EMPLOYMENT TRIBUNALS

Claimant: Mr K Puchalak

Respondent: TG Norman (Timber) Limited

Heard at: Manchester (by CVP) **On:** 30 November 2021
1 December 2021
2-4 February 2022
2 March 2022 (in chambers)

Before: Employment Judge McDonald
Ms A Gilchrist
Mr R Cunningham

REPRESENTATION:

Claimant: In person
Respondent: Miss L Quigley (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal succeeds because it did not follow a fair procedure in dismissing the claimant.

2. However, we do not award the claimant any compensation because:

    a. any basic award or compensatory award is reduced by 100% for contributory fault on the part of the claimant; and

    b. by reason of the principle in **Polkey v A E Dayton Services Limited [1987] ICR 142**, it was 100% inevitable that the claimant would have been fairly dismissed on the same date as his actual dismissal had a fair procedure been followed.

3. The claimant's claim that he was subjected to direct race discrimination by being denied training fails and is dismissed.

4. The claimant's claim that he was subjected to direct race discrimination by being treated less favourably than others injured at work fails and is dismissed.

5. The claimant's claim that his dismissal was an act of direct race discrimination fails and is dismissed.

6. The claimant's claim that he was subjected to race related harassment fails and is dismissed.

REASONS

Introduction

1. The claimant's claim is that he was unfairly dismissed and subjected to direct race discrimination and race related harassment by the respondent. The claimant is Polish and the hearing was throughout conducted with the assistance of Polish interpreters for whose assistance the Tribunal is very grateful. We are satisfied that the claimant was able to fully participate in the hearing.

2. The claimant represented himself. The respondent was represented by Miss Quigley of counsel. All parties and the Tribunal attended the hearing by CVP videolink.

Adjournment and resumption of the final hearing

3. The final hearing had been listed to be heard over 4 days, namely 30 November and 1, 6 and 7 December 2021. The Tribunal was unable to sit on the afternoon of the first day of the hearing and started hearing the claimant's evidence on the morning of the second day (1 December 2021) after dealing with some preliminary matters.

4. As explained at para 15 below, the claimant gave his evidence in chief partly by answering open questions from the Employment Judge. During the claimant's evidence on 1 December 2021, he identified for the first time an actual comparator in relation to one element of his direct discrimination claim. He said he had been treated less favourably because of race by being dismissed when injured at work. He said the comparator, a Latvian employee called Mr Guntiss Filipovs had been dismissed for long term sickness when injured at work rather than being dismissed for misconduct.

5. Given that this was the first time the claimant had identified a comparator, the Tribunal accepted Miss Quigley's submission that the respondent would be prejudiced if it was not given time to make enquiries about relevant evidence it might have about the comparator. Having done, Miss Quigely reported that the respondent would need to disclose further documents and provide supplementary witness statements to set out what had happened in Mr Filipovs' case. It would not be practicable to do that before the hearing was meant to re-start on 6 December 2021. Bearing in mind the need to deal with cases fairly and justly and ensure the parties were on an equal footing, we decided to adjourn the hearing to enable the

respondent to gather and provide the additional evidence. We were able to re-list the case for the 2-4 February 2022.

6. We heard the remainder of the evidence and oral submissions when the hearing resumed in February 2022. As we were not meeting in chambers until 2 March 2022 we gave the parties an opportunity to make written submissions. The respondent provided its submission by 11 February 2022 with the claimant providing his by 28 February 2022. We have taken into account both the oral and written submissions in reaching our decisions on the case. We have not set out those submissions in full but have referred to them in this judgment when relevant to a particular finding or decision.

7. The Employment Judge apologises that absences from the Tribunal and other judicial work has led to a delay in finalising the judgment in this case following the chambers day in March 2022.

The issues in the case

8. The Issues in the case are set out in the List of Issues in the Annex at the end of this judgment.

Evidence

Documents

9. The parties had agreed a 227-page bundle of documents for the final hearing. In this judgment it is referred to as "the Bundle". Page numbers referred to in this judgment are pages in the Bundle. During the adjourned hearing in 2021, both parties produced CCTV evidence which they said was relevant to the claim. Between the adjourned and resumed hearings the parties agreed a supplemental bundle of 96 pages which included the CCTV footage, the claimant's contract of employment and documents relating to Mr Filipovs. In this judgment that bundle is referred to as "the Supplemental Bundle". References in this judgment in the form "SB[page number]" are to pages in the Supplemental Bundle.

10. One of the pieces of CCTV footage included in the Supplemental Bundle was what was referred to as the "chainsaw" footage (SB item 30). This was footage which the claimant submitted as evidence that he used a chainsaw at work. That was relevant because the claimant said he had never been trained on using a chainsaw. The respondent's case and the evidence of the witnesses in the disciplinary process was that the claimant did not use a chainsaw at work.

11. The video clip was 55 seconds long but the last 30 seconds or so were blank. The first 25 seconds showed a man in a cap using a chainsaw to cut a piece of wood. In the case management order made after the adjourned hearing we ordered the claimant to provide the full 55 second version. He was unable to do so by the resumed hearing.

12. We had a number of concerns about the footage. The first was that it was, as we've said, incomplete and may have been edited. The second was that there was no date or time on it. The third was that it was difficult to understand why the claimant would have taken a video of himself at work on his phone chainsawing a

piece of wood. More fundamentally, we could not, even after repeated viewings, satisfy ourselves the person in the CCTV was indeed the claimant. The person's face was obscured by the cap and his head was not in shot except for a brief period when he bent down to pick up the chainsaw. Even pausing the CCTV at relevant points we could not be sure the person in the footage was the claimant. Although we admitted it in evidence, we found that CCTV footage did not assist us in making our decisions on the case.

13. Although not included in the Supplemental Bundle there was no objection to the following further documents submitted during the resumed hearing in February 2022:

a. 12 photographs of timber and machinery at the respondent's premises submitted by the claimant

b. CCTV footage of a fire involving a caravan being burnt at the respondent's premises submitted by the claimant

c. A character reference for the claimant from his current employer

d. An email from Mrs Jermy to David Sanderson dated 7 September 2020 produced by the respondent at the Tribunal's request.

e. Documents supplied by Alan Moffat (contracted by the respondent to train its employees) relating to training provided in 2017 to the claimant's comparators.

14. The respondent objected to the admission of screen shots of WhatsApp conversations between the claimant and Craig Sparrow, a former employee of the respondent. Those "conversations" had taken place on 29 January 2022, i.e. before the resumed hearing during which the claimant produced them. Having heard from the parties we decided not to admit those documents. We gave reasons orally at the hearing. In brief, there was no explanation about why they could not have been produced sooner and the prejudice to the respondent of allowing them in evidence outweighed the prejudice to the claimant of not. That was particularly given that they amounted in effect to evidence from Mr Sparrow on which he was not present to be cross examined.

Witness Evidence

15. The claimant had not set out his evidence in full in a written witness statement. On the first day of the adjourned hearing it was agreed that his particulars of discrimination dated 16 July 2021 (pages 47-51 in the Bundle) and the document called "Mr Puchalak's Statement (English Version)" would stand as his written evidence. It was also agreed that the Employment Judge would ask the claimant some open questions at the start of his evidence to supplement those written documents. When the hearing was adjourned on 1 December 2021, the claimant was still giving evidence in chief. With the respondent's consent he was released from his witness oath so he could take the steps necessary to prepare for the resumed hearing.

16. For the resumed hearing the respondent had prepared a "statement from the claimant 20.12.2021" which collected in one document the information supplied by the claimant in email form to the Tribunal and the respondent on 20 December 2021. The claimant was cross examined by Miss Quigley on the third day (2 February 2022) and the morning of the fourth day of the hearing and answered questions from the Tribunal.

17. For the respondent we heard evidence from Mrs Elizabeth Jermy ("Mrs Jermy") on the afternoon of the fourth day of the hearing. She is the respondent's company secretary. On the fifth day of the hearing we heard evidence from Mrs Debbie Tollitt ("Mrs Tollitt"), a self-employed HR consultant; from Mr James Norman ("James Norman"), a supervisor at the respondent; and from Mr Andrew Norman ("Andrew Norman"), director and majority shareholder of the respondent. Each was cross examined by the claimant via the interpreter and answered questions from the Tribunal. Each of the respondent's witnesses had a written witness statement. There were also supplementary witness statements for Mrs Jermy and Andrew Norman for the resumed hearing. They were supplied in compliance with our Case Management Order dated 2 December 2021.

18. James Norman has dyslexia. It was agreed that as a reasonable adjustment he would be given extra time to read any documents he was referred to and would make sure he let the Tribunal know if he did not understand a question he was asked so the Tribunal could clarify it.

Findings of Fact

Background facts

19. The respondent runs a sawmill. It is a small employer employing around 15 people. It is a family business. Andrew Norman is the Managing Director. Mrs Jermy is his sister and the company secretary. James Norman has been a Supervisor since 2020. He is Andrew Norman's son.

20. James Norman is present on the "shop floor" of the sawmill on a day to day basis. He summarised his role as being to make sure everyone was safe and doing what they should be. Mrs Jermy is based in the office and is in charge of paperwork and the administrative side of the business. Andrew Norman's day to day role involves dealing with pricing and managing orders and haulage. Although based in the office he is in and out on to the shop floor giving instructions to James Norman and other staff on fulfilment of orders.

