements. The situation must be looked at from the claimant's point of view but his or her perception must be 'reasonable' in the circumstances. This means the employee's own perception of having suffered a 'detriment' may not always be sufficient to found a victimisation claim.

Dismissal and discrimination

193. An employee who is dismissed because of race will be able to bring a claim of direct race discrimination under S.13 of the 2010 Act.

194. However, not every dismissal that follows a racial incident in the workplace will be discriminatory. Having been the victim of racial discrimination or harassment does not necessarily provide immunity from disciplinary action or dismissal for misconduct. In **Sidhu v Aerospace Composite Technology Ltd 2001 ICR 167, CA**, the claimant, S, was involved in a fight following a racially motivated attack on him by other employees. The employer dismissed S and the other employees involved. The Court of Appeal held that the employer was not guilty of discrimination against S because there was no suggestion that the policy itself would be applied any differently to someone who was of a different race to S.

195. The fact that a dismissal is not discriminatory does not mean it is fair. The Tribunal in **Sidhu** unanimously held that the dismissal was unfair both because of the appeal which it found to have been flawed and the employer's failure to take adequate account of both Mr. Sidhu's long service and the extent of the provocation which he had suffered.

196. To assist the parties to understand the law we would be applying we provided the parties with copies of the Court of Appeal's judgment in **Sidhu** and the EAT's judgment in **Securicor Custodial Services Ltd v Williams and others [2003] 1 WLUK 637** (affirmed by the Court of Appeal) on similar issues.

Liability of an employer for the discriminatory acts of its employees

197. S.109 of the 2010 Act explains when an employer is liable for discriminatory acts of its employees:

"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

..

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval."

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description"

198. In its written submissions under the heading "Responsibility of Employees" (p.16 of those submissions) the respondent referred to "guidance in **Jones v Tower Boot Co Ltd [1997] IRLR 168** where it was a defence that in situations where there is no knowledge on the part of an employer or manager of the risk of harassment or inappropriate sexual behaviour (in this current case, alleged race discrimination) by an employee, or indeed, in particular by one employee towards another." If the submission is that an employer needs knowledge of its employees' acts in breach of the 2010 Act before it can be liable for them then that submission is, in our view, incorrect. S.109(3) of that 2010 Act makes it clear that the employer's knowledge is not relevant so long as the employee's act is done in the course of employment.

199. The quote from the submissions above seems to us to be a quote from para 22 of **Canniffe v East Riding of Yorkshire Council 2000 IRLR 555, EAT**, dealing with the reasonable steps defence. We do accept that the employer's knowledge of the risk of a breach of the 2010 Act occurring is relevant to the extent of the actions an employer needs to take before they can benefit from the "reasonable steps defence" in s.109(4).

The reasonable steps defence

200. S.109(4) provides that it is a defence for an employer to show that it took all reasonable steps to prevent employees from either committing a particular discriminatory act or committing such acts in general.

201. The onus is on the employer to establish the defence. It can do so by showing either that it attempted to prevent the particular act of discrimination or that it attempted to prevent that kind of act in general. The defence is limited to steps taken before the discriminatory act occurred.

202. The EHRC Code (para 10.50) gives as an example: "An employer ensures that all their workers are aware of their policy on harassment, and that harassment of workers related to any of the protected characteristics is unacceptable and will lead to disciplinary action. They also ensure that managers receive training in applying this policy. Following implementation of the policy, an employee makes anti-Semitic comments to a Jewish colleague, who is humiliated and offended by the comments. The employer then takes disciplinary action against the employee. In these circumstances the employer may avoid liability because their actions are likely to show that they took all reasonable steps to prevent the unlawful act".

203. The Code also suggests (para 10.52) that reasonable steps might include:
- implementing an equality policy;
- ensuring workers are aware of the policy;
- providing equal opportunities training;
- reviewing the equality policy as appropriate; and
- dealing effectively with employee complaints.

204. In **Canniffe** the EAT held that the proper test of whether the employer has established the defence is to identify:
- first, whether there were any preventative steps taken by the employer, and
- secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable. The question as to whether such steps would in fact have been successful in preventing the act of discrimination in question was not determinative.

205. The EAT in **Canniffe** said that where employers or managers are not aware of any risk of inappropriate sexual behaviour or harassment by an employee, particularly towards another employee, it may be sufficient for the tribunal simply to ask whether there was a policy in place and whether it was disseminated. This is particularly relevant where there has been a one-off incident of serious harassment. The EAT contrasted that situation with one where the management or other employees knew or suspected that there was a risk that a particular employee might carry out inappropriate acts towards a certain employee or other employees.

Time limits including continuing acts

206. A claim concerning work-related discrimination, harassment or victimisation must usually be made to the Tribunal within the period of three months beginning with the date of the act complained of (S.123(1)(a) of the 2010 Act). However, The Tribunal may accept a claim outside that usual time limit if it is made within such other period as it considers just and equitable. The three month time limit is also extended in some circumstances to take into account compliance with the Early Conciliation procedure.

207. For the purposes of this section 123(1)(a) of the 2010 Act:

"(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it."

