EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Morgan	**v**	Hedleys Catering Ltd

Heard at: **Bristol** **On:** **18, 19, 20 January 2017**

Before: **Employment Judge Pirani**

Members:
Mrs GA Meehan
Ms J Cusack

Appearances
For the Claimant: in person
For the Respondent: Mr Oram, Managing Director

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

The claims for automatic unfair dismissal, harassment related to race, victimisation, direct race discrimination, outstanding holiday pay and unlawful deductions from wages do not succeed and are dismissed.

RESERVED REASONS

Background and Issues

1. By a claim form presented on 23 June 2016 (and by amendment dated 22 July 2016) the Claimant, who was born on 17 May 1966, brought complaints of unfair dismissal on the grounds of having made a public interest disclosure, discrimination on the grounds of race, unlawful deductions from wages and accrued but unpaid holiday pay. The Respondent has defended all of the claims.

2. The claimant says he was employed by the respondent as a Delivery Driver from 8 June 2015 to 27 May 2016 when he was dismissed. The dates on the ACAS certificate are 31 May – 22 June 2016.

3. The matter came before Employment Judge Livesey at a preliminary hearing on 13 September 2016. Employment Judge Livesey noted that the issues were not easy to

identify; the Claimant's Claim Form was short and the nature of the complaints that were being made were not readily discerned. The Response, on the other hand, was extremely prolix.

4. The issues were then set down and agreed as follows.

5. Public interest disclosure claim

5.1. What did the Claimant say or write? The Claimant relied upon a text message to Mr Oram dated 25 May 2016 (it was clarified that the other disclosures referred to in the amendment letter of 22 July postdated the dismissal).

5.2. In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show that a person, Mr Oram, had committed a criminal offence and/or had failed to comply with a legal obligation in relation to the declaration of income for tax purposes to which he was subject.

5.3. If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

5.4. If so, was that disclosure made to the employer?

6. Unfair dismissal complaints

6.1. Was the making of any proven protected disclosure the principal reason for the dismissal? The Claimant did not have two years' service and the burden is on him to show jurisdiction and therefore to prove that the reason or if more than one the principal reason for the dismissal was the protected disclosures.

7. Section 26: Harassment on grounds of race

7.1. Did the Respondent engage in unwanted conduct in that it invited the Claimant to a disciplinary meeting by asking him to choose between 3 options which, the Claimant believed, was an act of harassment.

7.2. Was the conduct related to race?

7.3. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

8. Section 13: Direct discrimination on grounds of race

8.1. The Claimant describes himself as mixed race Afro Caribbean.

8.2. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:

i. Failing to inform and/or misleading the Claimant as to the basis of his payments of wages. The Claimant alleges that he lost 20 minutes from his pay each day;

ii. Failing to re-arrange the disciplinary meeting due to the Claimant's ill health;

iii. Making false allegations against the Claimant which resulted in his dismissal;

iv. After 7 May 2016, failing to pay the Claimant in cash as it is alleged the Respondent did in respect of other staff;

v. Any of the treatment not found to have been harassment.

8.3. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators; Jenny Mitchell, David Robertshaw and/or hypothetical comparators.

8.4. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

8.5. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

9. Section 27: Victimisation

9.1. Did the Claimant carry out a protected act? He relies upon an oral complaint to Mr Oram that he alleges was made on 24 May 2016.

9.2. If there was a protected act, did the Respondent carry out any of the following treatment because of it?

i. Suspending, investigating and then dismissing him;

ii. Defending itself, within the Tribunal litigation, in a manner which is alleged to have caused the Claimant further detriment.

10. Unpaid annual leave – Working Time Regulations

10.1. It was noted by Employment Judge Livesey that the Claimant was unclear as to the nature and extent of his holiday pay claim and stated that he needed documents from the Respondent in order to calculate it. The Employment Judge therefore required disclosure to take place before the Claimant was ordered to provide a Schedule of Loss.