21. The claimant worked for the respondent from 31 March 2017 as a sawmiller. He worked on the cross-cut saw. On 25 October 2017 the claimant resigned to take up a job elsewhere. He returned to work for the respondent from 19 February 2018. He worked for it from then until his dismissal on 16 October 2020. His working hours at the relevant time were Monday to Friday 7 a.m. to 3.15 p.m.

The relative credibility of witnesses and the reliability of their evidence

22. Before setting out our detailed findings of fact we set out our findings on the witnesses' relative credibility. We do so because of the number of factual disputes at

the heart of this case and because the claimant made a number of allegations during the Tribunal hearing that evidence had been fabricated or was otherwise false.

23. We find that the claimant's oral evidence at the Tribunal was on a number of points inconsistent with what was recorded in documents in the Bundle and Supplemental Bundle. That included inconsistencies between his evidence at Tribunal and the evidence he gave during the disciplinary process carried out by the respondent. As Miss Quigley submitted, that included his oral evidence being inconsistent with documents which the claimant had himself signed such as his training records. When those inconsistencies were pointed out, the claimant alleged that the documents were fabricated or, at best, inaccurate. He made this allegation in relation to the training records and the notes of disciplinary meetings.

24. The claimant also alleged that statements taken during the disciplinary process were fabricated or inaccurate, specifically the second written statement taken from Craig Sparrow. We found Mr Sparrow's statement was not fabricated (see para 104 below). The claimant raised no such objection to the documents during the disciplinary hearing or prior to the Tribunal hearing. We accept Miss Quigley's submission that the damages his credibility and the reliability of his evidence.

25. We found Mrs Jermy and Mrs Tollitt to be credible witnesses and their evidence to be reliable. When there is a dispute between their evidence and the claimant, in general we preferred their version of events to the claimant's. We have, however, considered each relevant factual dispute based on the specific evidence we heard and read about it. We are mindful that even where a witness is in general less credible that other witnesses, they may give reliable evidence about a specific matter.

26. Although as we have explained below, we had reservations about one aspect of the evidence presented in his supplementary witness statement (para 53 below), in general, we found Andrew Norman to be a credible witness whose evidence as to factual events was reliable. He was not always able to give satisfactory explanations for why he acted as he did, e.g. not attending the disciplinary hearing.

27. As we have said, we took into account James Norman's dyslexia in assessing his evidence. We find he was a sincere witness doing his best but find that on occasion he struggled to remember the details of specific incidents.

<u>The respondent's contract, disciplinary and health and safety policies</u>

Contract of employment and disciplinary procedure

28. The employment contract for the claimant in the Bundle dated from 31 March 2017 when he began his first period working for the respondent. It confirmed his working hours were 7 a.m. to 3.15 p.m. (pp.72-75). Attached to it was a disciplinary procedure and a grievance procedure. The contract is signed by the claimant and the signature dated 31 March 2017.

29. The disciplinary procedure was in the bundle (pp.76-83). Of relevance to this case it:

- gave non-exhaustive examples of gross misconduct which included deliberate breaches of health and safety provisions including dangerous practices on company premises; breaching "Company or statutory rulings" which could cause danger to staff or customers; deliberate falsification of company/statutory documentation; theft or misappropriation of the respondent's property;

- said that "any other action which on a 'common-sense basis' is considered to be a serious breach of acceptable behaviour" would be seen as gross misconduct;

- confirmed that gross misconduct would result in instant dismissal.

- set out in some detail the process for appealing against a disciplinary decision, including providing a form for making an appeal;

- said that any appeal should always be dealt with by a manager more senior to the manager issuing the disciplinary action.

The respondent's Health and Safety Policy

30. The version of the respondent's Health and Safety Policy in the Bundle was revised on 1 June 2020 (pp.58-71). Of relevance to this case, it included a warning against "horseplay and practical jokes" (p.64); a warning not to lift anything too heavy for the employee without asking for help (in the Manual Handling and Lifting Section (p.65)); and on safe use of mobile phones by not using them while driving and by not "walking and talking" but instead finding a safe place to take or receive a call (p.65).

31. The section on "Accident Reporting" said that requirements would be conveyed during induction and briefings; that accident books were kept in the office; and that accidents would be investigated to establish root cause and actions needed to prevent recurrence (p.62). Such investigations were in practice carried out by David Sanderson of Sanderson Safety Limited, a health and safety consultant.

32. The Health and Safety Policy was to be reviewed annually. Mrs Jermy's said that she did review it annually to see if changes or updates were needed. The "Revision Details" (p.69) indicated that the policy was first issued on 1 June 2010; first revised on 1 June 2019 and then revised (by Sanderson Safety Limited) on 1 June 2020.

33. The claimant's evidence was that he had not been shown the policy and it was not available. In her investigation report, Mrs Tollitt concluded that the claimant had not been trained on the revised policy (para 110 below). We heard no evidence to suggest any training on the revised policy. We find that there was no such formal training and that any training on health and safety matters was done as part of the "on the job" training and focussed on how to operate the machines safely.

<u>The respondent's workforce and the use of English in the workplace</u>

34. Over the time when the claimant worked for it, the respondent's workforce was made up of workers from a number of different nationalities including British, Polish and Latvian.

35. We find that orders on the "shop floor" were given by Andrew Norman or James Norman in English. The claimant's evidence was that his English was very poor. He said that at work he communicated in Polish to his colleagues who were Polish speaking. For non-Polish speakers he would either use Google Translate (an app on his phone) to translate or he would ask his Polish colleagues who were better at English to translate for him. When he received text messages he would cut and paste them into Google Translate and then use Google Translate to draft a response, which he would then cut and paste back into text messages.

36. We considered the text messages, for example those at page 77. We note that there are some spelling errors in the text messages (e.g. "hallo" instead of "hello" and "thenks" rather than "thanks"). We found it implausible that Google Translate would have produced those spelling mistakes. We find that for at least some of the text messages sent by the claimant he did not use Google Translate but instead drafted them himself.

37. Andrew Norman, James Norman and Mrs Jermy spoke English to the claimant. Andrew Norman's evidence was that the claimant spoke broken English but was able to understand orders given in English. Mrs Jermy's evidence was the claimant's English was good enough for him to understand the letters sent to him during the disciplinary process.

38. On balance we find that the claimant's ability with English was better than he suggested. We accept that he was not fluent in English. However, we find he was able to understand spoken English and hold conversations in broken English. We find he was able to communicate by text message in English. We find he did not always need to use Google Translate to do so. We find the position is best summed up by the claimant's own email to Ms Davidson on 23 September 2020 (p.122), i.e. that although his English was not good he was able to get along at work in matters involving simple messages related to work and wood.

<u>March 2017 to 25 October 2017 – the claimant's first period of working for the respondent and training provided</u>

39. We find that when the claimant joined the respondent on 31 March 2017 he was shown by Andrew Norman how to use the Kirkbride Cross Cut Saw and the Eagle Re-Saw. We find he was also talked through the safety equipment and hazards involved in using the machinery. The instructions for the Kirkbride crosscut saw were provided in Polish (pages 85-86) as well as in English. The claimant signed the instruction and hazard documents to confirm he had received and understood the instructions he had been given (pp.193-205).

40. In cross-examining Andrew Norman, the claimant appeared to us to accept he had received that initial training from him. He put it to Andrew Norman that he did not have the necessary qualifications to train the claimant on that machinery. We find that there was no requirement for any specific qualification to provide the sort of induction training Andrew Norman provided. We find that the training on the

machines and how to operate them safely was given "on the job" by Andrew Norman. We find that was also how Craig Sparrow was trained on the cross cut saw when he operated it when the claimant was off due to his injury (para 92). There was also no evidence that employees who were not Polish had been provided with initial training in a more formal way or by someone more formally qualified than Andrew Norman.

41. There was a dispute about whether the claimant had attended a one-day basic training course on lift truck operation on 26 September 2017. We find that the respondent contracted Alan Moffat Training Services to provide such training for its workers on a roughly 3 year cycle. A certificate confirming that the claimant had completed the course was included in the bundle (p.206).

42. The claimant disputed that the certificate was genuine or reflected actual training undertaken. He pointed out, correctly, that although the certificate said he had attended a course on the 26 September 2017 the "date of test" on the certificate was "26 October 2017" (our underlining). That was the day after he left the respondent's employment for the first time. He put it to Mrs Jermy in cross-examination that the certificate was fabricated.

43. The Supplemental Bundle included an email "statement" from Mr Moffat confirming that the training took place on 26 September 2017 (SBp.89). We did not hear evidence from Mr Moffat, so can give that little weight. However, he attached to his email the handwritten test papers from the course, all of which were dated 26 September 2017 (SBpp.90 to 96). The documents had been signed with a signature which the claimant said in evidence was "probably his". We find it was his signature.

44. The documents included at SBp.93 a record of Mr Moffat observing the claimant manoeuvring a forklift to carry out set tasks within a set time. The claimant completed that in 26 minutes. At SBp.94 was the theory test. The claimant suggested that although the text in the first part of the form (which answered the theory test paper questions) was his handwriting, he had been given the text to copy out and put in the form. He said that with his knowledge of English he would in no way have been able to complete that part of the theory test himself. We do think that the English in it is more fluent than in the text messages we saw from him. However, that does not alter the fundamental point that the documents show, we find conclusively, that the claimant did undergo fork-lift training on 26 September 2017 as the respondent submits.