208. In a case like the claimant's where there are a number of incidents over a period of time a key issue is whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

209. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding this question:

'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which officers … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

210. In considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

211. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

Remedy for discrimination

212. Where a claimant succeeds in a claim of discrimination, s.124 of the 2010 Act gives the Tribunal three options (though not mutually exclusive) when deciding on an appropriate remedy for a claimant:

- to make a declaration as to the rights of the complainant and the respondent (s.124(2)(a))
- to order the respondent to pay compensation to the complainant (s.124(2)(b)), and/or
- to make an appropriate recommendation (s.124(2)(c)).

213. Most commonly the Tribunal will award compensation, the amount of which corresponds to the damages that could be ordered by a county court in England and Wales for a claim in tort (s.124(2)(b) and (6) combined with S.119(2) and (3) of the 2010 Act). This means that there is no upper limit on the amount of compensation that can be awarded for discrimination, unlike, for example, compensation for unfair dismissal. Compensation can include compensation for injury to feelings and personal injury in addition to compensation for financial loss.

<u>Deduction from Wages</u>

214. In relation to a claim for deduction from wages, s.13(1) of the ERA says:

"(1) An employer shall not make a deduction from the wages of a worker employed by him unless-

the deduction is required or authorised to be made by virtue of a statutory provision of a relevant provision of the worker's contract, or

the worker has previously signified in writing his agreement or consent to the making of the deduction."

215. S.27(1) of ERA says:

"(1) In this Part 'wages', in relation to a worker, means any sums payable to the worker in connection with his employment, including-
(a) Any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise"

216. S.13(3) of ERA says:

"Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

Time Limits for deductions from wages claims

217. There is a three-month time limit for presenting a claim to a Tribunal that an employer has made an unlawful deduction from wages (s.23(2) ERA). If the claim relates to a deduction by the employer, the operative date from which time starts to run is 'the date of payment of the wages from which the deduction was made' — S.23(2)(a). If the complaint is about a series of deductions or payments, the three-month time limit starts to run from the date of the last deduction or payment in the series — S.23(3).

218. If the Tribunal is satisfied that it was not reasonably practicable to present a complaint within three months, it may be presented within such further time as the tribunal considers reasonable (s.23(4)ERA).

Analysis and Conclusions

219. We now consider each of the issues we need to decide, applying the relevant law to our findings of fact.

Unfair dismissal

(a) Could the respondent prove a potentially fair reason for dismissal on the balance of probabilities?

220. We accept that the respondent has in this case established a potentially fair reason for dismissal, namely conduct. There was a physical altercation between the claimant and Marcin on 7 August 2018 which was captured on CCTV. That was potentially misconduct, the respondent's disciplinary policy making it clear that fighting was a gross misconduct offence. As we explain at

paras 260-262 below, we did not accept the claimant's submission that the dismissal itself was a discriminatory act.

(b) If so, was the decision to dismiss fair, applying s.98(4) ERA 1996?

221. We assessed the evidence in the light of the Burchell test. That requires that the employer had a genuine belief in the guilt of the claimant, that that belief is a reasonable one and is based on a reasonable investigation.

222. We do find that the respondent, specifically Mrs Wheeldon-Gorst had a genuine belief that the claimant was guilty of misconduct when she dismissed him. However, we do not accept that it was a reasonable belief based on a reasonable investigation.

223. The first reason we say that is that the claimant had in the phone call on the 13th August 2018 prior to the disciplinary hearing flagged up that the incident leading to the disciplinary proceedings was, to his mind, racially motivated. Our view is that that should have raised a "red flag" for the respondent of the need to investigate the circumstances leading to the altercation on 7 August 2018 further before making a decision to dismiss. It took no steps to do so before deciding to dismiss the claimant. Mrs Wheeldon-Gorst accepted she did not go back to Jonathan Wheeldon prior to the disciplinary hearing to seek information from him about the allegation the claimant had raised about the cause of the incident. As Mrs Wheeldon-Gorst had no day to day contact with the Oldham yard and its employees, it seems to us a reasonable investigation would have involved the decision maker seeking information from the person who was the employee's day to day manager before deciding how to proceed.

224. We accept that there was some limited discussion of the issue at the claimant's disciplinary hearing but we do not accept that Susan Wheeldon-Gorst carried out a reasonable investigation into the claimant's allegations of racial harassment leading to the assault. Had she done so, on our findings, she would have discovered that the claimant had information about specific incidents which he said were racially motivated. Her position, it seems to us, was that it was for the claimant to provide credible evidence of such incidents before there was an obligation on the respondent to investigate further. That seems to us to be the wrong way round. We do take into account the difficulties which the claimant on occasion has in articulating what had happened to him. However, it seems to us that that means there was a greater onus on the respondent to take the time to clarify with him what incidents he was alleging had happened and why he was saying that they involved or were related to his race. That is even more so where, as in this case, the employee is a longstanding one with no previous disciplinary sanctions on his record.

