EMPLOYMENT TRIBUNALS

Claimant: Mr I McFarlane

Respondent: ELG Carbon Fibre Ltd

FINAL HEARING

Heard at: Birmingham (in public; by CVP) **On:** 1 to 5 March 2021 & (deliberations in private) 11 March 2021

Before: Employment Judge Camp Members: Mrs L Evans, Mrs M Howard

Appearances
For the claimant: in person
For the respondent: Mrs K Parker, counsel

RESERVED JUDGMENT

(1) The claimant's complaints that he was subjected to the following detriments by the respondent because he made protected disclosures **succeed**:

a. in or around early July 2019, an unknown colleague wrote "*shut your mouth*" on a box in which the claimant stored PPE;

b. in or around July / August 2019, colleagues refused to work with him;

c. he was physically assaulted by a colleague on 3 September 2019.

(2) The claimant's other complaints **fail**, including a complaint that the respondent dismissed him because of his race.

(3) **ORDER:** The proceedings are stayed for 28 days to facilitate settlement negotiations, through ACAS or otherwise. Within 42 days, the claimant and respondent must either: confirm they have entered into a binding settlement agreement; put forward their proposals, agreed if possible, for case management orders leading to a 1 day remedy hearing, together with their dates of unavailability over the next 6 months.

REASONS

Introduction & Summary

1. The respondent is a company in business reclaiming carbon fibres from waste materials and converting them into products for use in the composites and compounding industries. The claimant worked for the respondent as an operative at its factory in Dudley from 20 May 2019. Initially he was an agency worker. From 19 August 2019, he was directly employed as an apprentice Maintenance Engineer.

2. On 23 and 24 June 2019, the claimant raised concerns with various people within the respondent about health and safety issues and quality standards. These concerns, which the respondent accepts were protected disclosures under the Employment Rights Act 1996 ("ERA"), were taken seriously by the respondent and the fact the claimant had raised them was welcomed by management. However, the resulting investigation led to a number of the claimant's colleagues being dismissed or disciplined. We have decided this was one of the reasons, and a significant one, for some of the respondent's non-managerial staff disliking the claimant and subjecting him to detriments.

3. One detriment the claimant was subjected to was being physically attacked by a colleague, a Production Operative called Mr R Hill, on 3 September 2019. The claimant is (as he describes himself) black. Mr Hill is white. The incident during which the claimant was attacked by Mr Hill was investigated by the respondent and both Mr Hill and the claimant were disciplined. Mr Hill was given a final written warning. The claimant was summarily dismissed for gross misconduct with effect on 17 September 2019. His appeal against dismissal was unsuccessful.

4. The claimant went through early conciliation from 18 September to 18 October 2019 and presented his claim form on 7 November 2019. In addition to complaints that he was subjected to detriments for making protected disclosures (which we shall refer to as "whistleblowing detriment" claims), the only complaint he has pursued at the final hearing is that his dismissal was direct race discrimination. We have rejected this discrimination complaint, on the basis that race played no significant part in the decision to dismiss him.

Claims & Issues

5. Precisely what complaints the claimant was making and pursuing did not become clear until we asked him about this on day 1 of the hearing.

6. The details of claim in the claim form are brief. The only thing in section 8.1 is a tick in the race discrimination box. In section 8.2: he complains about unspecified unfair treatment, which is said to be "*racially and age related*"; he complains of being "*Judged, relating to comments about my hair (which is culturally orientated), and age*"; he states he has "*been discriminated against as a Whistle blower*" in unexplained ways. There is mention of people wanting "*to get me dismissed*" and he ticked the box in section 9.1 to say that what he wanted, if his claim was successful, "*If claiming unfair dismissal, to get your old job back and compensation (reinstatement).*"

7. The response focusses principally on dismissal and denies any discrimination or whistleblowing detriment. There are three things of note about it. First, the only time limits point taken is a misconceived argument that any whistleblowing claim is out of time because of the date of the protected disclosures. That point has not been pursued at this hearing. Secondly, the respondent conceded the claimant made protected disclosures on 24 June 2019. Thirdly, there is no suggestion in the response to the effect that the respondent is not vicariously liable for any whistleblowing detriment or discrimination, on the basis of an argument that the respondent "*took all reasonable steps*" in accordance with ERA section 47B(1D) and Equality Act 2010 ("EQA") section 109(4) (we shall refer to this as the "statutory defence"), or otherwise.

8. There was a routine case management preliminary hearing on 17 April 2020 before Employment Judge Wynn-Evans. At that hearing, the claimant confirmed that: he was not making an age discrimination claim; he was making race discrimination and whistleblowing claims; he was not relying on any alleged protected disclosures other than (from paragraph (7) of the written record of the hearing), "*those made on 24 June 2019 concerning health* [and] *safety which the respondent has conceded were protected disclosures*". He was ordered to provide further and better particulars of his claims.

9. The written record of the hearing contains a list of issues. Based on that list, the claimant appeared to be making the following types of complaint:

    9.1 automatically unfair dismissal under ERA section 103A (whistleblowing);

    9.2 whistleblowing detriment;

    9.3 direct race discrimination;

    9.4 race-related harassment.

10. There is no suggestion in the list that the respondent was or might be relying on the statutory defence, nor that the respondent was alleging the claimant made his protected disclosures in bad faith and was seeking a reduction in compensation accordingly.

11. The Judge also made the following order: "*The parties must inform each other and the Tribunal in writing within 14 days of the date this is sent to them, providing full details, if what is set out* [above] *about the case and the issues that arise is inaccurate and/or incomplete in any important way.*" The parties confirmed to us that neither of them wrote in to the Tribunal pursuant to this order.

12. Although it might be arguable that some of the claims the claimant was wanting to pursue were not made in the claim form, and although the claimant has never been given permission to amend, no point about this has been raised by the respondent at any time, including at this final hearing.

13. The claimant provided some further information about his claim on or about 1 May 2020. He did so in a document headed "*Claimant's further detailed list of particulars*" which had two attachments to it. The document itself provides little clue as to precisely what complaints the claimant is making, beyond whistleblowing and race discrimination claims about his dismissal. It refers to the attachments as "*Evidence 1 & 2*". Evidence 2 is a 3 page document, dated 1 May 2020 at the top and 7 November 2019 at the bottom, and is headed "*Statement by* [the claimant] *pertaining to the outcome of the*

disciplinary hearing on the 23rd September 2019". It was one of three documents that were used together as the claimant's witness statement at this hearing. The focus of it is the incident of 3 September 2019. It provides almost no further particulars of the claimant's claim at all; certainly we cannot tell from it what complaints of discrimination and whistleblowing detriment are being made.

14. We still don't know what "*Evidence 1*" is or was. One unfortunate aspect of this hearing being conducted wholly remotely is that we haven't seen the Tribunal file, which might have given us this information. We asked about it at the start of the hearing. Respondent's counsel suggested it wasn't in the trial bundle because it contained 'without prejudice' material. The claimant did not dispute this, nor did he suggest to us that it was an important document we needed to see, as he did with other documents that were at first missing from the bundle and which were provided electronically part-way through the hearing, by the respondent's solicitors.

15. Employment Judge Wynn-Evans gave the respondent permission to lodge an amended response dealing with the issues raised in the claimant's further particulars. It chose not to do so.