45. We accept Mrs Jermy's explanation in her cross-examination evidence that the most likely explanation for the "test date" of 26 October 2017 on the certificate at p.206 is that Mr Moffat put the wrong date on the certificate. The certificate itself refers to the claimant having attended the course on 26 September 2017 and to the recommended refresher training date being 25 September 2020. A mistake about the date of the test on the certificate seems to us a more plausible explanation than Mr Moffat having fabricated the whole of the test materials and the claimant's signature on them.

46. Our finding is supported by the fact that the equivalent error appears on all the certificates provided by Mr Moffat for the training provided to other workers in September 2017. To take two examples, the certificate for Mrs Jermy (who is British)

shows her attending the training on the 27 September 2017 but the "test date" as 27 October 2017 as does the certificate for Krzytof Drobek (who is Polish).

47. Based on those certificates and the evidence of Mrs Jermy, we accept the respondent's case that the claimant and his colleagues were trained by Alan Moffat Training on 26 or 27 September 2017. The attendees included British workers, Polish workers and a Latvian worker (Mr Filipovs).

48. Although it relates to Autumn 2020 and so much later in the chronology it is convenient to deal with the refresher training here. It was accepted by the respondent that the claimant did not participate in the 3 year refresher training which took place on 23 September and 6, 7 and 8 October 2020 (SBpp.57-65). We find that that refresher training happened while the claimant was not at work having been signed off for six weeks from 10 September 2022 as being not fit for work because of lower back pain (p.108).

49. Most of those trained in 2020 were British workers (including Mrs Jermy and Andrew Norman). However, the claimant confirmed that one of those trained in 2020 (Jacek Siniak) was Polish. There were also in the Supplemental Bundle two earlier certificates confirming that Polish workers had received training. One dated from 2014 and related to Krzysztof Drobek and one to Mr Siniak dated 20 January 2016.

50. Although the claimant asserted he made requests for training on numerous occasions he was not able to provide any details of when or to whom those requests had been made. He provided no evidence of conversations or texts or emails making such requests. We prefer the respondent's version of events. We find that the claimant did not make any such requests for training.

<u>February 2018 to July 2020 – working relationship between Andrew Norman and the claimant and alleged incident of harassment</u>

51. The claimant returned to work for the respondent on 19 February 2018. We find that the relationship between him and Andrew Norman was a good one during this period. They communicated by text (pp.93-105) and Andrew Norman was understanding and supportive when the claimant needed to take time off at short notice to care for his partner and son. The claimant did not challenge Andrew Norman's evidence that on occasions in February 2020 he let the claimant sleep at the respondent's premises because of trouble he was having at home and that Andrew Norman lent him a company vehicle for a year when the claimant did not have a car. The claimant's payroll summaries for this period (pp.88-92) corroborate Andrew Norman's evidence that the respondent lent the claimant several hundred pounds when his mother was sick in 2019. That evidence was not challenged by the claimant.

52. In his supplementary witness statement Andrew Norman stated that in January/February 2020 the claimant had been caught stealing timber from the yard and had been given a verbal warning. That was not mentioned in his original witness statement. The respondent's disciplinary procedure (pp.76-83) says that when a verbal warning is issued it will be recorded in writing on the employee's personnel file and retained after its expiry (the expiration period being 8 weeks in the case of a

verbal warning) (p.78). There was no copy of any verbal warning in the Bundle. The claimant denied any such incident had happened.

53. There is no evidence in the text messages from February 2020 onwards of any deterioration in the relationship between Andrew Norman and the claimant. We would have expected to see some such evidence if Mr Norman had taken as serious a view of the incident as his supplementary statement suggest. On balance we prefer Andrew Norman's evidence that the claimant was told off in January/February 2020 for taking wood from the yard. However, we do not accept that it resulted in the claimant being issued with a formal verbal warning. It also seems to us unlikely that Andrew Norman viewed it at the time as the claimant "stealing" timber otherwise more serious action would have been taken.

54. The claimant's case was that on one occasion in May or June 2020 Andrew Norman had called him a "Fucking Polish Idiot". The claimant was not able to provide specific details about the incident in his oral evidence other than it happened around lunchtime and outside the sawmill building. Andrew Norman denied that he made the remark to the claimant.

55. We prefer Andrew Norman's version of events and find the comment was not made. The evidence suggests that there was a good relationship between the two. There is no evidence in any of the text messages we have seen of Andrew Norman using equivalent language nor did the claimant suggest that he did so. This was said to be a one-off incident. The alleged wording seems inconsistent in particular with Andrew Norman's reaction when the claimant did make a mistake about the dimensions of wood he was cutting on or around 12 June 2020. Despite the mistake costing the respondent money Andrew Norman's reaction was "no worrys we are only human we all make mistakes we are very very busy at min all off you are doing well" (p.102).

<u>7 August 2020 to 7 September 2020 – Craig Sparrow incident and injury</u>

56. The claimant accepted in evidence at the Tribunal that on the morning of Friday 7 August 2020 he had lifted his colleague Craig Sparrow over his shoulder inside the Sawmill building and carried him some distance out into the yard. This was when there was a break in work because the saw blades were being changed. The claimant said he had carried Mr Sparrow no more than 3 meters. Mr Sparrow in his evidence to the disciplinary proceedings estimated he had been carried 25 metres. We find based on the relevant CCTV footage that the claimant carried Mr Sparrow a minimum of 5-6 metres into the yard then bent forward as if to deposit Mr Sparrow in a skip. The claimant then twisted round so he was facing away from the skip and lowered Mr Sparrow to the ground so Mr Sparrow was standing. The incident was witnessed by another worker, Jack Johnston.

57. We find the incident happened at around 8.35 a.m. There was a clock on the CCTV footage we saw which showed the time as 7.35 a.m. We find that was because the CCTV clock had not been brought forward when the clocks changed in March 2020. We find that by 8.56 a.m. the claimant was suffering from back and leg pain. That is when the claimant sent a text message in Polish to his partner saying that he had badly injured his back and leg and felt as if he had been hit by a car (SBp.87).

58. About an hour after the incident, at 9.37 a.m. the claimant had a very brief conversation with James Norman. We find the claimant said he had hurt his back and leg. We find the claimant had complained about his back on more than one occasion in the past and James Norman told him to get on with his work.

59. We do not accept the claimant's evidence that he told James Norman he had had an accident at work. The conversation is very brief and involves the claimant gesturing to his back and leg; James Norman saying something and the claimant both walking off in opposite directions. There was no time for the claimant to have given even brief details of an accident. We find that if he had done so James Norman would at least have asked for details so the conversation would have been longer. The claimant did not report any accident at work until a month after the incident. We find it implausible he would have waited so long if he had been injured in an accident at work and already mentioned it to James Norman on 7 August 2020.

60. The claimant continued working for the rest of 7 August 2020. He worked Monday 10 August to Wednesday 12 August 2020. He was absent from work on 13 August 2020 and had an MRI scan on the morning of Friday 14 August 2020 before returning to work for the rest of that day.

61. The sawmill was on shutdown from 17 August to the 31 August 2020 so the claimant was on annual leave. He returned to work on Tuesday 1 September 2020. He worked the whole of that week until Friday 4 September 2020. He did not raise any issues about an accident at work during that week. He did not return to work after 4 September 2020.

<u>7 September 2020 to 10 September 2020 – the claimant's sickness absence and the start of Mr Sanderson's investigation</u>

62. On Monday 7 September 2020 the claimant and his partner, Daria, came into the office to speak to Mrs Jermy. Daria speaks English better than the claimant. They told Mrs Jermy that the claimant had injured his back. In answer to Mrs Jermy's question, the claimant said he had injured his back lifting timber at work on 7 August 2020. Daria also said they had spoken to an union rep and a solicitor about the matter and the claimant suggested the accident had happened because he had not received formal manual handling training. The claimant gave Mrs Jermy an SSP form and a copy of a printed form setting out the result of the MRI scan carried out on the 14 August 2020 (p.105-106). The MRI report said that there was a "large dorsal disc extrusion" and recommended consultation with spinal surgery. On the SSP form the claimant had ticked "yes" for "was your sickness caused by an accident at work?".

63. We find this this meeting was the first time the respondent had any indication that the claimant may have had an accident at work on 7 August 2020. Mrs Jermy was not aware of any accident reported on that day. She checked the respondent's accident book and there was no accident recorded. She spoke to Andrew Norman who also knew nothing about an accident on 7 August. They agreed that they would ask Mr David Sanderson, the respondent's Health and Safety consultant, to carry out an investigation.

64. Mr Sanderson had a visit planned to the respondent on 10 September and took the opportunity to discuss the claimant's case with Mrs Jermy and Andrew Norman. They were concerned that his SSP form suggested his absence was work related despite there being no previous indication that his back injury was work-related. Andrew Norman confirmed the although the claimant had previously been absent with back problems there was no indication that those absences were work-related. He also advised Mr Sanderson that the claimant's work on the cross-cut saw involved minimal manual handling (something the claimant disputed both during the disciplinary process and at the Tribunal).

65. It was agreed that Mr Sanderson would contact the claimant to establish the circumstances of his case and would also obtain details of the claimant's previous absence details from the respondent's Payroll provider. It was agreed that a medical opinion would be obtained before the claimant was allowed to return to work. On 10 September 2020 the claimant submitted a fit note confirming he was unfit for work for six weeks due to lower back pain (p108).

Mr Sanderson's investigation:

66. Mr Sanderson carried out his investigation between 10 and 14 September 2020. He tried to have a discussion by phone with the claimant on 10 September. However, they were only able to have a short talk because the claimant was in hospital and on medication. He had been admitted on 8 September because of back pain and was discharged later on the 10 September.