225. Second, our view is that no reasonable employer would have taken the view taken by Mrs Wheeldon-Gorst that the statements from witnesses to the event were in her words "not important" and what they said about where a punch had been thrown irrelevant. We found when considering Incident 12 that the evidence from Brian Pearce and Janusz Kycho about where the punch was

thrown by Marcin was important in establishing whether the claimant himself threw a punch. Mrs Thompson also submitted, and we accept, that three of the four witness statements about the incident said that the claimant was punched by Marcin and that the claimant did not retaliate. It was only Marcin's own statement which said that he had been punched by the claimant. In her witness statement, Mrs Wheeldon-Gorst said that Marcin had said that he had punched the claimant in the face after the claimant had punched him in the neck. However, the statements from the other witness referred to the claimant pushing Marcin away. We are not saying that to have acted reasonably the respondent would have had to reach the same conclusion as we did about that evidence. We are saying that a reasonable employer would have considered those statements carefully before reaching their conclusions rather than dismissing them as "not important".

226. Third, it was clear to us that in reaching her decision Mrs Wheeldon-Gorst had formed the view that the claimant was seen by others as aggressive and that this influenced her view of the claimant's conduct on the 7 August 2018. We found that this view was based in part at least on the written statement made by Jonathan Wheeldon on 2 February 2018 about the "breadknife incident". We find that a reasonable employer would not have based its decision to dismiss on a statement which had (by Jonathan Wheeldon's own evidence) not been taken for disciplinary purposes, at the very least without disclosing it to the claimant in advance of the disciplinary hearing so that he was aware it was being relied on.

227. Fourth, as we have recorded above, we had significant concerns about the thoroughness and accuracy of the witness statement taken by Jonathan Wheeldon from the claimant on 8 August 2018 (p.163-164). We have found that it was taken hurriedly and the claimant given no opportunity to take it home and check its accuracy. We find a reasonable employer would have taken the time to hold a thorough investigation meeting with the claimant and check that he was happy that the statement was accurate. That is particularly given that dismissal was clearly a possibility given the nature of the alleged misconduct and where the person taking the statement knew or should have known that there had been previous history between the two employees involved. Not doing so seem to us to have had a direct bearing on the decision to dismiss. Mrs Wheeldon-Gorst noted that the claimant's failure to refer to racial abuse in his investigation statement was in her view significant because she did not believe the claimant would stand by and be racially abused and do nothing about it.

228. We have considered whether the defects in the investigation and disciplinary process were remedied by the investigation carried out by Jonathan Wheeldon prior to the appeal hearing and by the appeal hearing itself.

229. The respondent's case is that prior to the appeal hearing, it carried out an investigation into racism at the Oldham yard. We have considered the written statements in the bundle from the workers at the Oldham yard (pp. 192-195 and 198-205). The respondent's case is that they were asked whether there were any racist incidents and made clear that there were none. As we noted

above, 7 of the statements were taken on the morning of the appeal hearing. It seems to us that as an investigation into alleged incidents of racism they are inadequate. Each employee is asked whether there is any racism in the yard. There is no reference to specific alleged incidents (because the respondent had not clarified with the claimant what those incidents were) and the answer is "no" (except where it is elaborated by saying that it was the claimant who was racist). It seems to us that a reasonable employer would have obtained details about specific incidents of alleged racism from the claimant and then spent adequate time to ask those workers identified as witnesses about those incidents rather than asking a generic question (with no follow up questions) about racism. One consequence of the failure to clarify the claimant's allegations was that that generic question was asked of a number of those who the claimant alleged were themselves involved in the alleged incidents.

230. When it comes to the appeal hearing itself, our view was that the notes of the meeting clearly indicate that Mr James Wheeldon had a pre-formed view about the evidence, and that that pre-formed view was that based on his interpretation of the CCTV footage, the claimant was the aggressor. He did not, it seemed to us, take time to genuinely listen to the claimant, in particular to understand the background leading to the altercation on 7 August. We find that a reasonable employer would have approached the appeal hearing with an open mind and that James Wheeldon did not do so.

231. We have also found that, contrary to what it says in the appeal outcome letter (p.216), the respondent did not take any steps to contact the two witnesses suggested by the claimant. We find that a reasonable employer would have taken steps to do so.

232. For those reasons we have concluded that the respondent's investigation was not within the range of reasonable investigations and that the belief in the claimant's guilt on the part of Mrs Wheeldon-Gorst or James Wheeldon was not a reasonable one. The claimant's claim that he was unfairly dismissed therefore succeeds.

(c) If the claimant was unfairly dismissed, did he contribute to his dismissal to any extent and/or do the 'Polkey' principles apply?

233. We considered whether we could make findings about what would have happened had the respondent not acted unfairly in the way we have set out above. We decided that we will need to hear the parties' submission on this issue before we can reach our conclusions. We will hear those submissions at the remedy hearing which will be listed as a result of our decision.

<u>Race Discrimination/harassment/victimisation</u>

(a) Direct Discrimination/Harassment/victimisation – the claimant has identified a series of acts of harassment or less favourable treatment or victimisation in the claim form and amended particulars and 'Scott schedule' and has identified white comparators for relevant allegations in the comparator table.

i. Did each such act occur?

ii. Was it an act of direct discrimination, harassment and/or victimisation?

234. Having heard the evidence we have decided that the best way to set out out conclusions is to deal in turn with the claims of harassment, direct discrimination and victimisation.

Allegations of harassment

235. As we explained in our summary of findings in relation to the incidents of harassment prior to the claimant's suspension, those incidents can be grouped together by the alleged perpetrator. We believe that the best way to record our findings is in relation to those groupings.