16. That was the state of play when this final hearing began. We asked the claimant to tell us what his claim was. This is what he told us and what respondent's counsel said in response, and is the basis upon which we have dealt with the case:

    16.1 the only complaint being made under the EQA is a single complaint of direct race discrimination concerning dismissal. The sole basis upon which it is made is that the person who made the decision to dismiss the claimant – Mr A Wilkes, Production Manager – was consciously or unconsciously prejudiced against the claimant because he is black;

    16.2 in particular, there is no race-related harassment claim, no discrimination claim directly about the incident of 3 September 2019 itself, no claim of any kind (under the EQA or ERA) about the appeal against dismissal, and no claim relating to things allegedly said to the claimant about his hair or to other allegedly inappropriate and race-related comments;

    16.3 there is no complaint of automatically unfair dismissal under ERA section 103A. This is because, although he thinks him making protected disclosures may have contributed to him being dismissed, the claimant is not alleging that this was the principal reason for dismissal;

    16.4 the claimant relies on alleged protected disclosures made on 24 *and* 23 June 2019, about health and safety issues *and* quality issues. The respondent, through counsel, accepted that disclosures of information were made by the claimant as alleged, about both sets of issues, on both days, and that they were protected disclosures. The respondent did not object to the claimant broadening his case in this way;

    16.5 the claimant is making whistleblowing detriment complaints about five alleged detriments, or sets of detriments, as explained immediately below;

    16.6 detriment 1 occurred on 23 June 2019. The claimant made the first protected disclosures to Mr M Saxon, Production Team Leader. Shortly afterwards, Mr Saxon called the claimant into his office and amongst other things told the

claimant that he [the claimant] was "*giving* [Mr Saxon] *attitude*" and "*telling* [him] *how to do* [his] *job*". Those comments are alleged to be detrimental. Later that day, Mr Saxon emailed Mr Wilkes, his manager, and a Mr C Bradley from HR. We refer to that email, which is at page 45 of the bundle. The sending of that email is the second part of detriment 1;

16.7 detriment 2 was on or around 28 June 2019. It consists of one of the claimant's colleagues, Mr N Kurzveil, Lead Operator (who has been referred to throughout this hearing as "Norbert" and so we shall call him that too), allegedly having a verbal spat of some kind with him at an informal meeting in the office of Mr W Wood, Team Leader;

16.8 detriment 3, tentatively given a date of 12 July 2019, is someone – who must have been a member of the respondent's staff but who has not been identified – writing "*shut your mouth*" on a cardboard box in which the claimant stored his PPE, referred to as a "Sundström hood box";

16.9 detriment 4, which dates from around the end of July through to around mid August 2019, is colleagues of the claimant refusing to work with him. There is an allegation connected with detriment 4 about the claimant being told to spend a couple of weeks observing contractors from a company called Tatham that was working on some of the machines used in the factory, allegedly because colleagues would not work with him. However, the claimant confirmed later on in the hearing that the alleged detriment he was making his claim about was colleagues refusing to work with him and not anything else;

16.10 detriment 5 is the incident on 3 September 2019 itself, specifically, Mr Hill attacking him;

16.11 no other complaints of any kind are being made;

16.12 counsel accepted on the respondent's behalf that all of those complaints were before the Tribunal and raised no objection to the claimant pursuing any of them, nor any amendment or limitation points. She also accepted that on the basis of the claimant's version of events, all five of the alleged detriments were indeed detriments as a matter of law.

17. We had hoped we would have enough time within the 5 day time estimate for this hearing to deliberate and give a decision on liability and potentially even deal with remedy. Technical difficulties we had put paid to that. We had on day 1 agreed with the parties our intention to deal with the issue lawyers call the '<u>Polkey</u> issue' (issue (xiii) a. in Employment Judge Wynn-Evans's list of issues; see <u>Chagger v Abbey National plc</u> [2009] EWCA Civ 1202). Part of the way through the hearing, we asked for the parties' views on also dealing, alongside liability, with the following issue relating to the causation of loss: if we found in the claimant's favour on detriment 5 but against him on race discrimination, would any financial losses he suffered as a result of dismissal be recoverable as damages for whistleblowing detriment? However, just before the start of closing submissions, respondent's counsel told us the respondent was opposed to us dealing with any remedy issues at all at the same time as liability and, after discussions between ourselves, we agreed not to.

18. Bearing all of the above in mind, the issues for us to decide are as follows:

Whistleblowing detriment

18.1 In connection with alleged detriments 1 to 5, what happened as a matter of fact?

18.2 To the extent that what happened differs significantly from what the claimant has alleged, did the respondent subject the claimant to detriment?

18.3 If so, was this done on the ground that he made protected disclosures on 23 and/or 24 June 2019?

Direct race discrimination

18.4 Was the claimant's dismissal less favourable treatment?

18.5 If so, was it because of the claimant's race (or because of the protected characteristic of race more generally)?

19. In closing submissions, for the first time in the entire proceedings to the best of our knowledge, respondent's counsel raised the statutory defence. The Employment Judge expressed the provisional view that that defence was not before the Tribunal. Counsel put forward no reasoned argument to the effect that it was; and we do not think it is. Although what would be called 'pleading points' in the County and High Court have a limited role to play in the Employment Tribunals, claimants and respondents are expected to, "*set out the essence of their respective cases on paper in respectively the ET1 and the answer to it*": Chandok v Tirkey [2015] IRLR 195. If they don't, they can't rely on the missing allegations, unless they successfully apply to amend. The respondent has never before applied to amend to add the statutory defence to its response and it made no such application to us. If it was wanting to pursue the statutory defence, it had a prime opportunity to raise it in the amended response that Employment Judge Wynn-Evans gave it permission to lodge, an opportunity it did not take up.

20. Nevertheless, we shall, for the sake of completeness, briefly deal with the statutory defence later in these Reasons.

The law

21. The list of issues in paragraph 18 above accurately reflects the law.

22. Because the respondent has conceded that the claimant made the disclosures he relies on and that they were protected disclosures, and also that, if the claimant's version of events is accepted, he was subjected to detriments as he is alleging he was, we have had to concern ourselves far more with the facts than with the law when considering the whistleblowing detriment claim.

23. In terms of whistleblowing law, we start by noting the wording of the legislation, and of the following parts of the ERA in particular: sections 47B and 48. As to case law, we adopt the summary of the relevant law from paragraphs 22 to 35 of the decision of

HH Judge Auerbach in Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust [2019] UKEAT 0047_19_2309, in particular to the following:

23.1 "*the correct test … is whether the protected disclosure materially influenced, in the sense of being more than a trivial influence upon, the employer's treatment of the whistle-blower, as opposed to the test being the one that would apply in the unfair dismissal context, of whether the protected disclosure was the sole or principal reason*" (from paragraph 27);

23.2 "*the burden of proof … passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained. … The Tribunal needs to be satisfied that there is a sufficient prima facie case, such that the conduct calls for an explanation. … if the burden does shift in that way, it will fall to the employer to advance an explanation, but, if the Tribunal is not persuaded of its particular explanation, that does not mean that it must necessarily or automatically lose. If the Tribunal is not persuaded of the employer's explanation, that may lead the Tribunal to draw an inference against it, that the conduct was on the ground of the protected disclosure. But in a given case the Tribunal may still feel able to draw inferences, from all of the facts found, that there was an innocent explanation for the conduct (though not the one advanced by the employer), and that the protected disclosure was not a material influence on the conduct in the requisite sense*" (from paragraphs 30, 33 and 34).