11. Unlawful deductions from wages

11.1. See paragraph above.

12. Remedies

12.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

12.2. There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.

13. An amended response was sent to the tribunal and the claimant on 24 September 2016.

14. The claimant has also produced a schedule of loss which sets out his holiday pay and wages claim (C67-68).

15. The case was originally listed and timetabled for four days. The parties were written to on 9 January 2017 by the tribunal explaining that the case was not currently allocated to a tribunal panel. The parties were asked to liaise and reply in writing to say whether all case management orders had been complied with.

16. Also on 9 January 2017 the respondents wrote to the tribunal making applications:
i. to exclude disputed documents from the claimant's bundle
ii. to dismiss the claim in its entirety

17. Within the application the respondent pointed out that discussion between the parties and ACAS are confidential and should not be disclosed to the tribunal.

18. The claimant wrote on 10 January 2017 resisting the application.

19. The respondents wrote again on 11 January 2017 with an application to strike out the victimisation claim.

20. Also on 11 January 2017 the respondent wrote to say all case management orders had been complied with.

21. On 13 January 2017 the Regional Employment Judge caused a letter to be written to the parties saying the time allocation was reduced to 3 days due to the availability of judicial resources. He also directed that issues relating to the respondent's application to strike out the claims would be discussed at the start of the hearing, but it may be inappropriate to consider dismissing or striking out any claims before the hearing of evidence.

22. The issues and applications were discussed at the commencement of the hearing. It was confirmed that the issues were as previously set out by Employment Judge Livesey.

23. After some discussion, the respondent withdrew its application for strike out.

24. In relation to the application to remove some of the claimant's documents we acceded to the application to remove pages 54 to 58 because these related to correspondence with ACAS and were accordingly covered by without prejudice privilege. Pages 69 and 70 were not referred to in the claimant's witness statement and he did not ask us to read them, so no further issue arose in relation to this document. However, we determined that pages 60 -66 should not be removed from the claimant's bundle. This was correspondence with the employment tribunal which related to the issues.

25. After reading the claimant's witness statement the tribunal expressed concern that contrary to the direction of Employment Judge Livesey it appeared that the claimant did not reference documents in his witness statement to which he intended to refer. Accordingly, we gave the claimant an opportunity to indicate which documents he wanted us to read in conjunction with his statement. We informed both parties that unless we were expressly taken to a document we would not necessarily read it. In response the claimant referred us to documents at pages 25, 26, 59, 60 – 66, 17 – 25 and 30 – 36. Further the claimant referred us to document 74 in the respondent's bundle which was said to be the protected disclosure.

26. We also expressed concern that the claimant's statement failed to deal with the issues as previously agreed and set out in the Order of Employment Judge Livesey. Accordingly, we asked him to explain the basis of some of his claims.

27. The claimant explained:

i. the outstanding holiday claim relates to 2.5 days or 25 ½ hours
ii. the unlawful deduction of wages claim is said to be for £1508 .81: the document he referred us to was page 178 in the respondent's bundle
iii. the allegation of victimisation set out in the issues at para 7.2.2 of the tribunal order relates to information which the claimant says the respondent sent to the tribunal. In particular, he relies on page 52 of his own bundle and pages 103 to 141 in the respondent's bundle which she says were sent to the tribunal on 27 July 2016. He relies on the sending of these to the tribunal as an act of victimisation.

28. The issues were agreed at the beginning of the hearing and were explained to the claimant. When giving his evidence he sought to re-characterise some of the issues but made no application to amend his claim.

29. Throughout the hearing both parties were continually reminded of the issues in the case and advised to ask questions relating to the issues. The parties were also advised not to interrupt each other's evidence and not to talk over each other. Unfortunately, the claimant had to be reminded of this on numerous occasions. In his written closing submissions the claimant graciously apologised for letting his emotions get the better of him.

Documents and witnesses

30. For the claimant we heard just from the claimant himself. We were provided with two different versions of the claimant's statement. One in the respondent's bundle and one signed version provided by the claimant himself. We only read the signed version which was relied on by the claimant in evidence.