67. On 11 September Mr Sanderson was sent the claimant's fit note and his hospital inpatient discharge summary (p.214-217). That summary said that the claimant had been an emergency admission with increasing back pain. The summary said "Incident at work whilst heavy lifting on 7/8/2020 and [the claimant] has had persistent pain since".

68. When the CCTV footage for the 7 August 2020 was reviewed it showed the incident in which the claimant lifted and carried Craig Sparrow. It also appeared to show the claimant making a personal phone call for 25 minutes from 9.10 a.m. to 9.35 a.m. It also showed the conversation between the claimant and James Norman at 9.37 a.m.

69. On 14 September 2020, Mr Sanderson interviewed Craig Sparrow, James Norman, Jack Johnston and Callum Sissons (another Mill operative) about events on 7 August. Mr Sparrow confirmed that the claimant had carried him in a fireman's lift from the mill building to the skip. The distance was estimated as some 25 metres. Mr Sparrow gave his weight as 65 kg. he confirmed that the claimant had complained to him about being in pain later that day and in the following week. Jack Johnston confirmed he witnessed the incident. James Norman could not recollect his conversation with the claimant.

70. At 12.12 p.m. on 14 September Mr Sanderson spoke to the claimant by phone. The claimant was initially reluctant to speak to Mr Sanderson without his partner being present. However, the claimant did continue the conversation and confirmed that he had hurt his back handling timber on the cross-cut saw on 7 August 2020. Although unsure about the time, he told Mr Sanderson he thought the

accident had happened between 12 p.m. and 1 p.m. He was not able to provide details of the incident or of potential witnesses to what had happened. He told Mr Sanderson that his current difficulties were unrelated to the back surgery which he had had in the past.

71. Mr Sanderson concluded that the claimant's injury was likely to be attributable to an act of horseplay (i.e. the Craig Sparrow incident) at 8.35 a.m. rather than to any accident while using the cross-cut saw at around 12 p.m. to 1 p.m. That was based on the CCTV footage and the witnesses he spoke to. His written report dated 14 September 2020 (p.112) concluded that the incident was not an accident at work and so should not be entered in the respondent's accident book. The report records that further discussions were to be held between the respondent and their HR advisers "for return to work advice, etc").

72. Mr Sanderson subsequently provided the respondent with a slightly expanded version of his report as his statement/investigation report to the disciplinary process (pp.113-114). We find the contents were fundamentally identical to the earlier accident investigation report at p112.

<u>22 September to 4 October 2020 – setting up the Disciplinary Hearing</u>

73. On 22 September 2020 Mrs Tollitt invited the claimant to a disciplinary hearing to take place on Thursday 24 September 2020. The invitation letter proposed that the meeting take place via video call, telephone call or in writing because of COVID related restrictions then in place.

74. The letter set out the allegations against the claimant. In summary, they were that he had:

a. fraudulently claimed pay for the period between 9.10 a.m. and 9.35 a.m. on 7 August 2020 when he spent those 25 minutes on his mobile phone

b. engaged in horseplay by lifting and carrying Craig Sparrow for approximately 25 meters on 7 August 2020 causing the claimant's injury and absence from work; endangering Mr Sparrow; and breaching the respondent's health and safety rules.

c. fraudulently or dishonestly reported to Mr Sanderson an accident or incident in which he hurt his back lifting timber between 12 p.m. and 1 p.m. on 7 August 2020 when his injury was actually caused by the horseplay with Craig Sparrow.

75. The letter said that the claimant's actions may have caused a breakdown in trust and confidence between the respondent and the claimant. It warned him that if proven the allegations could amount to gross misconduct and that might result in him being summarily dismissed at the disciplinary hearing. It confirmed that he had the right to be accompanied at the hearing and that the respondent would be happy for his wife (i.e. his partner Daria) to accompany him at the hearing if he wanted her to do so.

76. With the letter Mrs Tollitt sent Mr Sanderson's 2 reports; copy medical reports and medical certificates; and the copy of the Health and Safety provisions.When it came to the CCTV evidence the letter requested that the claimant contact Mrs Jermy to make arrangements if he wished to view the footage either by a video call or by visiting the respondent's office in a socially distanced manner (p.116).

77. The claimant had agreed that Mrs Tollitt could discuss his employment with his partner Daria and send letters to him via Daria's email. The claimant responded to the invitation by asking that an independent translator be present. The respondent agreed which led to the disciplinary hearing being postponed so an interpreter could be found.

78. On the 24 September Mrs Tollitt emailed the claimant and said she would be grateful if the claimant would contact Mrs Jermy without delay to arrange to view the CCTV footage if he wanted to see it. The claimant responded the same day to say that due to his ill-health he was not in a position to arrange to view the footage. Mrs Tollitt emailed him the CCTV footage the following day. We find that was the footage of him carrying Craig Sparrow. She confirmed that she could send the footage to a smart phone if the claimant preferred, and that if he had any difficulty viewing it he should contact Mrs Jermy to make arrangements to view it remotely. She confirmed that this would not require the claimant to go to the respondent's premises – he could contact Mrs Jermy to arrange to view it via video call on a tablet or phone.

79. On 29 September Mrs Tollitt emailed the claimant again to ask him to confirm receipt of the CCTV footage she had sent the previous week. She confirmed she could send photographs in hard copy from the CCTV if he preferred. She asked him to confirm 3 dates when he could meet up to the 14 October so she could arrange the interpreter. She also explained that although the interpreter would have to attend any meeting by Zoom because of Covid travel restrictions the claimant could request that the disciplinary hearing be held in person or via Zoom. On the same day the claimant confirmed he had received the CCTV footage and asked for hard copy photos to be sent. Mrs Tollitt sent them with her letter of 30 September confirming that the re-arranged disciplinary hearing would take place by Zoom on the 5 October 2020.

<u>The Disciplinary Hearing on 5 October 2020</u>

80. Mrs Tollitt chaired the disciplinary hearing on 5 October 2020 and Mrs Jermy took notes. The claimant attended by Zoom with his partner. The typed notes of the hearing were in the Bundle (pp.134-139). Mrs Tollitt and Mrs Jermy had signed at the bottom of each page to confirm the accuracy of the notes. Although at the Tribunal hearing it was suggested that the claimant had also signed the notes we find his signature does not appear on any of those pages. The same position applied to the notes of the second Disciplinary Hearing on 12 October 2020. The claimant put it to Mrs Jermy in cross-examining her that the notes of the meetings which she had taken were inaccurate. Mrs Jermy maintained that they were accurate. The claimant was not able to pinpoint parts which we he said were inaccurate. On balance we prefer Mrs Jermy's evidence that the notes were accurate and base our findings about what happened at the two disciplinary hearings primarily on those notes and on the evidence of Mrs Jermy and Mrs Tollitt. Taking into account our findings about their relative credibility, we prefer their evidence about what happened

at the meetings to that of the claimant. In doing so we take into account that (as the notes themselves acknowledge) what is recorded in the notes as being said by the claimant was at the meeting relayed via the interpreter, Ms Fryer.

81. In answer to Mrs Tollitt's questions at the first hearing on 5 October 2020 the claimant said that on the 7 August he had hurt his back while lifting something heavy. When asked what he had lifted the claimant said he wasn't sure but something like a heavy piece of wood. He said he lifted heavy pieces of wood all day at work. He accepted that Craig Sparrow normally took the timber off the cross-cut saw but said that sometimes it was too heavy for one person so he would help him.

82. The claimant accepted that it was possible he was using his phone at around 9 a.m. on 7 August. He said that he was on for a while because he was on hold. He said that most of the workers did it when waiting for the saw blades to be changed. He suggested it was up to James Norman as supervisor to tell them not to do so. He also suggested that when he had reported to "the boss" (which Mrs Tollitt understood to mean James Norman) that 2 workers were using their phones he didn't react and said something like "why not?" He did accept that Mrs Jermy had sent out an email during Lockdown to confirm that using phones at work was not allowed.

83. The claimant denied that he had any back problems before lifting the timber on 7 August – his previous back issues had been sorted out by the surgery he had had.

84. The claimant accepted he had picked up Craig Sparrow but estimated he had only carried him 3 metres. He said all the workers joked around when the blades on the saw were being changed. He estimated that Mr Sparrow weighed 50-60 kg and suggested he was as likely to hurt his back lifting timber of 50 kg as lifting Mr Sparrow.

85. The claimant said he wasn't provided with proper training and denied that he had understood the forms he signed when he started with the respondent. Mrs Jermy suggested the forms had been provided in Polish as well but the claimant denied that. He said he had never received proper manual handling training, training on using a chain saw or training on operating the cross cut saw. He said he had to work at height and had never been trained in cleaning the cross-cut saw or on abrasive wheels.

<u>6-12 October 2020 - Further investigation and preparation for second disciplinary hearing</u>

86. After the meeting, Mrs Tollitt asked Mrs Jermy to carry out some further investigation in light of what the claimant had said at the meeting. That included further checking the CCTV for 7 August 2020 to see whether it showed evidence of the claimant lifting timber and hurting his back between 11 a.m. and 2 p.m. She also asked her to ask Andrew Norman about induction and on the job training and to ask James Norman about conversations at work with the claimant and supervision of workers.