24. Counsel referred us to a number of other authorities in closing submissions, but the only one we think we need to address here is Martin v Devonshires Solicitors [2011] ICR 352. She submitted, validly, that when looking at the reason why the claimant was subjected to a particular detriment, we are entitled to draw rather fine distinctions between different possible reasons. However, that case is normally cited as authority for the proposition that a distinction can be drawn between subjecting someone to a detriment, on the one hand, because they made a protected disclosure and, on the other, because of the way in which they made it. Counsel cited it in connection with an argument to the effect that we should decide the main reason for the detriments in this case was – essentially – the claimant's abrasive personality rather than his protected disclosures. Several times during the hearing, we had to remind her that we were not looking for the principal reason for detriments; that the test was – as above – whether the protected disclosures were a significant part of the reasons ("*more than a trivial influence*"); and that if that test were satisfied, it would not help the respondent to show that the main reason was something else.

25. Finally in terms of whistleblowing case law, in relation to whether or not something constitutes a detriment, we note St Helens MBC v Derbyshire [2007] UKHL 16, in light of which we understand the position to be as follows:

25.1 the test is an objective one: would a reasonable employee, in the claimant's position, consider the treatment to be to his detriment?

25.2 another way of putting the same objective test is to ask: did the claimant honestly and reasonably believe the treatment to be to his detriment?

25.3 an unjustified sense of grievance cannot constitute detriment, and although being caused distress and worry can, it will only do so if it was objectively reasonable

in all the circumstances for the employee to view such distress and worry as a detriment;

25.4 it is not a defence *per se* that the employer behaved honestly and reasonably, but save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment.

26. In relation to the discrimination complaint, we again begin with the wording of the relevant legislation, in particular sections 13, 23 and 136 of the EQA.

27. In terms of case law, our starting point is paragraph 17, part of the speech of Lord Nicholls, of the House of Lords's decision in Nagarajan v London Regional Transport [1999] ICR 877. We also note paragraphs 9, 10 and 25 of the judgment of Sedley LJ in Anya v University of Oxford [2007] ICR 1451.

28. So far as concerns the burden of proof, a succinct summary of how [the predecessor to] EQA section 136 operates is provided by Elias J [as he then was] in Islington Borough Council v Ladele [2009] ICR 387 EAT at paragraph 40(3), which we adopt. We have to start by looking for "*facts from which the court could decide, in the absence of any other explanation*" that unlawful discrimination has taken place.

29. Although the threshold to cross before the burden of proof is reversed in accordance with EQA section 136 is a relatively low one – "*facts from which the court* could *decide*" – unexplained or inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status[1] and/or incompetence are not, by themselves, such "*facts*"; unlawful discrimination is not to be inferred just from such things – see: Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen v Wong [2005] IRLR 258; Madarassy v Nomura International Plc [2007] EWCA Civ 33; Chief Constable of Kent Police v Bowler [2017] UKEAT 0214_16_2203. Further, section 136 involves the tribunal looking for facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred. See South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23.

30. Generally, in relation to the burden of proof, we have applied the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913.

Factual background

31. Some of our findings of fact are made later in these Reasons, in sections dealing with particular claims and issues.

32. We had witness evidence on the claimant's side just from the claimant himself. As already mentioned, three documents were together used as his witness statement. These were: a 3-page document dated 7 November 2019 headed "*WITNESS STATEMENT*"; "*Evidence 2*" (see above); a 6-page, signed statement prepared for the

[1] i.e. the claimant can point to someone in a similar situation who was treated better and who is different in terms of the particular protected characteristic that is relevant, e.g. is a different age, race, sex etc.

appeal against dismissal dated 23 September 2019. We shall refer to these, respectively, as his "witness statement", "Evidence 2", and his "appeal statement".

33. The claimant had been intending to rely on evidence from a former colleague called Mr C Francis, who still works for the respondent and who the claimant describes as black. We have two statements from Mr Francis. One is a statement he gave to the respondent in early September 2019 relating to the incident on 3 September 2019, in which, amongst other things, he stated that, in the part of the incident he saw (which was after Mr Hill attacked the claimant) the claimant, "*seemed to be the aggressor – he was pushing/walking towards* [Mr Hill]", and that, "*everyone is sick of* [the claimant] *and the way he speaks to people*". The second statement related to a disagreement in early August 2019 between the respondent and Mr Francis and the claimant about paid holiday. However, the claimant told us that that disagreement was not part of his claim. Ultimately, Mr Francis was not called as a witness.

34. On the respondent's side, we heard from: Mr Wilkes; Miss T Edwards, no longer employed by the respondent but at the time the respondent's HR Manager; Mr F Barnes, Managing Director, who dealt with the claimant's appeal. Because the claimant was not making any allegations against Mr Barnes or pursuing any complaint about the appeal against dismissal, Mr Barnes's evidence proved to be largely – although not entirely – irrelevant. Although Miss Edwards conducted the investigations into the incident on 3 September 2019 and did further investigations in connection with the claimant's appeal against dismissal, she was similarly not alleged to be a discriminator or to have subjected the claimant to whistleblowing detriment. Her witness statement for the most part consisted of a 'walk through' the evidence she gathered, principally her notes of her interviews with various members of staff, which have been referred to during this hearing as their "statements".

35. The entire hearing was conducted by CVP and all of the witnesses gave their evidence by video. Technical difficulties added significantly to the length of the hearing and were particularly acute for respondent's counsel. After fairly lengthy and unsuccessful attempts on day 1 to get her video to work, she attended the rest of the hearing, cross-examining the claimant and giving submissions, by telephone (via CVP), without her or anyone else objecting.

36. There was a largely agreed file or 'bundle' of documents with 100-odd pages in it. Other documents were added during the hearing by consent, three of which in particular were of some importance: an unsigned statement from the claimant (although, as we understand it, written up for him) of 24 June 2019 evidencing and partly containing his protected disclosures of 23 and 24 June 2019; an unsigned statement from Mr R Jones, Production Team Leader, taken on or about 4 September 2019 by Miss Edwards; the notes of Mr Hill's disciplinary meeting.

37. In addition, both sides wanted us to watch some CCTV footage of the incident of 3 September 2019. We did so, several times, both in private and publicly via CVP, with the Employment Judge 'sharing' his screen. Unfortunately – from everyone's point of view – the CCTV has no sound. Although it does not cover the whole of the (apparently more-than-20 minute) build-up to the physical altercation: it does show several minutes beforehand; it clearly shows Mr Hill attacking the claimant, without discernible provocation, by grabbing his lapels and pushing him against the side of a machine called a blender; it then shows, much less clearly (because of the camera angle and

the blender being in the way), Mr Hill being pulled off the claimant by colleagues, the claimant then making a move towards Mr Hill, and both of them then being restrained and led away in different directions.