31. For the respondent we heard from:

i. James Oram, joint owner of the business
ii. Rebecca Oram, joint owner of the business and wife of Mr Oram
iii. Chloe Pratt, deputy kitchen manager
iv. Jacqueline May, who worked in the respondent's café
v. Anna Witherington, who carries out bookkeeping and payroll for the respondent

32. In accordance with the directions of Employment Judge Livesey the parties produced two separate bundles of documents. The claimant's bundle ended at page 70 and the

respondent's at page 245. In addition the respondent provided a shorter bundle ending at page 97. This included the statements as well as the pleadings, applications and case management order.

33. On the second day of the hearing the respondent made an application to adduce further documentation. The first document related to an attachment setting out details from tracking data for a sample period. It was agreed that this document was already in the bundle in any event. The second document related to takings received by the respondent at various events. This was said to be relevant to the issue of cash bonuses. The claimant objected to the admission of this document. We decided not to allow this document in evidence. Disclosure had taken place sometime previously. Further, the claimant had already been cross-examined by this point. We did not consider it to be in the interests of justice or in accordance with the overriding objective to allow the document into the evidence bundle.

Facts

34. After hearing all the evidence, reading the documents to which we were taken and listening to the submissions of the parties we made the following unanimous findings of relevant fact. Some of our findings on disputed issues of fact are set out in the conclusions section.

35. The respondent is a catering company jointly owned by James Oram and his wife Rebecca Oram, who bought the company about 3 years ago. It employs around 23 people. Previously Mr Oram had worked for KMPG with HMRC as a client.

36. The claimant was interviewed for a job as a delivery driver on 21 May 2015. He was offered a job and started work on 8 June 2015. A written contract of employment was provided to and signed by the claimant, dated 20 June 2015 (R5).

37. Clause 8 of the contract provided that the company reserves the right to require employees to repay to the company by deduction from pay items including overpayment of wages, outstanding loans or advances, or relocation expenses. Clause 11 provided that the claimant was entitled to a 20 minute unpaid break if working for more than 6 consecutive hours "by arrangement and at times convenient to the company" (R7). Clause 13 provided that the claimant was required to clock in and out for the purposes of time recording at the start and end of each working day "or otherwise as directed"(R7).

38. The claimant was paid £8.20 per hour payable on or around the last Friday of each month.

39. Initially the respondent's view was that the claimant "started off brilliantly".

40. Soon after commencing employment with the respondent, the claimant requested advances on his wages. These were agreed and the claimant signed confirmation slips to evidence the advances (see at R197).

41. In Mr Oram's experience his staff, who were on relatively modest wages, found budgeting tough sometimes and the respondent sought to help where possible. The process, derived from previous management, was that staff sign a piece of paper detailing the amount and date. The claimant went on to regularly request cash advances (see summary sheet at R193). Mr Oram was willing to help because the claimant was a good performer who had only just got back on his feet after periods of intermittent employment.

42. In September 2015 the claimant requested a substantial cash advance of £1,500 for a car to help him get to work. After serious consideration, Mr Oram agreed. Mr Oram also explained to the claimant that, while the balance would not be repaid monthly all advances would remain as a series of wages advances each to be repaid in order. This was to the claimant's benefit as it remained interest-free. From that point onwards the claimant had regular conversations with Anna Witherington, who handles payroll and bookkeeping for the respondent. The advances were kept on a summary document which was shown to the claimant (R193).

43. All in all, the parties agree that claimant was given cash advances of an amount in the region of £5,000. These were provided on an interest-free basis. This amount was was far in excess of those given to other members of staff (see at R194).

44. In or around December 2015 the claimant asked if he could carry over unused holiday entitlement from that year. This was agreed as an exception to his contract.

45. On 13 January 2016 the respondent installed a new clocking system. To account for some staff failing to clock breaks the new system automatically deducted 20 minutes when working six hours without clocking breaks. Staff, including the claimant, were briefed on the new system in January 2016 and were told about the auto deduction policy for breaks. The policy was also put up in the staff room (182).