87. David Sanderson also provided written answers to Mrs Tollitt in response to specific questions she raised. He confirmed in particular that the CCTV in the outside

yard showed the claimant carrying Craig Sparrow for 5-6 metres. He confirmed that because of where it was situated, the CCTV at the other end of the mill did not help clarify how far the claimant had carried Craig Sparrow in the mill but that Mr Sparrow's own evidence was that it was a total of 25 metres. In relation to training and risk assessments he confirmed he had produced a tool box talk to support new inductions and had carried out risk assessments for each machine in 2019 which he had reviewed in September 2020 and produced a training matrix to allow managers to deliver and record "on the job" training. There were no "working at height" risks identified in the risk assessments. His assessment was that Andrew Norman's experience in the operation of the mill and its machinery was suitable and sufficient for him to be able to deliver on the job training. He confirmed that external training was provided on matters such as first aid, chainsaw operation and plant operation. Finally, he suggested it would be worth asking Craig Sparrow whether he could narrow down when on 7 August 2020 the claimant had complained to him about a sore back.

88. Mrs Jermy interviewed Andrew Norman, James Norman and Craig Sparrow on 6 October 2020. She sent their signed statements to Mrs Tollitt on the same day. In brief:

a. James Norman (having been shown the CCTV of his conversation with the claimant on the morning of 7 August 2020) confirmed the claimant had come up to him and told him he had a sore back but said he didn't take much notice because the claimant was always complaining of a sore back. He said he had never seen the claimant using a chainsaw. (This was asked because in the 5 October 2020 meeting the claimant said he did use a chainsaw but never received training on one).

b. Andrew Norman accepted that the claimant occasionally dealt with timber of 50 kg. However, he said that a combination of rollers, chain and mechanics reduced the load to help with manual handling and if necessary 2 men handled the timber. He confirmed he trained the claimant on the use of the cross cut saw and how to clean it. He had talked him through the risks involved and confirmed that the platform on which the claimant operated the machine was 19 inches from the bottom of the first of two steps up to it. Asked how he could be sure the claimant had understood the training he had provided he confirmed that he watched the claimant to check he was doing things right and he always did, and the claimant had also signed the risk assessment and safe methods to confirm he understood them. He added that the claimant always spoke to him in English and understood all instructions given to him. Asked about what happened on 7 August 2020, Andrew Norman confirmed he had viewed CCTV footage of the claimant carrying Craig Sparrow. He confirmed that there was no footage of the claimant being visibly hurt after lifting timber or any evidence of him lifting anything heavy between 11 a.m. and 2 p.m. except with the use of the rollers and the chain which he did every day.

c. Craig Sparrow confirmed in his statement that the claimant had carried him around 25 metres and that the incident happened about 8.30 a.m. when the blades on the saw were being changed. He said that the

> claimant immediately afterwards held his back with both hands for about 5-10 minutes and later told him he had put his back out or words of that effect. He confirmed the claimant kept wincing and holding his back throughout the day. Mr Sparrow also confirmed that he now worked on the cross-cut saw and that the timber on it was mechanically moved for the most part and for any heavy wood he would a colleague to help or get the fork lift to move it.

89. With the statements Mrs Jermy sent a "risk assessment form" in Polish signed by the claimant in 2017 (we find that was the crosscut saw instructions at pp.85-86) and confirmation she had weighed Craig Sparrow who weighed 61.1 kg (with his boots off).

90. On 7 October 2020 Mrs Tollitt emailed the claimant an update. She confirmed she was carrying out further investigations and proposed holding the next disciplinary meeting on 12 October 2020 when the same interpreter was available. She also suggested that they view further CCTV footage from 7 August 2020 via a Zoom meeting with Mrs Jermy. That was because the video files were too big to email. During the email exchanges arranging that the claimant emailed to say (for the first time) that it was between 8.45 and 8.55 a.m. that he had hurt his back and that he had texted his partner that something had happened to him. Mrs Tollitt therefore suggested they view the CCTV footage from that time; the footage of the conversation with James Norman; and the footage from 12 p.m. to 1 p.m. which was the time the claimant told Mr Sanderson he had hurt his back. She asked the claimant to let her know if he wanted to see footage from any other time.

91. The Zoom call to view the footage was set up for 1.30 p.m. on 8 October 2020. However, at 7:49 on the morning of the 8 October the claimant emailed Mrs Tollitt to say that he had had a bad night and had no strength for another meeting. He asked that she record the CCTV on to an USB flash drive and deliver it to him. He apologised and offered to pay for the USB flash drive. Mrs Tollitt agreed to discuss how they could arrange that with Mrs Jermy. It was not possible to use a flash drive but Mrs Tollitt emailed the claimant further CCTV footage and told him (in her letter dated 9 October 2020) that if he wanted to view the footage of the whole day on 7 August 2020 he would need to make arrangements to do so at the respondent's premises in a socially distanced way.

92. Mrs Tollitt sought further information from Andrew Norman, James Norman and Craig Sparrow via Mrs Jermy. All three confirmed in further written statements dated 8 October 2020 that the heaviest wood handled by the cross-cut saw operator was up to 20 kg but that the mechanical assistance reduced that weight by about 90%. All three confirmed that they had never seen the claimant using a chainsaw. Mr Sparrow confirmed that he could not remember the claimant lifting any wood or wood items between 8.30 a.m. and 1 p.m. on 7 August 2020. He also confirmed that his on the job training had been provided by Andrew Norman and the claimant. Andrew and James Norman in their joint statement confirmed they had not seen the claimant operate equipment on which he had not received training. They said they did not keep records in writing to confirm that they were satisfied that a worker was competent at their job. In other words, as we understand it, there were no formal records kept of an employee's satisfactory completion of induction training.

93. Mrs Tollitt's emailed letter of 9 October 2020 confirmed the reconvened disciplinary hearing would take place on 12 October 2020 and that the additional information collected would be hand delivered to the claimant's home that same day. The letter reiterated the warning that summary dismissal was a potential outcome; that Daria could accompany the claimant and that the interpreter would attend by Zoom.

The Second Disciplinary Hearing on 12 October 2020

94. At the start of the second Zoom Disciplinary Hearing the claimant confirmed he had received the hand delivered evidence and the CCTV footage emailed to him. He noted, however, that there was no CCTV footage of him on the phone from 9.10-9.35 a.m. despite the footage of his conversation with James Norman at 9.37 a.m. being provided. In answer to Mrs Tollitt's question, Mrs Jermy confirmed that footage did exist. Mrs Tollitt confirmed that if it was taken into account in making any decision, it would be provided to the claimant and he would be allowed to comment on it.

95. At the meeting the claimant said that when he told Mr Sanderson that the accident had happened between 12 p.m. and 1 p.m. he was not in a fit state and his English was not good. He confirmed that he was now reporting that the accident took place between 8.45 and 8.55. a.m. He also said that having viewed the CCTV he was able to recollect that what he had been lifting was the container from under the cross cut saw where off cuts are put. He said that there were a lot of off cuts and he had to bend down to pick it up and then lift it above his head to put it in the skip. He said that had been witnessed by Jacek Siniak. He confirmed that the incident happened after he had lifted Craig Sparrow at 8.35 a.m. but before he had texted Daria at 8.56 a.m. Mrs Tollitt asked the claimant whether he would be willing to share that text to help establish the time of the accident but the claimant refused, saying it was private.

96. Mrs Jermy pointed out that when the claimant and his partner came to see her to report his injury he said that he had lifted heavy timber. The claimant suggested that there had been a misunderstanding and he merely meant to say that he had lifted something heavy. He suggested that there was no difference between saying he'd lifted a bin and he'd lifted timber. At points the exchanges between the claimant and Mrs Jermy became somewhat heated, with the claimant questioning how Mrs Jermy would know what his job was when she worked in the office.

97. Mrs Tollitt asked the claimant what his reaction was to Andrew Norman's statement that he trained the claimant on the cross cut saw. The claimant said that Andrew Norman had not trained him and could not use the cross cut machine. He acknowledged he had received the training document in Polish with his signature on it (see 39 above) but did not remember signing it.

98. The claimant asked why Andrew Norman was not at the hearing. Mrs Tollitt said it would not be appropriate as he was the Managing Director. At the Tribunal Andrew Norman's evidence was that he was too busy to attend the hearing. The claimant also suggested that he was being disciplined despite being a good worker and that the only reason for that was that he had sustained an injury and was off sick.

99. Mrs Tollitt confirmed she would now consider the evidence and make recommendations and would get back to the claimant by the end of that week or Monday 19 October 2020 at the latest. Asked if there was going to be another meeting she said that there would not be as the claimant had already made clear that he was not willing to have one.

12 October 2020 to 16 October 2020 – further investigation and Mrs Tollitt's report

100. After the second disciplinary hearing Mrs Tollitt carried out further investigation. On 13 October 2020 she spoke to Mr Sanderson by phone to clarify what the claimant had told him about the time of the accident. She put it to Mr Sanderson that when he spoke to the claimant he was in hospital and on medication so that the information he provided to Mr Sanderson may not have been accurate. Mr Sanderson confirmed that it was during the second conversation he had had with the claimant on the 14 September that he had said the accident was in the afternoon, probably around 12-1 p.m. but that he did not know what he had lifted to injure his back. Mr Sanderson confirmed the claimant was not in hospital then and spoke very good English to him.

101. Mrs Jermy was asked to obtain further information from witnesses. Mr Siniak provided a signed statement on 13 October saying he did not see the claimant lifting the bin from underneath the cross cut saw between 8.45-8.55 a.m. on 7 August 2020 nor did he remember the claimant hurting his back. He said the claimant was always complaining about having a bad back so he never used to pay attention to him. His evidence was that the bin under the cross cut saw would weigh up to 20kg if it was full but that it was rarely left to get full, being emptied 1-2 time a day. He confirmed it would be empty at 8.45 because it would be emptied at the end of the previous day. The material in the bin would be sawdust and small pieces of wood.