236. Incident 1: We found that in May 2017 Dariusz Saqziak and Mariusz Grochowski made derogatory remarks about back people and Muslims to the claimant and Salim Sadjo in the wake of the Manchester Arena bombing. (Incident 1). We find that those remarks were unwanted and (in relation to the comments about black people) related to race. Given the explicitly racial nature of the comment about black people made by Mariusz we find that it did have the purpose of violating the claimant's dignity or creating the harassing environment in s.27(1)(b)(ii). If we are wrong about that we would have found that it had a harassing effect and that it would have been reasonable for the conduct to have had that effect.

237. Incident 2: We found that in in around Autumn/Winter 2017 Slavomir Kramer made the snapchat monkey filter remark. We find that the conduct was unwanted and that it was related to the claimant's race, being a derogatory comparison of a black person to a monkey. We find that the conduct did violate the claimant's dignity being an obvious racial slur. The impact on the claimant is evidenced by the fact that the claimant remembered the incident some time afterwards when he reported the matter to Jonathan Wheeldon. On the balance of probabilities we find that it was made with the purpose of having that effect given the obviously derogatory comparison inherent in it. If we are wrong about that we would have found that it had the harassing effect in s.27(1)(b) and it was reasonable for it to have that effect given the well-known derogatory connotations of comparing black people to monkeys.

238. Incidents 3, 6, 8, 10, 11 and 12: These were all incidents involving Marcin and Dariusz which we have found were aimed at the claimant. They began in February 2018 (Incident 3 – banging wood) with most of them happening in July 2018 (incidents 6,8,10 and 11) culminating in the incident on the stairs on 7 August 2018 (incident 12) which we found was instigated by Marcin and led to his and the claimant's suspensions. We found that these were all incidents of unwanted conduct. We agree with the claimant's characterisation of them as an ongoing campaign against him. We did not hear evidence from Dariusz or Marcin. However, the acts consisted of acts both of verbal hostility ("no one likes you", "we don't want black people" – incidents 10, 11) and physical hostility (banging wood, throwing wood at the radio, Marcin's middle finger

gesture and the incident on the stairs – incidents 3, 6, 8, and 12). We find that they were made with the purpose of creating a hostile and intimidating environment for the claimant.

239. As to whether they were "related to" the claimant's race, incident 11 is a comment by Marcin explicitly related to (and unfavourable to) the claimant's race. None of the incidents involve Dariusz making remarks about black people. However, we found that Dariusz did make a comment about "fucking Muslims" (in incident 1) and accepted the claimant's unchallenged evidence about Dariusz's hostile actions towards black (but not white) agency workers (para 106 above). As we explained (at para 109 above), we did not find the evidence of the absence of racism in the written statements gathered before the claimant's appeal hearing to be convincing. We find that the claimant has proved facts from which we could conclude that the actions of Dariusz and Marcin were acts of harassment related to the claimant's race. Applying the burden of proof provisions in s.136 of the 2010 Act that means the burden passes to the respondent to prove there was an explanation other than race for the conduct.

240. In his oral submissions Mr Jaffier suggested that the reason the claimant was treated in a hostile manner by his co-workers was not his race but the fact that he had told Jonathan Wheeldon about them stopping the line early to go and warm up their lunch. The only evidence we heard about this was in relation to Incident 9. We found that the claimant's co-workers did call him a "grass" after this incident in July 2018. We do not, however, find this provides an adequate explanation non-race related explanation for the incidents because the hostility against the claimant and the incidents themselves began in February 2018 before Incident 9 had taken place. We find the respondent has failed to provide to discharge the burden placed on it by s.136 of the 2010 Act and that incidents 3, 6, 8, 10, 11 and 12 were acts of race related harassment in breach of s.26 of that Act.

241. <u>Incidents 4 and 7:</u> These were alleged incidents of harassment by Jonathan Wheeldon, namely failing to respond to complaints of racial harassment in February 2018 (incident 4) and making his "friends" comment in July 2018 (incident 7).

242. In relation to incident 4 we found that Jonathan Wheeldon did not investigate the underlying causes of incident 3. However, we also found that the claimant did not explicitly tell him that the behaviour he had experienced was because of his race. In relation to incident 7, we found that Jonathan Wheeldon did tell the claimant that "you do not come to work to make friends" when he complained to him about incidents which had happened to him. However, we also found that this was Mr Wheeldon's approach to similar matters raised with him by employees other than the claimant, including white employees.

243. Although the EHRC Code makes it clear that "unwanted conduct" in s.26 of the 2010 Act "covers a wide range of behaviours" (Para 7.6) we find it difficult to see how the failure to investigate by Jonathan Wheeldon (incident 4) fits within the notion of harassment. We think it is better characterised as potential

less favourable treatment of the claimant and therefore potential direct discrimination under s.13 of the 2010 Act. However, if we are wrong about that then we would have found that the claim of harassment in relation to this incident failed because Jonathan Wheeldon's conduct in failing to further investigate the incident was not related to the claimant's race. The claimant had not told him the incident he was asking him to investigate was race related and there is no evidence that Mr Wheeldon's failure to act was related to the claimant's race. Applying the burden of proof test, our conclusion would be that the claimant had not in relation to that incident proved facts from which we could conclude it was related to race, so the burden did not pass to the respondent to provide a non-race related explanation for the incident.