38. There are few factual disputes, and much of what is in dispute is not relevant. The main disputed things that are important are things on which we have little or no direct evidence: what was going on in Mr Wilkes's unconscious mind when he decided to dismiss the claimant; what was going on in the minds of the various people who subjected the claimant to detriments, none of whom was a witness before us.

39. The claimant was recruited to work for the respondent via an agency. He started on or about 20 May 2019 as a temporary agency worker. He was 19 years old at the time. He is relatively well-educated and his long term goal at that point in time was to become a qualified engineer. The perception of some of his colleagues was that he did not wear his education lightly and that he thought himself to be more knowledgeable and experienced than in reality he was, and they took against him because of this.

40. A couple of weeks after the claimant started, a single vacancy arose within the respondent for an Apprentice Maintenance Engineer. He applied and was successful, although – for reasons that are not relevant to our decision – he did not officially start his apprenticeship, and become an employee, until around 19 August 2019. He was interviewed by Mr Wilkes who, with Miss Edwards, made the decision to appoint him. In oral evidence, they both said something to the effect that he was an exceptional candidate, and we have no good reason to doubt that that was what they genuinely thought. There were a number of other applicants, including the son of Mr W Wood, a Team Leader and possibly – the evidence around this was a little confused – Norbert's son, who already worked in the factory, too.

41. On 23 June 2019, the claimant made the first of his relevant protected disclosures. The context in which it was made was that the claimant was blamed by Mr Saxon for the wrong 'feedstock' being fed into some machinery. The claimant thought Mr Saxon was himself to blame. The claimant also saw a Maintenance Fitter, Mr Walker, in the machine with the guards up – something everyone agrees was extremely dangerous – and Mr Saxon encouraged or condoned this. The claimant raised this health and safety issue with Mr Saxon on the shop floor, possibly in the presence of Norbert, Mr Walker, and a fellow agency worker called Mr D Wrzesien (referred to throughout the hearing as "Dawid", which is what we shall call him). At some stage he also raised quality issues too. Mr Saxon took the claimant into his office to have words with him. The claimant's own evidence, from his witness statement, is that, "*I explained to Mr Saxon that I hadn't been trained … I told Mr Saxon that new employees should obviously be trained by more experienced members of management like himself*".

42. We accept that in this conversation, Mr Saxon did indeed say that the claimant was "*giving* [Mr Saxon] *attitude*" and "*telling* [him] *how to do* [his] *job*". This part of the claimant's allegations is consistent with the email Mr Saxon sent to Mr Wilkes later that day: "*Just to make you aware I had an informal meeting with Isaac* [the claimant] *regarding a number of issues I had. I told Isaac what I expected of him and I got a load of complaining then I told him if he carried on I would send him home. He still carried on trying to question my position as a team leader. He stated that the company structure was a joke and walked out*". We also accept that the claimant did indeed walk out. He admitted as much in the statement he gave the next day and in his oral evidence before

us almost made the same admission, albeit he kept, somewhat disingenuously, insisting that he just left the meeting because there was nothing more to say.

43. On 24 June 2019, which was a day off for the claimant, he came into work and raised his concerns about health and safety breaches with Mr Wilkes. Mr Wilkes immediately referred him to HR. The claimant had a meeting with Mr Bradley and Mr M Roberts, Production Co-ordinator. As explained above, and as the respondent accepts, he made protected disclosures about quality and health and safety issues during the meeting. He also gave the statement already referred to.

44. When the claimant arrived for work the following day – 25 June 2019 – he was met by Mr Wood and told that Mr Saxon had been escorted from site and that he [the claimant] would be working under Mr Wood for the time being.

45. Mr Wood conducted the claimant's first appraisal – a "four week review" – around 16 July 2019. The claimant had an 8 and a 12 week review with Mr Jones. A consistent theme in all three appraisals was that the claimant needed to improve his relationships with colleagues.

46. Unbeknownst to the claimant, within a matter of days of him raising his concerns, they had been escalated to Mr Barnes, who was away at the time. He identified a problem with the whole structure of the respondent company and took the matter so seriously that he told the respondent's parent company he would resign if there wasn't a restructure, which there was. There were investigations and, as a result of what those investigations revealed about health and safety and quality issues: two people were sacked, including Mr Saxon; one person left; seven others were subjected to disciplinary action short of dismissal, including Mr Roberts and others to some extent involved in the incident of 3 September 2019, such as Mr M Mannu, Lead Operator, but not Mr Wilkes or Mr Hill.

47. The next relevant date is 28 June 2019, when detriment 2 is said to have occurred. There was allegedly some kind of incident on or around that date involving Norbert. The only contemporaneous evidence we have about it is an email from Mr Wood sent to Mr Wilkes and others at 22:45 hrs on 28 June 2019. According to that email:

> *I was approached by Isaac at approximately 22.00hrs tonight and he asked if there could be a team meeting with Norbert, Dawid, himself and me. I asked him what was it about and he replied, the communication is shit and there is no team work within his team. So I had all 3 in my office … Isaac … said he feels that Norbert doesn't talk to him, he shouts at him. … It began to turn into a bit of a slanging match so I asked Norbert to take on board what has been said because everyone has to be treated respectfully and decently. I pointed out to Norbert that this wasn't an attack at him and he says he will take it on board and be more thoughtful in future.*

48. The claimant's evidence about this has been inconsistent and unclear. The incident is not mentioned in the Evidence 2 document. In his witness statement, he wrote, "*I do not remember any confrontation*". As far as we can tell, the first time it was suggested that there was a detriment to which he was subjected on 28 June 2019 was when the claimant explained that that was his case on day 1 of the hearing. The first time he provided details of what this detriment complaint was about was during cross-examination, where he seemed to be suggesting that there was a disagreement

about lack of training. We are not satisfied that anything particularly untoward occurred – anything that the claimant reasonably believed was to his detriment.

49. On or about 1 July 2019, following the claimant's protected disclosures and in response to them, the respondent had what has been referred to as an "amnesty meeting" for all relevant staff. They were encouraged to raise all and any concerns they had, with a view to the respondent putting things right. The claimant, Mr Barnes and Mr Wilkes were all present.

50. Having considered the evidence of all three, we think that what happened at the meeting that is relevant to our decision is that the claimant raised quality issues and an allegation that staff were fabricating quality reports, and that he did so in such a way as:

    50.1 not to endear himself to his colleagues;

    50.2 to draw attention to himself and make his colleagues guess – in so far as they had not already guessed and did not already know from workplace gossip – that it was he who had blown the whistle, indirectly resulting in the disciplinary action detailed above being taken.

51. Detriment 3 is someone writing on the claimant's Sundström hood box. The claimant's unchallenged evidence is that what was written was: "*shut your mouth*". The nearest thing we have to contemporaneous evidence about it is an email of 12 July 2019 from Mr Jones to Mr Wilkes. That email was mainly about an incident on that date involving a disagreement between the claimant and Dawid. That incident is not the subject of a Tribunal complaint. Mr Jones's email ends with this: "*I think there is more to it than what just happened. Isaac seems to think they're all against him because of what happened with Mat* [Saxon]*, he also has had things wrote on his sundstrom hood box.*"

52. It has been suggested that the writing on the box incident was on 12 July 2019 itself, but we think it was probably a little before then. This is because of the wording of the email of 12 July 2019 and of a statement from Mr Jones of 8 October 2019, given in connection with the claimant's appeal against dismissal, in which Mr Jones states that the claimant did not mention that incident on 12 July 2019. If it occurred on that date and the claimant did not mention it on that date, we don't think Mr Jones would have been aware of it when he sent his email that evening.