102. Craig Sparrow provided a further statement on 12 October. His evidence was consistent with Mr Siniak's. He had not seen the claimant lifting the bin and he confirmed that at 8.45 a.m. it would have been empty because it was emptied at the end of each day. At its fullest it would weigh 20 kg.

103. Mrs Jermy provided these statements to Mrs Tollitt along with a picture of the bin. That picture shows a domestic dustbin which is split at the bottom. There are some chunks of wood in it (p.167).

104. The claimant suggested in cross examination to Mrs Jermy that she had fabricated the statement from Craig Sparrow at page 165. He said that the contents of the undated WhatsApp conversation between him and Mr Sparrow (SBp.86) supported his case that Mr Sparrow had not said that the claimant never used a chainsaw or ridden a forklift. In the message Mr Sparrow says he was "sure he told [Mrs Jermy] that you did now and again". Its not clear whether Mr Sparrow meant using a chainsaw or riding a forklift or both. The respondent accepted the claimant used a forklift and, we have found, provided training on it. The claimant also said that the notes of the conversation with Mrs Jermy had not been signed by Mr Sparrow. There is a signature on that 12 October statement which seems to us very similar to that with which Mr Sparrow signed the statement at SBp.51 on 6 October 2020. The claimant did not suggest that 6 October statement or the signature on it was fabricated. Mrs Jermy's clear evidence was that Mr Sparrow had signed the 12

October statement and that the contents were accurate. Mr Sparrow did not give evidence to the Tribunal. We prefer Mrs Jermy's evidence on this point and find the statement was signed by Mr Sparrow and that its contents accurately recorded what he told Mrs Jermy on 12 October 2020.

105. On Tuesday 13 October 2020 Mrs Tollitt wrote to the claimant sending him copies of the further evidence collected since 12 October 2020. That included the statements from Mr Siniak and Mr Sparrow and the note of her conversation with Mr Sanderson. She also enclosed the notes of the Disciplinary Hearing on 12 October 2020 and asked the claimant to sign and return them. She said that if the claimant wanted to make any amendment to the notes he should use a different colour and initial the amendment. She also told him to let her know if he needed any assistance with any of the documents she had sent him. She gave the claimant the option of commenting on the further evidence in writing by 16 October 2020 or to have a further meeting (which she acknowledged he had said on 12 October 2020 that he had no wish to do).

106. The claimant emailed Mrs Tollitt on 14 October 2020 (SBp.53). He confirmed what he said at the disciplinary hearing about the accident being between 8.45 and 8.55 a.m. He said a full basket from under the cross cut saw weighed more than 20 kg and that it included larger pieces of wood as well as sawdust and small pieces of wood. He said that his English was not good enough to talk about such serious matters while in hospital or on strong drugs. We take that to be his explanation for why he had told Mr Sanderson that the accident was between 12 p.m. and 1 p.m. on 14 September 2020. He wrote that "all I wanted to said I said" and that he didn't have the strength to challenge the documents provided. He said the respondent would write what it wanted to write (which we take to mean that it would write whatever suited its case in the documents). He asked for a quick decision and that he considered the topic "closed".

107. On 15 October 2020 Mrs Tollitt completed her Findings And Recommendations report (pp.171-179). We find the report was a very thorough and balanced review of the evidence during the disciplinary process. Mrs Tollitt's key findings were summarised on the last page of her report. They were that on balance the evidence showed that it was likely that the claimant had been involved in an act of horseplay at work which placed him and another employee at risk of injury; that that was the real cause of the claimant's back injury; and that the claimant had reported his injury in an inaccurate and dishonest or fraudulent manner. She concluded that Mr Sparrow had been lifted by the claimant for more than the 5-6 metres visible on CCTV and probably closer to the 25m Mr Sparrow mentioned in his statement.

108. In deciding not to accept the claimant's version of events, i.e. that he had been injured lifting the contents of the bin under the cross cut saw she took into account the inconsistencies in his evidence. She did not accept that the claimant would have found it hard to remember that lifting the bin was the cause of the injury from the start of the disciplinary process if that was the real cause of the injury. She noted the evidence about the bin being empty at that time of day and the fact that no one had seen the claimant sustaining an injury lifting a bin. In contrast, Craig Sparrow had said that the claimant had immediately felt back pain after lifting him.

109. When it came to use of the mobile phone, Mrs Tollitt found that the claimant had used his mobile phone for around 20 minutes and had done so knowing this was against the respondent's rules. However, she said consideration had to be given (in deciding on what action should result) to the fact that there was no further investigation into whether this was, as the claimant alleged, regular and usual practice and James Norman's comment when the claimant reported others using their phones to him.

110. Mrs Tollitt also made findings on the balance of the evidence that the claimant was provided with on the job training by Andrew Norman though that was not recorded in writing; that Andrew Norman was competent to do so given his experience; that there was no evidence that the claimant had been trained in the new Health and Safety Policy dated June 2020 but that he was aware of some health and safety rules and had reported breaches of the rules, such as workers using mobile phones at work.

Decision to dismiss and appeal process

111. Mrs Tollitt said it was for the respondent to decide whether the claimant's conduct had caused a breakdown of trust and confidence between it and the employee. Mrs Jermy and Andrew Norman discussed the report and Andrew Norman made the decision to dismiss the claimant for gross misconduct. He confirmed his decision in a dismissal letter dated 16 October 2020. It said that there had been a significant breach of health and safety involving an act of horseplay which placed both parties at risk and was the act which resulted in the claimant's injury and ongoing absence from work. It said that this completely undermined the trust and confidence between the respondent and the claimant.

112. The letter did not refer to the claimant's use of a mobile phone. In answer to the Tribunal's question, Mr Norman said that although he had taken that into account he would have dismissed the claimant in any event because of the other findings against him in the report. Those findings, i.e. the horseplay and the misreporting of the cause of the claimant's injury, had caused the loss of trust and confidence in the claimant. Mrs Jermy's evidence was that other employees had been disciplined for using their mobile phone but the claimant would not have been dismissed if that had been the only finding against him.

113. The dismissal letter enclosed Mrs Tollitt's report and asked the claimant to let Andrew Norman know if he needed a translation of it. The letter also confirmed the right to appeal against the decision by writing to Andrew Norman within 5 days.

114. The claimant did not appeal and did not ask for a translation of the report. The claimant said at the Tribunal that he did not appeal because he had no faith in the appeal process. He questioned how anyone could overturn Andrew Norman's decision on appeal given he was the respondent's managing director. Mrs Jermy acknowledged that as the most senior person in the company it was likely that an appeal would involve Andrew Norman reconsidering his decision to dismiss.

Findings about Mr Filipovs - Comparator relied on in relation to the discrimination claim (less favourable treatment when injured at work and dismissal)

115. The claimant relied on Guntus Filipovs as an actual comparator for his direct race discrimination claim. He said that when Mr Filipovs was injured at work he had not been subjected to misconduct proceedings and had been dismissed for long term incapacity rather than misconduct.

116. We find that Mr Filipovs was a Latvian employee who worked for the respondent as a sawmiller. On 1 February 2018 he broke his ankle unblocking the woodchipper at the respondent's premises. The respondent's insurers admitted liability for the accident. Mr Filipovs submitted a series of fit notes confirming he was unfit for work. That was as a result of a "drop foot" he sustained as a result of the injury and the psychological symptoms he developed as a result of his physical injury. Mr Filipovs was dismissed for long term incapacity in December 2019. He had been invited to a meeting to discuss his case with Mrs Jermy and Mrs Tollitt in November 2019 but indicated he would not be attending. We find that was because it was his view that he would not be in a position to return to work for the respondent (either as a sawmiller or in an alternative role) in the foreseeable future.

Findings relevant to the "just and equitable" extension of time limits

117. Taking into account the claimant's difficulties with English we accept that during his employment prior to the incident on 7 August 2020 the claimant was not aware of his right to bring a discrimination claim to the Tribunal or the time scale for doing so. However, we find that by 7 September 2020 the claimant with his partner had taken advice from an union and a solicitor and was aware of his rights. The claimant accepted in his written submissions that he was aware that there were time limits for brining Tribunal claims.

Relevant Law

Unfair Dismissal

118. 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 at the time they are dismissed, which the claimant had in this case.

119. 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.

120. If the employer shows a potentially fair reason for dismissal then whether the dismissal is fair (having regard to that reason) will depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

121. In this case the respondent said the reason for dismissal was conduct. Conduct is a potentially fair reason for dismissal under s.98(2).

Compensation for unfair dismissal

122. In **Polkey v A E Dayton Services Ltd [1988] 1 AC 344, [1988] ICR 142** Lord Bridge said that "If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness... is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under section [98(4)] may be satisfied."

123. S.118(1) ERA says that:

> **"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—**
>
> **(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and**
>
> **(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."**

124. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

125. The compensatory 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).

126. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or 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** referred to above).

127. 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).

128. The case law confirms that the question for the Tribunal is whether the claimant was culpable or blameworthy, by which is meant "deserving of blame". That was confirmed most recently in the Employment Appeal Tribunal case of **Sanha v Facilicom Cleaning Services Limited**.