244. The same is true of incident 7. Although we can accept that the making of a remark falls within the notion of harassment, we find that the remark was not related to the claimant's race. Neither do we think it was made with the purpose of creating a harassing environment nor would it be reasonable for it to have that effect. As with incident 4, the claimant did not in relation to this incident prove facts from which we could conclude it was related to race, so the burden did not pass to the respondent to provide a non-race related explanation for the incident.

245. We therefore find that neither incident 4 nor incident 7 was race related harassment in breach of s.26 of the 2010 Act.

246. Incident(s) 5: We found that Mr Savery did on more than one occasion make the remark about black men alleged by the claimant and did grab his private parts. We found that conduct was unwanted conduct and had the effect of humiliating the claimant. Having heard Mr Savery give evidence we do not believe he made the remarks with the purpose of violating the claimant's dignity. He displayed no hostility towards the claimant nor was there evidence that he otherwise treated any of the respondent's employees less favourably because of race.

247. We do find that this was an ill-judged attempt at humour but one which had the effect of violating the claimant's dignity and creating a humiliating environment for him, especially as we have found it happened on at least one occasion in front of the claimant's manager and supervisors at his workplace. Given the explicit nature of the remark we find it was related to the claimant's race and, even though not meant as harassment by Mr Savery was serious enough in its effect to amount to harassment under s.26 of the 2010 Act. In reaching that conclusion we have taken into account Mr Jaffier's submission that had the incidents been sufficiently serious to have a harassing effect, the claimant would have reported them. We have set out in para 56 why we prefer the claimant's evidence that there were reasons which inhibited him from raising the incident, not least that we have found it was witnessed by Jonathan Wheeldon who did nothing about it.

248. We therefore find that incident 5 was race related harassment in breach of s.26 of the 2010 Act.

249. Incidents 13 and 14: The claimant alleged that Jonathan Wheeldon's decision to suspend him from work on 8 August 2018 and his failure to treat the 7 August 2018 incident as a racial assault amounted to harassment.

250. In relation to the suspension, our conclusion is that even if the claimant experienced the decision to suspend him as having a harassing effect, it was not reasonable for the decision to have that effect. We found that both the claimant and Marcin were treated in the same way and suspended on full pay once the incident on the 7 August 2018 came to Jonathan Wheeldon's attention. It was not denied there had been a serious incident which the employer was bound to investigate. The letter of suspension made it clear that this was the standard procedure in such cases and did not indicate guilt nor would disciplinary action necessarily result (p.165-166). We have found that the incident which led to the suspension was an act of race related harassment but we do not find that is enough to make it reasonable for the claimant to view the suspension arising from it as having a harassing effect.

251. We also find that that the act of suspension was not related to the claimant's race. There was no evidence that at the time he took the decision to suspend, Jonathan Wheeldon was aware that the claimant was saying the incident was a race-related assault.

252. The same, we find, applies to incident 14 (the failure to treat the incident as a racial assault and instead subjecting the claimant to disciplinary proceedings). We are not satisfied that this conduct by the respondent can be properly characterised as harassment. The respondent was following its disciplinary procedures by holding disciplinary proceedings in relation to two employees involved in a serious incident at work. We do not think that it was reasonable for that to have the harassing effect which the claimant would need to show for this claim to succeed. We also find (for the reasons given in relation to incident 13) that this incident was not related to race.

Allegations of direct discrimination

253. We have found that incidents 1, 2, 3, 5, 6, 8, 10, 11 and 12 were acts of race related harassment in breach of s.26 of the 2010 Act. S.212(1) of the 2010 Act makes it clear those acts cannot also be "detriments" for the purpose of a direct discrimination claim under s.13 of the 2010 Act. Below we set out our findings about those acts which we did not find to be acts of harassment in breach of s.26 of that Act (incidents 4, 7, 13 and 14) and those acts which the claimant alleges were acts of direct race discrimination but not harassment namely incident 15 (the decision to dismiss) and the allegation of direct discrimination in promotion and training opportunities. For these claims to succeed the claimant must show that they were acts of less favourable treatment because of race.

254. Incidents 4 and 7: These were Jonathan Wheeldon's failure to respond to complaints of racial harassment in February 2018 (incident 4) and making his "friends" comment in July 2018 (incident 7).

255. We found that these incidents did occur but also found that Mr Wheeldon's approach to similar matters raised with him by white employees was the same. We found, for example, that Mr Wheeldon made similar remarks to Marcin (about "not acting as a child") when he raised complaints about the claimant. Our conclusion is that the claimant has not shown on the balance of probabilities that he was treated less favourably than a white employee in the same circumstances would have been and that the claim of direct race discrimination in relation to both these incidents fails.

256. Incident 13: We take the same view in relation to Jonathan Wheeldon's decision to suspend the claimant from work on 8 August 2018 (incident 13). We found that the evidence showed that both the claimant and Marcin were treated in the same way and suspended on full pay once the incident on the 7 August 2018 came to Jonathan Wheeldon's attention.