53. Detriment 4 is people refusing to work with the claimant. In closing submissions, respondent's counsel sought to suggest that this just didn't happen. However, she then contradicted herself by taking us to a number of instances in the evidence of people saying they or others did not want to do so, but also saying that the reason they did not want to was not the claimant's protected disclosures.

54. There is ample evidence of people not wanting to work with the claimant. For example:

    54.1 from the claimant's witness statement, not challenged in cross-examination, that a few days before the claimant's 12 week review meeting of 15 August 2019, "*a colleague shouted in front of several members of staff saying and I quote "I ain't working with him" – in response to this* [Mr] *Jones said clearly that she can go home if she wanted to act in that manner*";

54.2 Mr Roberts's statement of 1 October 2019, given in connection with the appeal, in which he recalls the claimant saying that colleagues in Maintenance did not want to work with him "*because of Bob's* [Mr Walker's] *dismissal*[2]", something that was brought to Mr Wilkes's attention, who spoke to them about this, and that "*This happened in the week prior to*" 3 September 2019. Mr Roberts goes on to say that, "*A few people have made comments about not wanting to work with*" the claimant;

54.3 Mr Wilkes stating in his witness statement that in mid July 2019, he felt the need to meet with "*the staff on all 3 shifts on which* [the claimant] *worked and informed them that going forward there should be no negative attitudes towards* [him] *and that they were all required to work well with him*". This meeting would not have occurred unless there was perceived to be a real problem. In addition, if there was a real problem, simply saying this kind of thing wouldn't prevent people not wanting to work with the claimant and could even fuel bad-feeling towards him. We are not criticising Mr Wilkes for doing this, merely making the point that it was not necessarily a complete solution;

54.4 Mr Jones, in his statement of October 2019: "*In my opinion people didn't want to work with*" the claimant;

54.5 Norbert's statement of 8 October 2019 given in connection with the claimant's appeal: "*People did not want to … work*[3] *with Isaac … I found it very difficult to work with* [him]".

55. The claimant started his apprenticeship towards the end of August 2019. As part of his apprenticeship, he had to go to college. On 29 August 2019, shortly after the claimant had first attended college, Mr Wilkes sent Miss Edwards an email:

> *Look I believe we may have an issue with Isaac. He really does not get that we want him to be part of the maintenance team, what I mean by that is he thinks the course he is going to be doing is not right for what he wants...!! He really thinks we are going to educate him to degree level and then he's planning on leaving us and doing his own thing. I've told him the course we've set up for him is an apprentice for a maintenance person for us. To joint* [sic] *our maintenance department and then give us what we require going forward...!! He wants more than that, so I think you need to talk to him. I do not want to train someone for us not to get the benefit from it. If he wants to go off to university and get a degree, then fine he can do that. However, I want someone to work for us. In maintenance... !! I've already spoken to him regarding what we want … I would rather drag someone off the street and give them the chance than us waste our time.*

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[2] Mr Walker's employment came to an end as a result of the claimant's whistleblowing, but we are not entirely sure whether he was the person other than Mr Saxon who was dismissed, or was the individual who we were told had left (presumably 'jumping before he was pushed'). The general understanding amongst the respondent's workforce seems to have been that Mr Walker was dismissed.

[3] The sentence written is: "*People did not want to 'not work with Isaac' not because of Mat Saxon incident but because of his attitude, and his behaviour*." The syntax is wrong, in that there is one too many 'not's, but the meaning is clear.

56. That brings us to events of 3 September 2019 and detriment 5: the allegation being that Mr Hill assaulted the claimant, thereby subjecting him to a detriment, on the ground that the claimant made a protected disclosure.

57. On 2 September 2019, the claimant had taken it upon himself, albeit he obtained permission beforehand, to cut 'cores'. What cores are in this context is not relevant to our decision. It turns out he cut them to the wrong length. Whether this was or was not his fault is, again, irrelevant.

58. On 3 September 2019, the claimant was undertaking a task he had been given. A machine had been stopped and the claimant was blamed for this. The claimant was taken by Mr Wood into his office and was spoken to about it. Immediately afterwards, Mr Mannu came over to the claimant and asked him whether he had cut the cores. The claimant said he had and there was then a long discussion, involving half a dozen or more people, some of whom came and went, about why the claimant had cut the cores, whether he had cut them to the wrong length, what the right length was, and the situation vis-à-vis the cutting of the cores generally.

59. We refer to what we set out above, in paragraph 37, about the CCTV footage. In the few minutes of footage we have, and have watched: most of the conversation before the physical altercation seems to be between the claimant and a Mr Millard, a Quality Control Specialist; the claimant is in a group of people who included Mr Hill and a Mr Donnelly; Mr Mannu had been part of the conversation until shortly before the incident itself and other people were nearby. Mr Hill moves towards the claimant – we would say attacks him – apparently out of the blue.

60. In the days immediately following the incident, investigations were conducted by Miss Edwards, as described in her witness statement. She interviewed most of the people involved and/or in the vicinity. She produced a report, which we have seen and which speaks for itself, recommending disciplinary action against both the claimant and Mr Hill for potential gross misconduct, namely fighting. They both had disciplinary meetings with Mr Wilkes on 13 September 2019. The claimant was dismissed. Mr Hill – who, we note, only had a couple of months more service with the respondent than the claimant – was not.

61. Before his dismissal, the claimant did not suggest that his whistleblowing or his race had anything to do with what had happened. He first made this suggestion during the course of his appeal, which he began on 17 September 2019. His appeal hearing, with Mr Barnes, was on 23 September 2019. After that, Miss Edwards, at Mr Barnes's instruction, embarked on a fresh round of investigations. Miss Edwards prepared a further report. Her conclusions, mirrored in Mr Barnes's letter of 11 October 2019 dismissing the appeal, were, broadly: that allegations of discrimination were not proven; and that although there had initially been some "*negative behaviour*" towards the claimant as a result of the dismissals following him blowing the whistle, any later negativity was due to the claimant's own behaviour and attitude.

Detriment 1 – 23 June 2019

62. We shall now deal with each of the claimant's complaints in turn, starting with detriment 1: what Mr Saxon said to the claimant and wrote in his email on 23 June 2019.

63. Having reviewed our notes of the claimant's oral evidence and the statement he gave on 24 June 2019, it seems to us that the claimant's focus was not on making protected disclosures but on the fact that he had been told off by Mr Saxon and blamed for something he did not think he was responsible for. In his statement of 24 June 2019, the health and safety issue that was, rightly, of such concern to the respondent's management is just two sentences and almost a 'throw-away': "*Mat sent someone into the machine with the guards up. I questioned this but he ignored me.*" As best we can tell, the first time the claimant suggested he blew the whistle and was subjected to whistleblowing detriment on 23 June 2019 was on day 1 of this hearing. We have already found (see paragraphs 41 to 42 above): that the claimant said something to Mr Saxon about Mr Saxon's responsibilities for training that Mr Saxon could legitimately see as impertinent; and that the claimant walked out of a meeting. We think any manager in Mr Saxon's position would have wanted to do something about this and that the email Mr Saxon sent was not inappropriate.