46. Among other things, the notice provided that: "Due to repeated instances of staff being observed on breaks while not clocked out, where staff are working in excess of six consecutive hours but no breaks have been clocked then Headley's catering Ltd reserves the right to make appropriate deductions from staff hours to account for breaks, including automatic deductions of up to 20 minutes for each day with over six consecutive hours worked and no breaks clocked out for, and further deductions where longer breaks have been taken" (R182).

47. For a time the old and new time reporting systems ran in parallel. It is likely that this led to some confusion. However, we do not accept, as the claimant seeks to argue, that he respondent knew that he was taking breaks by driving home while not clocking in and out. It makes no sense for Mr Oram to have agreed to pay the claimant while on such breaks.

48. If employees remembered to clock out for breaks the new system would not auto deduct time. We are satisfied that Mr Oram discussed the new system with the claimant and reminded him of the importance of clocking for breaks. Again, it is highly unlikely that the claimant would have worked under a system which had not been explained to him. He was unable to explain why he had not clocked out for breaks when he was required to.

49. Several staff requested alternative arrangements for breaks. For example another delivery driver, David Robertshaw, agreed to a 15 minute auto deduction per six hour day (see at R183). The same level of deduction was applied to the claimant from February 2016 (see at R191 where 0.25 is 15 minute deduction) as his job was deemed similar to that of Mr Robertshaw's.

50. On 7 May 2016 the claimant was scheduled to work at an evening function alongside Mr Oram and other members of staff at Gloucester Cathedral. Mr Oram asked the claimant to remove his cap and overcoat before guests arrived. He did this by saying 'lose the hat and

coat' while pointing at the claimant. In the event, the claimant left the event early as he felt offended. After several unanswered calls the claimant texted Mr Oram later saying he left because he was unhappy being asked to remove his hat. The client was happy with the event and gave each member of staff present a £20 tip, including to Jenny Mitchell the claimant's comparator (see at R78). Mr Oram did not pass on any of the tip to the claimant.

51. Jenny Mitchell also drove a jiffy van for the respondent. When she did so she was paid a bonus by way of commission from the van's sales. If the claimant, or anyone else, drove the same van they would only be paid at their normal hourly rate.

52. The claimant explained in his evidence to us that the reason why he wanted to keep his hat on was his face was very tanned as it was good weather and his head was "literally white" because it had been covered for most of the time. Accordingly, he was uncomfortable with his appearance which would have been heightened when serving the public. We accept what the claimant says about this issue, although both parties could have handled the situation better.

53. Mr Oram decided that as well as the £20 tip paid on 7 May 2016 the respondent would pay the staff who remained with a cash advance against wages to say thanks for staying late and performing well. According to the respondent the claimant was not entitled to this as he left off before the start, leaving everyone in the lurch.

54. In contrast, the claimant says he was told before the event that staff would be paid £50 cash in hand in addition to their hourly pay, because it was a difficult to persuade them to work at such events. However, the claimant also says in his statement that other staff were moaning about not being selected to work at such events because Mr Oram paid cash in hand. The claimant also says that the respondent has recently come up with the excuse that money was given as a cash advance from wages to cover up complaints of discrimination. In his statement, the claimant says Mr Oram never paid him or any other member of staff a cash advance before 7 May.

55. We prefer the respondent's evidence on this issue. It would not make economic sense for the respondent to pay for the hours plus an additional cash bonus. All the respondent's witnesses were clear that no such payments were made. Margins were already very tight for the respondent at such events. The claimant's evidence on this issue was contradictory. Even on his own case he received cash advances before 7 May, contrary to what he says in a statement. It was only at the tribunal that the claimant's case on cash bonuses became clear. He alleged, seemingly for the first time, that he and others were paid cash bonuses when they attended events. In his claim form he says that "all staff except me were paid cash in hand". At the tribunal the claimant said that he had been paid cash in hand when attending events for the purposes of avoiding tax in addition to his agreed hourly rate. Although he sent many texts emails and letters this allegation was never set out in such terms before. Further, it was not set out in these terms in his witness statement.