257. Mrs Thompson did submit that the point was that the claimant and Marcin should not have been treated the same because one was the perpetrator and the other was the victim of a race related assault. It seems to us that the difficulty with that argument is that at the point of suspension there was no evidence that he claimant had raised the allegation that the assault was race-related with Jonathan Wheeldon. He was therefore (as the letter of suspension says) following standard procedure by suspending both the claimant and Marcin. Until there was evidence about who the perpetrator was, there was no basis for treating the two of them differently. We therefore find that the claimant was not treated less favourably than Marcin.

258. If we are wrong about that, we would have found that any less favourable treatment in terms of the suspension was not because of race. We heard no evidence that a white worker who was the victim of a race-related assault would not also have been suspended by the respondent pending the outcome of a disciplinary investigation. Our conclusion is that the claimant's claim that the decision to suspend him was an act of direct race discrimination fails. The claimant has not proven facts from which we could conclude that the suspension (even if less favourable treatment) was because of race so the burden of proof does not pass to the respondent.

259. Incident 14: We reach the same conclusions in relation to incident 14 (the failure to treat the incident as a racial assault and instead subjecting the claimant to disciplinary proceedings) as for incident 13 . The respondent was following its disciplinary procedures by holding disciplinary proceedings in relation to two employees involved in a serious incident at work. We heard no evidence that the claimant was treated less favourably than Marcin nor that (if there was any such less favourable treatment) it was because of race. Applying the burden of proof test, our conclusion is that the claimant has not in relation to this incident proved facts from which we could conclude it was related to race, so the burden does not pass to the respondent to provide a non-race related explanation for the incident.

260. Incident 15 – Dismissal: The claimant alleges that the decision to dismiss him was an act of direct race discrimination. We found that both he and Marcin were dismissed for gross misconduct as a result of the incident on the 7 August 2018. Mrs Thompson in her submissions suggested that Marcin was not the appropriate comparator, because he was not in the same circumstances as the claimant. Marcin was the aggressor and the claimant was the victim.

261. We have found that Marcin was the aggressor and that the claimant was the victim when it comes to the incident on the 7 August 2018. However, given **Sidhu** it seems to us that is not enough for the claimant's claim of direct race discrimination to succeed. Instead, the claimant has to satisfy us that he was treated less favourably than a white employee in the same circumstances would have been because of race. The relevant comparator, it seems to us, would be a white employee who said he had been the victim of a race-related assault but where the respondent had taken the same (very limited) steps as those taken by Mrs Wheeldon-Gorst to investigate that allegation before deciding to dismiss.

262. We bear in mind that the decision maker when it came to the dismissal of the claimant was Susan Wheeldon-Gorst. We have heard no evidence to suggest that she was involved in (or even witnessed) any of the incidents which we have found to be acts of race-related harassment. We have taken into account the point that motivation can be subconscious. However, when it comes to Susan Wheeldon-Gorst we do not find that the claimant has proved primary facts from which we could conclude that her decision to dismiss him was less favourable treatment because of race. The burden of proof does not pass to the respondent in relation to the decision to dismiss and the claimant's claim that it was an act of race discrimination fails.

263. Less favourable treatment in promotion and training: The claimant claimed that Jonathan Wheeldon directly discriminated because of race in deciding to whom to offer training and promotion opportunities. We accepted Jonathan Wheeldon's evidence that he would provide training on the machines to any employees who showed an interest in doing so.

264. The claimant's case in relation to this claim rested primarily on the evidence in the table (at p.37) which showed that at the Oldham yard that the vast majority (all bar one) of workers who had been trained on the machines at the yard were white whereas all those who had not (including the claimant) were black. We have considered carefully whether that evidence is sufficient to pass the burden of proof to the respondent. We find that it is not.

265. The first reason we say that is the numbers involved are relatively small, with a total of 16 employees (5 black and 11 white). It seems to us that those numbers are too small to be enable us to judge that they are statistically significant. The second reason is that (other than length of service) we heard no evidence about the relative ability of those employees or (more importantly) about which of them had approached Jonathan Wheeldon to ask to be trained or promoted (other than from the claimant in relation to himself).

266. We find that the claimant has not proved facts from which we could conclude that the respondent did discriminate when it comes to training and promotion opportunities. On that basis, the burden of proof does not pass to the respondent. If, however, we are wrong and the evidence in the table provided by the claimant is sufficient to pass the burden, we would have found that Jonathan Wheeldon had given an adequate non-discriminatory explanation for the claimant not being picked to be trained on the machine, namely that he had never shown any interest in doing so.

267. In those circumstances, the claim of direct discrimination in relation to training and promotion fails.

Victimisation

268. The claimant alleged that the respondent had victimised him under section 27 Equality Act 2010. For such a claim to succeed, the claimant would have to show that he had carried out a "protected act" which, in practice, means raising an allegation of discrimination. We accept that the claimant had raised allegations of discrimination with the respondent, specifically in relation to the Snap Chat monkey filter issue. On our findings of fact, the claimant did not make further a protected act until July 2018 when he reported Marcin's comment in incident 11 to Jonathan Wheeldon.

269. For his victimisation claim to succeed, the claimant also has to show that he was subjected to a detriment or detriments because he did a protected act. The detriments on which the claimant relies for his victimisation claims are incident 9 (Jonathan Wheeldon asking him why he had stopped the picking line) and incidents 13,14 and 15 (suspension, failing to treat the assault as a racial incident and dismissal). We deal with each in turn below.