64. On balance, we think that what Mr Saxon said to and wrote about the claimant on 23 June 2019 was him managing a performance issue in a not unreasonable way, rather than anything more sinister. This complaint fails.

Detriment 2 – 28 June 2019

65. This is the incident involving Norbert. As explained in paragraph 48 above, the claimant was not subjected to a detriment on this occasion. If he was, there is no substantial evidence suggesting it was because he made the protected disclosures. We are not satisfied that Norbert was even aware the claimant had made them by this date.

Detriment 3 – the Sundström hood box incident

66. In the statement he gave to Miss Edwards in connection with the claimant's appeal of October 2019, Mr Jones's recollection was that what was written on the box was, "*something to do with* [the claimant] *being a grass*". We think this is significant because Mr Jones, who was not only a Production Team Leader but also conducted the claimant's 8 and 12 week appraisals – and therefore must have had as good an idea as anyone about what was going on, had evidently formed the view that the comment was connected with the claimant 'grassing'. The only thing we know potentially fitting that description was the claimant making his protected disclosures. Mr Jones expressed that view on 4 September 2019 when interviewed in connection with the incident the previous day: "*everyone hates* [the claimant] *which stems from the* [Mr Saxon] *incident*". The contents of his email of 12 July 2019 – see paragraph 51 above – suggests he was thinking along similar lines then, very close in time to the comment being written.

67. We also note comments made by Mr Wilkes and Mr Roberts to Miss Edwards in October 2019 when she was conducting investigations in relation to the claimant's appeal:

    67.1 see paragraphs 54.2 and 54.3 above;

    67.2 on 1 October 2019, Mr Wilkes told Miss Edwards that, "*When the MS* [Mr Saxon] *incident occurred, NWL operation* [non-woven line; part of the respondent's operations] *and maintenance alleged that IM had whistleblown. I had meetings with all the shifts and maintenance at the time and told them that rumours were*

incorrect and that decisions regarding [Mr Walker and Mr Saxon] *were based on the investigation of the incident.*" By this, Mr Wilkes was almost in terms saying that staff looked unfavourably on whistleblowers and on the claimant because they thought he was one.

68. Mr Wilkes, and the respondent's management generally, were naïve if they thought that the opinions of the claimant held by staff would be improved by knowing that his whistleblowing led to an investigation that in turn led to the disciplining and dismissal of staff, rather than itself leading directly to the disciplining and dismissal of staff. It is a very fine distinction to expect people to draw and we don't think anyone relevant drew it. Telling staff not to mistreat the claimant as a whistleblower may inhibit them from doing so overtly, but it does not stop them feeling resentful and potentially finding other ways to express their resentment, such as writing anonymous graffiti.

69. It is of course right that the words "shut your mouth" could have been wholly referring to something other than the claimant's whistleblowing, for example to some other disagreement with the claimant, or the fact that he mentioned his educational attainments and expressed himself in ways that some colleagues found demeaning to them. It is also true that Mr Jones was only expressing his opinion and did not know for sure – any more than anyone other than the person who wrote the comment did – why it was written. However, there is more than enough to raise a prima facie case and an inference that the reason it was written was the claimant blowing the whistle:

    69.1 the words used;

    69.2 the fact that the claimant had – or was perceived to have – caused people to be sacked and disciplined by blowing the whistle, and that, by the respondent's own admission, there was at least a period of time when people took against the claimant because of this;

    69.3 Mr Jones, who was there at the time and would be in a position to pick up on how people felt, expressing the views he consistently expressed in July, September and October 2019.

70. The respondent is in no position to provide a contrary explanation for why "*shut your mouth*" was written on the box, because it never discovered who wrote it or, so far as we know, investigated the incident. Looking at the totality of the evidence, there is nothing in it to satisfy us of an alternative, innocent explanation. It is possible there were a number of reasons why the unknown author of the comment wanted the claimant to "*shut*" his "*mouth*", but in any event we think a significant part of those reasons was the claimant making the protected disclosures he made on 24 June 2019.

71. During cross-examination, questions were put to the claimant hinting that the respondent might be wanting to argue that this was not a detriment to the claimant as a matter of law. If that is an argument the respondent is making: it goes against the concession made on day 1, referred to at the end of paragraph 16.12 above; it is a hopeless argument – although the claimant seems to have taken this incident in his stride, he was concerned enough about it to tell Mr Jones and it was objectively and, on the evidence, subjectively upsetting.

72. This complaint therefore succeeds.

Detriment 4 – refusing to work with the claimant

73. A prima facie case that at least part of the reason people did not want to, and refused to, work with the claimant was his whistleblowing is established by the same factors, just mentioned, that support whistleblowing detriment complaint 3.

74. The evidence put before us includes suggestions from various individuals offering alternative explanations for why people disliked the claimant.

75. When asked, no one is likely to say, "It's because he blew the whistle"; and if this was part of the reason for them thinking badly of the claimant, they might not even admit it to themselves, or be conscious of it. Some of the respondent's staff may well have found aspects of the claimant's personality, and things other than his whistleblowing, more irritating than they would have found identical traits and behaviour in someone who was not a whistleblower.

76. Nevertheless, we do accept that the claimant's protected disclosures were far from being the only reason for his unpopularity.

77. However, it does not follow that resentment towards the claimant as a whistleblower who had caused people to be sacked and disciplined was not also present, and we are sure it was. We are satisfied that that resentment materially influenced some of his colleagues not to want to work with him, and to refuse to work with him.

78. Accordingly, whistleblowing detriment complaint 4 also succeeds.

Detriment 5 – 3 September 2019

79. We repeat everything we have already mentioned in terms of how the claimant was viewed generally by his colleagues and the reasons for this. In particular, we note Mr Jones's statement to Miss Edwards on 4 September 2019 that, "*In my opinion, everyone hates* [the claimant] *which stems from the MS incident*", i.e. from Mr Saxon's dismissal, for which the claimant was blamed because his whistleblowing led to it.

80. Something must have caused Mr Hill to attack the claimant as he did. Watching the CCTV, there is no evidence of physical provocation and there was no apparent conversation immediately before the attack between the claimant and Mr Hill. If the provocation was something the claimant said, it was insufficiently provocative for anyone else to react in any discernible way, or for anyone – Mr Hill included – to be able to recall what it was.

81. In our view, a prima facie case that this happened at least partly because of resentment towards the claimant as a whistleblower is made out.

82. We therefore look at what explanation has been put forward by Mr Hill and by the respondent more generally.

83. When questioned by Miss Edwards on 4 September 2019, Mr Hill said that the claimant was "*irate; belittling everyone; calling everyone idiots; and swearing*". He also said (quoting from Miss Edwards's notes), "*I felt threatened – grabbed arms and moved back with me* [possibly "*I grabbed his arms and moved him back with me*"] *…. Not angry – I was scared*". At his disciplinary meeting, Mr Hill said something like, "*I thought it was*

going to explode … I moved closer to stop anything kicking off. I wanted to calm the situation".