56. Subsequently Mr Oram considered the hat/coat and other incidents relating to damage to a vehicle required a formal discussion. By letter dated 9 May 2016 the claimant was invited to attend a disciplinary hearing to discuss performance and potential misconduct. Included in the allegations were leaving the event on 7 May 2016 and refusing to remove his hat and coat R14). The letter informed the claimant of his right to be accompanied and warned him that action which may be taken included dismissal. The letter was not given to the claimant until 10 May 2016. There was to be a disciplinary hearing on 12 May 2016 but in the event

a short discussion ensued and after reflection Mr Oram decided that a first written warning was appropriate for failing to follow a reasonable request to remove a hat and dress in line with other staff for a formal function (R16).

57. The written warning was to last for a year and the claimant was warned that further misconduct during the currency of the warning was likely to result in further disciplinary action. Although the claimant was given a right of appeal he did not do so.

58. Although the claimant did not appeal the written warning he gave evidence that he had every right to work wearing his hat as he had done since starting work with the respondent. He says that he was particularly concerned that he was never warned before about wearing a hat at functions. In his view, 7 May was the "triggering event" for the termination of his employment.

59. Texts were exchanged between Mr Oram and the claimant on 9 May 2016 about the failure to pay the claimant in the same way as the other members of staff (R240).

60. On 11 May 2016 Mr and Mrs Oram became suspicious about the claimant's movements as he had been heard saying he was heading home for a break. Accordingly, Mr Oram decided to check his vehicle tracking reports. On the face of it these seem to show trips home when working and stops at unknown locations as well as inexplicable routings and departure times.

61. Analysing the tracking data was time consuming as it needed to be cross-referenced with delivery sheets and other information. It took until about 21 May for this analysis to be completed (R24-25).

62. Mr Oram formed the view that his investigation revealed extensive abuse and clocking manipulation.

63. The respondent's disciplinary procedure provides that if employees have fewer than two years continuous service the company reserves the right to discipline or dismiss without following the procedure (R76).

64. Mr Oram decided to suspend the claimant. He wrote on 23 May 2016 setting out five specific allegations of misconduct (R71). Again, the claimant was invited to attend a disciplinary meeting on 25 May 2016. The letter advised the claimant of his right to be accompanied and that action taken could include dismissal.

65. The letter was given to the claimant in person on 24 May when he was suspended.

66. There is a dispute about whether the claimant accused Mr Oram of race discrimination on this day. We will return to this issue in our conclusions section.

67. The allegations of misconduct set out in the letter were:

i. Carrying out personal business while clocked in, including personal visits, trips to car boot sales and trips home to inflate hours worked
ii. disappearing for unexplained periods while clocked in, including potentially clocking in and going straight home to inflate hours worked
iii. taking excessively long (over 20 minutes) or unwarranted breaks (where working for less than six hours) without any explanation

iv. improper use of the respondents resources, including using vehicles and fuel to drive home for breaks
v. inflating time taken to carry out tasks while on company business in order to inflate hours worked

68. Subsequently the claimant texted saying that due to concreting his garden he hurt his back and would be unable to attend the disciplinary hearing the next day (R73).

69. Mr Oram then texted the claimant back on 25 May 2016 proposing three options: rearrange the date, conduct the meeting by telephone or submit a written email statement. Although Mr Oram offered changing the meeting date he only offered the 26 or 27 May 2016. Within the text Mr Oram reminded the claimant that the respondent had the right to discipline him without following its disciplinary procedure (R73).

70. Before sending that text Mr Oram looked up employment law on the internet and found a page which advised him that if an employee states they cannot attend a meeting due to ill-health employers could give consideration to making adjustments to the procedures including dealing with the hearing by telephone or by written representations (see at R77).

71. Mr Oram made no reference to relevant ACAS codes on discipline and did no further legal research.

72. The claimant responded saying he did not think he would be able to attend and asked that the meeting not go ahead in his absence as it would be unfair (R77).

73. Mr Oram replied the same day saying he did not believe that a good reason had been provided why the meeting could not proceed as even if the claimant was unable to attend in person the meeting could go ahead by phone. The claimant was informed therefore that the meeting would go ahead by Friday 27 May at 2 PM the latest.