129. If the Tribunal finds that the claimant did contribute to the dismissal then it must make a reduction, although the amount of reduction is for it to decide on a just and equitable basis. The Employment Appeal Tribunal in the case of **Hollier v Plysu Limited [1983] IRLR 260** provided guidance, suggesting that broadly a reduction should be as follows:

- Where the claimant is wholly to blame there should be a 100% reduction in the compensatory award;
- Where they are largely to blame, a 75% reduction;
- Where the employer and the employee are equally to blame, a 50% reduction;
- Where the claimant is slightly to blame, a 25% reduction.

130. 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).

Misconduct cases

131. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

132. The "Burchell test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

133. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

134. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

135. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

136. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

137. If the three parts of the Burchell test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

138. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854 (paragraph 38)**.

The Equality Act claims

Direct race discrimination

139. 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".**

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

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

141. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic (in this case, race), the key question is the "reason why" the decision or action of the respondent was taken.

Harassment

142. 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."**

143. 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."

The Burden of Proof

144. 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."**

145. 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.

146. Authoritative guidance on the effect of the burden of proof in the predecessor legislation to the 2010 Act was given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205** and approved (with slight adjustment) by the **Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931**. Further guidance was given by the EAT in **Laing v Manchester City Council [2006] ICR 1519**, which was approved by the Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] ICR 867**. The guidance in **Igen Ltd v Wong** and **Madarassy** was in turn approved by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37; [2012] ICR 1054**.

147. In **Royal Mail Group v Efobi [2021] UKSC 33**, the Supreme Court confirmed that under the 2010 Act the position remains as it was - the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. Along with those facts which the claimant proves, the Tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. The initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent. It is well established that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination - they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

148. The **Igen** guidance states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfied some objective standard of reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Efobi** at para 29).

149. In **Hewage v Grampian Health Board 2012 ICR 1054, SC**, Lord Hope endorsed the view of the EAT in **Martin v Devonshires Solicitors 2011 ICR 352, EAT**, that it is important not to make too much of the burden of proof provisions. The burden of proof provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation but they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or the other, and still

less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law.

Equality Act 2010 Time Limits

150. The direct race discrimination and race-related harassment claims were brought under the 2010 Act. The time limit for bringing a claim under the 2010 Act appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B proceedings on a complaint within Section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> (b) **such other period as the Employment Tribunal thinks just and equitable**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**
>
> **(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."**

Continuing Acts

151. 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'.

152. 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**.

153. 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**.

Just and equitable extension of time

154. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider

exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

155. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

156. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly. It went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

Discussions and Conclusions

Jurisdictional Issues

1) Are any or all of the claimant's claims for discrimination out of time?

2) If so, do the allegations made by the claimant amount to an act extending over a period of time so as to bring the claimant's claims in time?

3) Would it be just and equitable to extend the time limit for submitting such claims?

157. For the reasons given below we have decided that all the claimant's claims of race-related harassment and direct race discrimination fail. The time-limit issues do not arise for decision.

Unfair Dismissal

4) Was the claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 (**ERA**), namely conduct?

158. We find that the respondent has established that the claimant was dismissed for a potentially fair reason, namely conduct (specifically gross misconduct).

5) Did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant, in that:

a) Did the respondent form a genuine belief that the claimant was guilty of gross misconduct?

159. We find that the respondent, in the person of Andrew Norman, did have a genuine belief that the claimant was guilty of gross misconduct. The respondent had a genuine belief that the claimant had engaged in horseplay at work (i.e. the Craig Sparrow incident). It had a genuine belief that that act of horseplay had caused the claimant's back injury. It also had a genuine belief that the claimant had falsely reported the cause of his injury, blaming it on an accident at work rather than that horseplay.

b) Did the respondent have reasonable grounds for that belief?

160. We find that the respondent did have reasonable grounds for that belief. When it came to the act of horseplay, the claimant accepted it had happened. That was corroborated by the CCTV footage and the evidence from Craig Sparrow.

161. When it comes to the horseplay being the cause of the claimant's injury, the respondent had reasonable grounds for that belief. It had carried out an extensive investigation. After initially suggesting to Mr Sanderson that the injury happened between 12 p.m. and 1 p.m., the claimant confirmed for the first time on 7 October 2020 that the injury happened between 8.45 and 8.55 a.m. The investigation provided CCTV evidence of the claimant complaining to James Norman about a bad back at 9.37 a.m. and evidence from Mr Sparrow that the claimant had had back pain immediately after lifting him.

162. We find it was reasonable for the respondent to find that the claimant's explanation for the injury was inconsistent with the evidence collected by the investigation. It was also inconsistent in the sense that it changed both in terms of when he said it happened and what caused it. He at first said he had hurt his back lifting heavy timber and only later changed his story to say he had been lifting the bin under the crosscut saw. We find that it was reasonable for the respondent to take the view that if that is what had caused the injury the claimant would have remembered it from the start. We also find that it was reasonable for the respondent to conclude that lifting the bin at that time of day would not have caused the claimant the alleged injury because of the evidence that it was likely empty. There was also no evidence to support the claimant (either from witnesses or the CCTV) that he had sustained an injury at that time from lifting the bin.

163. Those factors and that evidence also provided reasonable grounds for the belief that the claimant had falsely reported the reason for his injury. In reaching that conclusion it was also reasonable for the respondent to take into account the fact that the claimant had not reported any accident for a month after he alleged it had taken place.

c) Did the respondent form that belief based on a reasonable investigation in all the circumstances?

164. We have set out our findings of fact about the disciplinary process above. We find that Mrs Tollitt carried out a thorough process. The claimant was given an opportunity to comment on the evidence including the CCTV footage. The claimant did claim that he had not had access to the CCTV footage of him using the phone. We find that he was given the opportunity to do so but that in any event, that evidence was not relied on in the decision to dismiss which related to the horseplay incident and its false reporting only.

165. The disciplinary process involved checking and re-checking points raised by the claimant at the disciplinary hearings with witnesses including Mr Sanderson. We found the report Mrs Tollitt produced was thorough and balanced. We find the investigation was clearly within the band of reasonableness required by **Sainsbury v Hitt**.

6) Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within section 98(4) ERA and the band of reasonable responses available to the respondent?

166. We find that the decision to dismiss the claimant would have been a fair one if it were not for the procedural unfairness we explain in answer to the next issue. Had a fair procedure been followed, the decision to dismiss the claimant for gross misconduct would have been within the band of reasonable responses. The respondent had reasonable grounds for genuinely believing that the claimant had falsely reported the cause of his back injury. He had reported the injury was due to an accident at work rather than the horseplay which the respondent was entitled to find was its true cause.

7) Did the respondent follow a fair procedure when dismissing the claimant?

167. We find that the respondent followed a fair procedure with one exception. As we have said, it carried out a thorough disciplinary process and gave the claimant an opportunity to respond to the allegations against him. It arranged for an independent interpreter to attend both disciplinary hearings and allowed the claimant's partner to attend both hearings.

168. The exception, we find, is the absence of Andrew Norman from the disciplinary hearings. We do not say that it is always necessary for a fair procedure for the dismissing officer to attend the disciplinary hearing. We take into account that in cases involving small employers it is not uncommon for an external HR practitioner to conduct the disciplinary investigation. We accept that there may be some cases where the investigation produces factual findings and evidence which are sufficiently clear to mean there is no unfairness if the person dismissing does not attend a disciplinary hearing. We think that would be the exception. In cases such as the claimant's, where there were issues about the honesty and credibility of an employee's account, we find that a fair procedure required the person dismissing to attend the

disciplinary hearings. We did not find the explanations for Andrew Norman's non-attendance at those hearings to be convincing ones.

169. It was also suggested by the claimant that the lack of an appeal meant the process in this case was not fair. We can see there were issues about what would have happened if Andrew Norman had to re-consider his own decision to dismiss (or someone else had to hear an appeal against it). That is academic in this case, however, because the claimant did not exercise the right to appeal which the respondent told him he had.

8) Did the respondent follow the ACAS Code when dismissing the claimant?

170. The ACAS Code does not explicitly spell out that the person dismissing/deciding on the disciplinary action must attend the disciplinary hearing but it seems to us that it proceeds on the basis that they will. We find that the failure of Andrew Norman as the dismissing officer to attend the disciplinary hearings means that the respondent did not follow the ACAS Code of Practice when dismissing the claimant.

9) If the claimant's dismissal is found to be unfair, which is denied by the respondent, did the claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

171. We find that the claimant did contribute to his dismissal. There is no dispute in this case that the claimant lifted Mr Sparrow and carried him at least 5-6 metres in a fireman's lift. We do not think any employee needs to be told that is dangerous horseplay which would risk the health and safety of the employee and the person being lifted. It was put to the claimant by Ms Gilchrist that given his bad back condition it was surprising that he had decided to lift Mr Sparrow since he would presumably be being very cautious about his back. The claimant confirmed that he was being cautious but that it was a silly thing for him to do.

172. We are also satisfied on the balance of probabilities that that horseplay was the cause of the claimant's injury but that he falsely reported that he had sustained the injury in an accident at work. We find that the injury happened by 8.56 a.m. on 7 August 2020 when the claimant texted his partner about his injury. We find that there was no evidence of the claimant lifting any heavy wood or the bin under the cross-cut saw between 8.35 a.m. and 8.56 a.m. On the balance of probabilities we find the bin under the cross-cut saw was not full at the time the injury occurred and even if it was full it would be no heavier than 20 kg. We base that on the evidence from Andrew Norman, James Norman and Craig Sparrow. We prefer their evidence that any wood lifted by the claimant would have been lifted with mechanical help which would have significantly reduced its load. We found it inherently implausible that if the claimant had suffered an injury at work due to an accident (rather than his own horseplay) he would not have reported it for a month.