84. Based on what can been seen on the CCTV, that account of Mr Hill's was largely false. When Mr Wilkes was asked about this during his oral evidence, even he expressed the view that Mr Hill had not been telling the truth at his disciplinary hearing. A striking feature of the respondent's investigations into this incident is its failure to make any serious attempt to get to the bottom of what it was that triggered Mr Hill. Various suggestions as to what it might have been have been put forward by various people at different times. For example, Mr Jones expressed the view that Mr Hill might have been "*sticking up for*" Mr Mannu, but no one else suggested this, and Mr Mannu had left the immediate vicinity of the conversation taking place between the claimant and Mr Millard at the time Mr Hill assaulted the claimant.

85. In summary, there is in the evidence no plausible explanation for why Mr Hill would react in the way he did to counter the material from which we infer that it was at least partly because of ill-will towards the claimant stemming from his whistleblowing. Our conclusion is that the claimant having made protected disclosures on 24 June 2019 materially influenced Mr Hill to physically attack him on 3 September 2019.

86. If Mr Hill reads our decision, he may feel aggrieved about our findings relating to him, and about the fact that he has had no opportunity to come before us and defend himself against the claimant's allegations. It is possible that had he given evidence, the part of this Reserved Judgment and Reasons that relates to whistleblowing detriment complaint 5 would have been different. However, we have to make a decision; and we can only do so on the basis of what is put before us; and, for whatever reason, the respondent chose not to call him as a witness.

Vicarious liability – the statutory defence

87. We don't think the respondent handled the claimant's whistleblowing badly. It was not – in a non-technical sense – the respondent's 'fault' that the claimant was subjected to detriments 3 to 5 by some of its staff. But its evidence falls far short of what would be necessary to make out the statutory defence. For example:

    87.1 none of its witnesses to any extent attempted to explain what steps the respondent took to prevent those responsible for detriments 3, 4 and 5 from doing them or from doing anything like them, in accordance with ERA section 47B(1D);

    87.2 we don't know what whistleblowing policies, if any, the respondent had or what training connected with whistleblowing and not persecuting but welcoming whistleblowers, if any, had been given to staff;

    87.3 we have not been taken to any particular parts of the respondent's disciplinary policies and procedures which make clear that subjecting whistleblowers to detrimental treatment is a sackable offence, nor were we given any examples of the respondent taking any kind of disciplinary action against someone who had done this;

    87.4 we know of no steps the respondent took to find those responsible for detriments 3 and 4 or, before the incident on 3 September 2019, to discover their motivation;

87.5 there was no detailed evidence about what was said to staff during the meeting or meetings Mr Wilkes had with them in response to them apparently being (paragraph 19 of Mr Wilkes's statement) "*angry with*" the claimant "*because Matt* [Saxon] *was dismissed*". However, based on Mr Wilkes's own evidence, the focus seems to have been on telling them that the dismissals were not the claimant's fault rather than on trying to promote positive attitudes to whistleblowing. In addition, Mr Wilkes did not give evidence to the effect that he had told them that they would face severe disciplinary consequences if they targeted the claimant or whistleblowers in general, or anything along those lines.

88. In summary, even if the respondent had properly raised the statutory defence, in such a way that it was an issue in the case, the defence would fail for lack of evidence.

Direct race discrimination

89. As we explained earlier in these Reasons: the one and only discrimination claim is an allegation that Mr Wilkes subjected the claimant to less favourable treatment by deciding to dismiss him because Mr Wilkes himself was, consciously or unconsciously, racially prejudiced towards him. In closing submissions, the claimant suggested it was unconscious prejudice. It also seems to be part of the claimant's case that Mr Wilkes blamed the claimant more than was appropriate because of a stereotypical assumption that the claimant, as a young black man, was aggressive.

90. The first issue we have to address is: was there less favourable treatment? In factual terms, the issue could be put in the following way: was the claimant dismissed where someone else in the same position as he was but who was white – a "comparator" – would not have been dismissed?

91. The claimant has named Mr Hill as his comparator. He was not an apprentice, but was at a similarly low level in the respondent's hierarchy and had been doing a vaguely similar job to the claimant for not substantially longer than the claimant, such that neither of them had a right not to be unfairly dismissed. The differences between the two of them are not so stark as to make the comparison obviously wrong. But: is he a valid comparator in accordance with EQA section 23?

92. In the particular circumstances of this case, we have found the best way to establish the validity of the comparison to be to examine the reasons put forward by the respondent for the relevant difference in treatment: dismissing the claimant and not dismissing Mr Hill.

93. Mr Wilkes put forward three main reasons why Mr Hill was treated more favourably than the claimant in terms of the outcome of the disciplinary process.

94. The first was an assertion that Mr Hill was genuinely contrite whereas the claimant was not. We accept the claimant was not genuinely contrite – although whether there was a good reason for contrition may be another matter – but we do not accept that Mr Wilkes had a reasonable basis for allegedly believing that Mr Hill was. Mr Hill continued to make up excuses for why he had attacked the claimant throughout his disciplinary hearing and Mr Wilkes confirmed in his oral evidence that he thought Mr Hill was not telling the truth about this. We do not understand how Mr Wilkes could have persuaded himself that Mr Hill was genuinely sorry in these circumstances; we are not satisfied that he really believed this.

95. The second of the main reasons put forward for the difference in treatment was that Mr Hill immediately accepted he had done something wrong whereas the claimant did not. The Employment Judge put to Mr Wilkes that Mr Hill really had no choice in this respect, given the clear CCTV footage of an apparently unprovoked assault. Mr Wilkes's response was that the claimant had not accepted that he had moved forward aggressively towards Mr Hill behind the blender machine until they re-watched the CCTV together at the disciplinary hearing. However, the notes of the disciplinary hearing do not support this. At the disciplinary hearing, the claimant accepted that he stepped towards Mr Hill, but said that he was provoked. He consistently denied aggression.

96. Our conclusion is, again, that this provides no proper basis for saying that the claimant's and Mr Hill's circumstances were not in all relevant respects the same. The fact that Mr Hill accepted he was guilty of something when he had to do so, whereas the claimant did *not* accept he [the claimant] was guilty when he did *not* have to do so, does not make their positions materially different.

97. The third of the main explanations provided for the difference in treatment is an allegation that the claimant behaved in an inappropriate way during the disciplinary hearing. There is considerable overlap between this and the suggestion that the claimant was not genuinely contrite and would not admit he did anything wrong. The particular part of Mr Wilkes's evidence that is said to support the allegation is that the claimant started to laugh and that Mr Wilkes reminded him that it was a serious meeting and not a joke. This version of events is supported by the disciplinary meeting notes. Mr Wilkes also mentioned the claimant avoiding answering questions, something for which there is, again, support in the disciplinary notes.

98. However, when we look at the disciplinary hearing of Mr Hill, there is a stark contrast in the way the two of them were treated. Mr Hill was not challenged at all in relation to his excuses for his conduct, which Mr Wilkes admits were not credible. We think Mr Wilkes's view of Mr Hill as a liar who was making up excuses is comparable to – or worse than – his view that the claimant was evasive and was not taking things sufficiently seriously, because the claimant once laughed during the disciplinary hearing (possibly nervously).