270. Incident 9: We found that in July 2018 Jonathan Wheeldon did ask the claimant why he stopped the picking line. We can see the claimant's argument that by asking him to provide information about his colleagues (and then passing what was said on to those colleagues) Mr Wheeldon left him open to being viewed as a "grass". However, the claimant did not prove facts from which we could conclude that Mr Wheeldon acted as he did because the claimant had done a protected act. Viewing the evidence as a whole, we think it more likely that Mr Wheeldon simply did not think through the consequences of his actions rather than his behaviour being linked to any protected act by the claimant.

271. Incidents 13 and 14: We have already noted that in suspending the claimant and in subjecting him to disciplinary proceedings, While we accept that the test for victimisation is not whether less favourable treatment has been suffered, it seems to us that the treatment of Marcin is relevant in deciding why Jonathan Wheeldon suspended the claimant and subjected him to disciplinary proceedings. We have found that Jonathan Wheeldon treated the claimant the same as Marcin, who had not carried out a protected act under

the 2010 Act. The claimant has not proved facts from which we could conclude that he was subjected to a detriment because he carried our a protected act. In those circumstances the burden of proof does not pass to the respondent. We find that the victimisation claim in relation to incidents 13 and 14 fail.

272. Incident 15: The claimant also said that the decision to dismiss him was an act of victimisation. The decision maker when it came to dismissal was Mrs Wheeldon-Gorst. We found that she treated the claimant and Marcin the same in that they were both dismissed. The claimant did not provide evidence to suggest that the decision to dismiss him was in any way linked to his having carried out protected act. Indeed, part of our overall conclusion when it comes to the fairness of her dismissal is that she did not sufficiently take into account the allegation that the incident on the 7 August 2018 was race related. There was no evidence that she knew about the protected act in July 2018. The claimant has not proved facts from which we could conclude that he was subjected to a detriment because he carried out a protected act. In those circumstances the burden of proof does not pass to the respondent. We find that the victimisation claim in relation to incidents 15 fails.

(b) *Are any acts out of time and, if so, should the Tribunal grant a just and equitable extension to allow the claims to be brought?*

273. The claimant lodged his Tribunal claim on the 6 November 2018 having initiated the ACAS Early Conciliation procedure on 18 September 2018.

274. As set out in our summary of our findings, we found that the incidents of harassment involving Marcin and Dariusz from February 2018 onwards up to and including the incident on 7 August 2018 formed an ongoing hostile campaign against the claimant. We have concluded it was a “continuing state of affairs” so that the time limit for bringing a claim in relation to any of those incidents (3, 6,8, 10, 11, 12) ran from the last of those acts on 7 August 2018. All those incidents are in time.

275. In relation to the other successful claim, the incidents of harassment by Mr Savery (incident 5), the claimant was not able to pinpoint a date for those other than 2018. We have found that there were more than one such incident. The absence of specific dates mean that it is difficult for us to decide whether they should be regarded as a series of one-off incidents or a continuing act. Because it was the same person involved and the nature of the act was the same each time we have decided on balance that they should be regarded as a continuing act. In a sense, however, that does not take us very much further because we do not know when the last instance of it happening was.

276. It seems to us that the better way to approach the matter is to decide whether it would be just and equitable for us to hear the claimant’s claim about these incidents assuming they were out of time. We have decided it would be. We have found that there were reasons why the claimant was inhibited from raising complaint about these incidents, including Mr Savery’s status as a Wheeldon family member and the fact that Jonathan Wheeldon had

witnessed one of the incidents and not taken action. We take into account also our finding that the claimant was desperate not to lose his job and that this inhibited him from raising a complaint within the respondent. We find that these reasons would apply even more where the complaint would have been to an employment tribunal against his employer. We also accept the evidence we heard from the claimant that he had not heard of the employment tribunal and did not know about the possibility of bringing a tribunal claim until he sought advise after being dismissed.

277. We do not believe that the respondent would be prejudiced by the claimant being allowed to bring his claim in relation to these incidents. At the earliest, they would have occurred six months or so before an in-time claim could have been brought and so this is not a case where the respondent's ability to respond to the claim was significantly prejudiced by the passing of time. It seems to us that any prejudice would be far greater on the claimant's side if he were prevented from bring a claim about the incidents involving Mr Savery. We find that the claim was brought within time extended under the just and equitable rule in s.123(1)(b).

278. When it comes to incidents 1 and 2, however, we take the view that those claims are out of time and it would not be just and equitable to allow the claimant to bring them. It seems to us they involved one-off incidents which were distinct from the later acts of harassment in the period leading up to the claimant's dismissal. In addition, in the case of incident 2 the perpetrator is no longer employed by the respondent which would prejudice it in terms of its defence of the claim.

279. We therefore find that incidents 1 and 2 are out of time but that incidents 3, 5, 6, 8, 10, 11, 12 were brought within time (extended where necessary under the "just and equitable" rule in s.123(1)(b) of the 2010 Act).

(c) Is the respondent potentially liable for any acts of its employees in breach of the 2010 Act?