173. We find that that conduct did contribute to the claimant's dismissal. We find that the claimant's conduct was culpable and blameworthy and therefore must make a reduction under section 123(6) of the ERA. When it comes to the extent of the

reduction it is just and equitable to make, we find this is a case where the employee was wholly to blame for the dismissal. Had he not engaged in horseplay and then sought to falsely report the reason for his back injury, his dismissal would not have occurred. We do not think it requires any training to know that falsely reporting the cause of an injury was wrong. We find it just and equitable to reduce the claimant's compensatory award by 100% to zero.

174. In this case, given the nature of the claimant's contributory conduct, we have also concluded it would be just and equitable to reduce his basic award by 100% to zero.

10) If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?

175. We have referred to the thorough investigation carried out byt eh respondent and the extent to which some of the allegations (e.g. the horseplay was not contested by the claimant. We are satisfied that had Andrew Norman attended the disciplinary hearing there is a 100% chance that the outcome would have been the same, i.e. a decision to dismiss the claimant for gross misconduct.

11) If the respondent failed to comply with the ACAS Code, was its failure reasonable? If the respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the claimant?

176. We have awarded no compensation so this question is academic. Although the respondent was acting on advice from an external HR practitioner, we do consider the failure to comply with the ACAS Code was not reasonable. As we have already said, neither Andrew Norman nor Mrs Tollitt provided a convincing explanation as to why Andrew Norman could not attend the disciplinary hearing if he was the decision maker. Had we been required to decide the point we would have decided that it was just and equitable to increase any compensation by 10%. That reflects the fact that the respondent was acting on advice and is a small company reliant on such advice. We also accept the failure to attend the disciplinary hearing was not done deliberately to prejudice the claimant.

12) Has the claimant complied with the ACAS Code? If not, should any compensatory award made to the claimant be reduced to take into account the claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?

177. We awarded no compensation so this question is academic. The claimant failed to comply with the ACAS Code by failing to appeal. We do think that failure was unreasonable given he was fully aware of the right of appeal. If we had been required to decide the point, we would have reduced the claimant's compensation by 15%. We accept that the claimant had reservations about whether the appeal would be dealt with fairly given the initial decision was made by the respondent's managing

director. It seems to us that did not prevent him from at least giving the respondent an opportunity to reconsider its decision by appealing if he had grounds for doing so.

13) To what extent, if any, has the claimant mitigated his losses?

178. We did not hear submissions on remedy. Had we decided that the claimant was entitled to compensation we would have heard evidence and submissions on this issue at a remedy hearing.

14) To what, if any, compensation is the claimant entitled?

179. For the reasons set out above we award no compensation.

Direct race discrimination (s.13 of the 2010 Act)

15) Did the respondent treat the claimant less favourably than it treated or would treat others?

16) Is the following considered to amount to less favourable treatment?

a) The respondent's treatment of the claimant when he injured himself in the workplace.

b) The dismissal of the claimant on 16 October 2020.

180. We find that the actual comparator identified by the claimant, Mr Filipovs, was not in the same material circumstances as the claimant. Mr Filipovs had been off on long-term illness following an accident at work. There was no evidence to suggest that Mr Filipovs had given inconsistent accounts of how his injury had come about or otherwise done anything which gave rise to a suspicion on the part of the respondent that he had falsely reported the cause for his injury. From the evidence we saw, the respondent accepted that his injury arose from an accident at work. In those circumstances we find that Mr Filipovs was not an appropriate comparator. The claimant pointed to no other evidence which suggested he had been treated less favourably than anyone else who had given inconsistent accounts about how he was injured at work.

c) The denial of the claimant's requested training and the giving of training to other British workers.

181. The claimant relied on British workers at the respondent’s workplace as his comparators. We do not find that the claimant was treated less favourably than those comparators when it came to training.

182. We found as a fact that the claimant did not request any training which was denied. We also found that when the claimant first joined the respondent on 31 March 2017 he was given initial training on the machinery he was to use by Andrew Norman. There was no evidence to suggest that was any different or less favourable to what happened to British (or any other) worker when they joined the respondent. Mr Sparrow’s evidence to the disciplinary hearing was that he had received the same kind of “on the job” training from Andrew Norman. Mr Sparrow is White British.

183. We also find that the claimant undertook lift truck training on 26 September 2017 as did British and other workers. There was no evidence that he was treated less favourably than British workers in that regard.

184. When it comes to the lift truck refresher training in September/October 2020 we find that the claimant was not treated less favourably than his British colleagues who undertook that training. We find that there were material differences between his circumstances and those of his colleagues who were given refresher training in that he was off sick when the training took place. The appropriate comparator would be a hypothetical British worker who was off sick when the training occurred. There was no evidence to suggest they would have been treated any differently to the claimant. We think it overwhelmingly likely that any worker signed off sick (especially with back pain) would not have attended the lift truck refresher training.

17) If so, was the less favourable treatment because of race?

185. If we are wrong, and the claimant was treated less favourably in relation to training, his treatment when injured and/or his dismissal, we would have found that the less favourable treatment was not because of his race. The claimant did not prove facts which led to the burden of proof passing to the respondent.

186. When it comes to the training, the evidence pointed the other way and showed that other Polish workers (Mr Siniak and Mr Dobrak) and those from other nationalities (such as Mr Filipovs, who was Latvian) received the same training as British workers.

18) Who is the correct comparator? Claimant claims the other British workers at the respondent in relation to (a) and (c).

187. We have dealt with this issue under paras 180 to 186 above.

<u>Harassment (s.26 of the 2010 Act)</u>

19) Did the respondent engage in unwanted conduct related to the claimant's race for the purposes of the 2010 Act? Namely, that on or around the start of May or June 2020, the Respondent's Andrew Norman called the claimant a "fucking Polish idiot".

188. We found that Andrew Norman did not make the remark alleged. The harassment claim fails because the alleged "unwanted conduct" did not happen.

20) If so, did the unwanted conduct have the purpose or effect of:

a) violating the claimant's dignity; or

b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

21) If so, having regard to all the circumstances of the case and the perception of the claimant, was it reasonable for the conduct to have that effect?

189. Had we found that the alleged remark was made by Andrew Norman we would have found that it amounted to race-related harassment. It was unwanted, related to the claimant's race and had a harassing purpose or effect by creating a humiliating or offensive environment for the claimant.

_____

Employment Judge McDonald

Date: 5 August 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

8 August 2022

FOR THE TRIBUNAL OFFICE

Annex
List of Issues

Jurisdictional Issues

1) Are any or all of the claimant's claims for discrimination out of time?

2) If so, do the allegations made by the claimant amount to an act extending over a period of time so as to bring the claimant's claims in time?

3) Would it be just and equitable to extend the time limit for submitting such claims?

Unfair Dismissal

4) Was the claimant dismissed for a potentially fair reason pursuant to s.98(2)(b) of the Employment Rights Act 1996 (**ERA**), namely conduct?

5) Did the respondent act reasonably in treating the claimant's conduct as a sufficient reason for dismissing the claimant, in that:

    a. Did the respondent form a genuine belief that the claimant was guilty of gross misconduct?

    b. Did the respondent have reasonable grounds for that belief?

    c. Did the respondent form that belief based on a reasonable investigation in all the circumstances?

6) Was the dismissal of the claimant fair in all the circumstances? In particular, was the dismissal within section 98(4) ERA and the band of reasonable responses available to the respondent?

7) Did the respondent follow a fair procedure when dismissing the claimant?

8) Did the respondent follow the ACAS Code when dismissing the claimant?

9) If the claimant's dismissal is found to be unfair, which is denied by the respondent, did the claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

10) If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by what proportion would it be just and equitable to reduce the compensatory award?

11) If the respondent failed to comply with the ACAS Code, was its failure reasonable? If the respondent's failure to comply with the ACAS Code was

unreasonable, is it just and equitable to increase any award made to the claimant?

12) Has the claimant complied with the ACAS Code? If not, should any compensatory award made to the claimant be reduced to take into account the claimant's unreasonable failure to comply with the ACAS Code? If so, by what proportion should the compensatory award be reduced?

13) To what extent, if any, has the claimant mitigated his losses?

14) To what, if any, compensation is the claimant entitled?

Direct race discrimination (s.13 of the 2010 Act)

15) Did the respondent treat the claimant less favourably than it treated or would treat others?

16) Is the following considered to amount to less favourable treatment?

a. The respondent's treatment of the claimant when he injured himself in the workplace.

b. The dismissal of the claimant on 16 October 2020

c. The denial of the claimant's requested training and the giving of training to other British workers.

17) If so, was the less favourable treatment because of race?

18) Who is the correct comparator? Claimant claims the other British workers at the respondent.

Harassment (s.26 of the 2010 Act)

19) Did the respondent engage in unwanted conduct related to the claimant’s race for the purposes of the 2010 Act? Namely, that on or around the start of May or June 2020, the respondent's Andrew Norman called the claimant a "fucking Polish idiot".

20) If so, did the unwanted conduct have the purpose or effect of:

c) violating the claimant's dignity; or

d) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

21) If so, having regard to all the circumstances of the case and the perception of the claimant, was it reasonable for the conduct to have that effect?