99. In conclusion, we think Mr Hill is a valid comparator in accordance with EQA section 23. Although his position and that of the claimant were not identical, they were in all relevant respects the same. To the extent they were different, the differences tend to make the more favourable treatment of Mr Hill more inexplicable than it would otherwise be.

100. The claimant therefore was less favourably treated by being dismissed in accordance with EQA section 13. The question for us then becomes: was the less favourable treatment because of the protected characteristic of race, i.e. (on the facts of this case) was it because the claimant is black and Mr Hill is white?

101. The only fact we can identify that might possibly lead us to decide that race was the reason for the difference in treatment is that the respondent generally, and Mr Wilkes in particular, attributed aggression to the claimant in an unreasonable way. In particular:

    101.1 extraordinary weight was put on the fact that the claimant had his hands behind his back for most of the incident on 3 September 2019 and for almost all of the

build up to it that we could see from the CCTV. The respondent's – in our opinion baseless – suggestion seemed to be that him having his hands behind his back was in and of itself an aggressive act or provocation, or, at least, that it was evidence of an aggressive intent;

101.2 when discussing his decision-making process, Mr Wilkes referred to previous incidents and exaggerated what had happened, for example referring to the incident on 3 September 2019 as "*yet another altercation involving Isaac*". The impression he seemed to want to give – and this was reinforced by counsel's closing submissions – was that the claimant was serially aggressive and that there was a series of incidents of increasing severity that (paragraph 58 of his statement) led Mr Wilkes to, "*believe that if he was permitted to continue working, Isaac would repeat his actions. By that I mean he would consistently and deliberately demean and insult his work colleagues and be aggressive towards them.*" The picture of the claimant he was trying to paint was not borne out by the evidence, nor by the respondent's actions prior to 3 September 2019, nor by what various people who had worked with the claimant, but who had no particular axe to grind, said about him during the investigation that followed the appeal hearing, in particular Mr Wood and Mr Jones;

101.3 another example of Mr Wilkes exaggerating the claimant's supposed aggressiveness is what is in paragraph 18 of Mr Wilkes's witness statement, which concerns the incident on 12 July 2019 involving some kind of altercation between the claimant and Dawid: "*At this stage I noted that there was a pattern of behaviour with Isaac being aggressive towards his work colleagues*". We do not accept that Mr Wilkes genuinely thought in July 2019 that there was such a pattern of behaviour. If he had done so, he would surely have taken some kind of remedial action, and would have stopped at that stage supporting the claimant going into a 2 year apprenticeship. In addition, identifying a pattern of aggressive behaviour on the back of one incident where the claimant walked out of a meeting with someone who was about to be sacked, one incident where – based on what Mr Wood said in his contemporaneous email – Norbert and not the claimant seems to have been given the main talking-to, and one incident that at the time was seen as six-of-one and half-a-dozen of the other, would be unjustified.

102. We accept that there is a prevalent racist stereotype that young black men are aggressive. The claimant is a young black man and was unreasonably characterised as aggressive. The attribution of aggression to him can be contrasted with the attitude taken to Mr Hill, whose overt aggression appears to have been downplayed.

103. The question for us is whether those facts are sufficient to reverse the burden of proof[4] in accordance with EQA section 136.

104. Our conclusion, after considerable discussion and debate between the three of us, is that they are insufficient. The evidence suggests no more than the *possibility* of racial bias rather than what various cases, but in particular South Wales Police Authority v Johnson [2014] EWCA Civ 73, tell us the claimant needs, namely: facts from which we could infer the *existence* of racial bias.

[4] "*reverse the burden of proof*" is, of course, no more than a convenient, simple shorthand for something a little more complicated.

105. Moreover, the person who is alleged to have that racial bias is Mr Wilkes – someone who had until the latter stages of the claimant's employment been something of a cheerleader for the claimant. Mr Wilkes was primarily responsible for the claimant being offered the apprenticeship. He took steps to try to protect the claimant from reprisals for blowing the whistle. He took no action against the claimant in relation to the incident on 12 July 2019. At that stage, the claimant was still an agency worker. It would have been a very easy thing for Mr Wilkes to have contacted the agency to tell them that they should stop sending the claimant in, but he didn't do it. All of that is suggestive of an absence of racial prejudice towards the claimant – conscious or unconscious.

106. We ask ourselves: why would someone who acted as if they had no racial bias suddenly start showing it? To put it another way, the claimant's race did not change between June / July 2019, when Mr Wilkes was actively supporting him, and September 2019, when he took the decision to dismiss, so the inference that Mr Wilkes was racially prejudiced is not a logical one to draw.

107. What did change between June and September 2019 was Mr Wilkes's attitude to the claimant. That change of attitude and the reasons for it are evidenced by Mr Wilkes's email of 29 August 2019, quoted almost in full in paragraph 55 above. There is no good reason for us to doubt Mr Wilkes's sincerity in that email; he would not have imagined when he sent it that it might end up in the claimant's hands, let alone that it would be a piece of evidence in a Tribunal final hearing. There is nothing in it suggestive of racism. Instead, what comes across is Mr Wilkes's enormous disappointment that someone of whom he had such high hopes was, he believed, unlikely to be committed to the respondent in the medium to long term. Whether he was right or wrong to believe that is unimportant. What matters is that his belief was genuine, that it readily explains his change of attitude towards the claimant, and that that change of attitude in turn provides a much more plausible explanation for him treating the claimant rather harshly in comparison to Mr Hill than any suggestion that Mr Wilkes: had suddenly become racist; or had deep-seated racial prejudices, previously kept in check, that had suddenly manifested themselves.

108. Our conclusion on the direct race discrimination complaint is that the evidence taken as a whole suggests:

108.1 Mr Wilkes was not racially prejudiced towards the claimant, whether generally or, specifically, when making the decision to dismiss;

108.2 the true motive for treating the claimant less favourably than Mr Hill in terms of disciplinary sanction was –

108.2.1 a conviction that the claimant was not committed to the respondent and therefore was the wrong person for the apprenticeship, which would involve the respondent in a significant investment of time, money and other resources that would be wasted if the claimant left;

108.2.2 underlying concerns about the relationships between the claimant and many of his colleagues and the potential disruption that might cause to the smooth-running of the respondent in the future.

These potentially did not operate on Mr Wilkes's mind at a conscious level, but we think they were the main reason why he treated the claimant less

favourably than Mr Hill, and that the colour of the claimant's skin was not a factor.

109. We have therefore decided that in relation to the race discrimination complaint, in accordance with EQA section 136: the burden of proof does not shift onto the respondent; if it does, the respondent has discharged it.

Summary

110. The claimant has five whistleblowing detriment complaints, set out in paragraphs 16.6 to 16.10 above. He has won three of them – labelled complaints 3 to 5, including, most significantly, complaint 5: that he was physically assaulted by a colleague on 3 September 2019 because he made protected disclosures on 24 June 2019 (see paragraphs 79 to 86 above). We have rejected the other two – complaints 1 and 2, the first because there is no link between the detriment and the protected disclosures relied on and the second because we are not satisfied the claimant suffered any relevant detriment.

111. The claimant has a single race discrimination complaint: direct discrimination by dismissal. Although we agree that the claimant was less favourably treated, we have decided that this was for reasons other than his race: see, in particular, paragraphs 101 to 109.

Employment Judge Camp

1 April 2021