280. Other than the reference to **Jones v Tower Boot** in its submissions (see para 198 above), the respondent did not seek to argue that any of the employees were acting outside the course of their employment when they did the alleged acts. The respondent's main contention in relation to these acts was that it did not know about many of them because the claimant did not report them. S.109(3) of the 2010 Act makes it clear that is not a relevant consideration when it comes to an employer's liability for the actions of its employees. Our conclusion on this issue is that the respondent is liable for the acts of the employees involved in the incidents because they were carried out in the course of their employment.

(d) If so, does it have a defence to the claims based on its employees' acts because it took all reasonable steps to prevent the employees doing those acts or acts of that kind (s.109(4) of the 2010 Act)?

281. The respondent submitted that it had taken all reasonable steps to prevent harassment arising. We bear in mind that the employer in this case is a medium to large employer with over 100 employees. We have taken into account **Canniffe** and the EHRC Code which suggest that (at least for an employer with the respondent's resources) as a minimum an employer would be expected to make its employees aware of out its policies in relation to discrimination and harassment and to undertake training (at least of managers if not all employees).

282. On our findings, the respondent took no such steps beyond having paper policies at its head office yard relating to equal opportunities. The one page Policy was not displayed at Oldham so that it would come to the attention of employees. There was no evidence that the employees had access to the policies set out in the respondent's handbooks. There was no evidence that Jonathan Wheeldon, a yard manager about what was and what was not acceptable behaviour and how to deal with cases of suspected harassment or discrimination. There was no evidence of any training of employees on these issues.

283. We bear in mind the onus is on the respondent to establish that it took all reasonable steps. From the evidence we have heard, we are not satisfied that it did so in this case and conclude it cannot rely on the defence in s.109(4) of the 2010 Act to escape liability for its employees' acts in breach of the 2010 Act.

Unlawful deduction from wages

(a) Did the respondent unlawfully deduct three weeks' pay from the claimant's wages between 1 May and 2 May 2013?

284. We found that the respondent did not make any deductions from the claimant's wages so the claim that unlawful deductions were made fails.

(b) Since the unlawful deduction claim was not brought within three months of the deductions being made should the claimant be allowed to pursue it because it was not reasonably practicable for him to bring the claim sooner than he did?

201. We do not need to decide this point because we have found no deductions took place.

Summary of conclusions

285. In deciding this case we have had to make a number of detailed findings about a number of incidents. In relation to some incidents the claims were put in the alternative so we have had to consider whether they were harassment, direct discrimination, victimisation or none of these. We have found that the following claims succeeded:

(a) The claimant's claim that the respondent subjected him to harassment related to race in breach of s.26 of the Equality Act 2010 succeeds in relation to incidents 3, 5, 6, 8, 10, 11, 12.

(b) The claimant's claim that he was unfairly dismissed.

286. There is always a risk of over-simplifying when summarising. Even at that risk, it seems to us helpful to provide an overview of what we found in this case (and as importantly, what we did not). We did not find that the management of the respondent in this case was itself directly guilty of breaches of the 2010 Act. However, we did find that as an employer it failed to take the basic reasonable steps envisaged by the EHRC Code to prevent some of its employees from carrying out acts of racial harassment. It also failed to take into account what an employee was telling it about what had led up to an incident which led to his dismissal. Partly, it seems to us, that was because its managers had not had sufficient training in discrimination and harassment to recognise that harassment in particular need not always involved incidents of explicit race-related abuse.

287. The claimant is no longer employed by the respondent. In those circumstances it seems to us we cannot make recommendations under s.124(2)(c) of the 2010 Act because they would not have the effect required by s.124(3). Had this Tribunal been in a position to make recommendations, we would have recommended that the respondent:
- review its approach to training its managers and its employees on equality and diversity
- ensured that it took proactive steps to make its employees aware of what behaviours are and are not acceptable and
- who to turn to when they experience unacceptable behaviour.

Next steps

288. Because some of the claimant's claims have succeeded, the Tribunal will now set a date for a one day hearing so it can hear the parties' submissions about remedy. The notice of that hearing will be sent out separately to this judgment.

Employment Judge McDonald

Date: 22 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 January 2020

FOR THE TRIBUNAL OFFICE

<u>Appendix:</u> List of incidents of alleged discrimination, harassment or victimisation under the 2010 Act.

Incident 1 (p.63) – canteen remarks in May 2017
Incident 2 (p62) – snapchat monkey filter incident Winter 2017
Incident 3(p.60) – the banging wood and bread knife incident February 2018
Incident 4 (p.60) – Jonathan Wheeldon failing to respond to complaints of racial harassment – February 2018
Incident(s) 5 (pg 57 – 59) – Stephen Savery - 2018
Incident 6 (p.57) – the radio incident – July 2018
Incident 7 (p.56) – Jonathan Wheeldon "friends" comment – July 2018
Incident 8 (p.55) – "No one likes you" comment – July 2018
Incident 9 (p.54) – Jonathan Wheeldon asking the claimant why he stopped the line – July 2018
Incident 10 (p.53) – Marcin middle finger gesture – July 2018
Incident 11 (p.53) – Marcin "we don't want black people" comment – July 2018
Incident 12 (p.52) – Incident on the stairs – 7 August 2018
Incident 13 (p.51) – Suspension from work – 8 August 2018
Incident 14 (p.50) – Failure to treat 7 August incident as a racial assault – 15 August 2018
Incident 15 (p.50) – Dismissal – 17 August 2018