74. The claimant then replied by text making reference to race discrimination and victimisation. He also indicated that a grievance letter was being completed by him.

75. He then sent a further text also on 25 May 2016 saying: Also we have a expanation (sic) to declare to the taxman tax invasion (sic) carry a prison sentence Mr Oram and you are also involved with other members of staff. You have completely broken down the mutual confidence and trust through being one sided lissen too (sic) other members of staff tell you lies so I would be without Employment. As I said I am not in no shape to attend the disciplinary. (R74)

76. In his statement, the claimant explains that he was told by another employee that the former managing director had shown Mr Oram "how to fiddle the books". He says he worked at many events for the respondent and was paid cash in hand, as were other staff. The claimant also says that he was well aware that Mr Oram was going to dismiss him and withhold his wages because he was not prepared to hide the fact that Mr Oram was not paying taxes.

77. His next message, sent on the same day, included the following: "Don't forget you also paid me cash in hand… And it's too late to try and amend it" (R74).

78. Mr Oram replied saying: "I am not sure what you mean about 'cash in hand'? You have received cash advances and subs against your salary that and has logged in full detail and are fully taxed along with all your salary". (R75)

79. As we have said, during his evidence the claimant explained that his allegation related to cash payments or bonuses in the sums of £50 or £30 being paid by the respondent to employees including himself. The claimant says this was done in order for the respondent to avoid tax.

80. In the claim form the claimant makes reference to Mr Oram not declaring taxes and paying white employees cash in hand some three weeks earlier. This allegation is set out after the date of 12 May 2016. Later in the claim form the claimant goes on to say all staff except him were paid cash in hand. This contradicts the evidence he gave to the tribunal when he said that he was also paid cash in hand on numerous occasions by way of a bonus to avoid tax.

81. Also on 26 May 2016 Mr Oram emailed the claimant setting out his version of what occurred on 7 May. He explained that the staff who remained at the event were given £70 which comprised a £50 cash advance against the time booked on the event in May's wages plus a £20 tip for each member of staff given by the client hosting the event. Mr Oram explained that he did not feel that this applied to the claimant as the client inquired about the number of staff at the event and Mr Oram did not feel able to reply that there were six working but one had "stormed off" (R78).

82. As we have already found, we prefer the respondent's evidence on this issue. The claimant's evidence has been contradictory and changing.

83. Mr Oram also reiterated in the email that the respondent was exercising its right to discipline the claimant without following the disciplinary procedure given his insufficient length of service (R79).

84. On 26 May 2016 Mr Oram emailed the claimant a copy of the respondent's disciplinary and grievance policy together with details of holiday entitlement. He also attached tracker information for the week of 10 to 17 April 2016, which was said to be a sample week for the misconduct alleged (R81).

85. The text conversation carried on into 27 May 2016 when the claimant texted saying he would prove Mr Oram paid all-white staff before he paid the black member of staff.

86. On 27 May 2016 Mr Oram went through the evidence, in the absence of the claimant, and concluded that the claimant was guilty of gross misconduct. He sent the claimant a letter informing him that he was dismissed with immediate effect but had a right of appeal (R88). Attached to the letter was a summary of the disciplinary meeting discussion (R89-92).

87. The claimant was also sent his final wage slip on 27 May 2016 (R178). The wage slip shows the claimant was due outstanding holidays for 25 ½ hours in the sum of £209.10. Under deductions was a heading for "cash sub" in the sum of £1508 .81. This left a balance of £152 .40 for the claimant to repay. The net pay was therefore zero (see also at R178).

88. On 28 May 2016 the claimant emailed an appeal and grievance (C30-36).

89. Among other things, the claimant said in his letter:

i. he was not clear of the precise time of the allegations
ii. he was targeted because he was a black employee
iii. he was instructed by Mr Oram to participate in fundamental breaches of his contract of employment
iv. he went home for breaks from the start of his employment and Mr Oram was aware of this
v. he was not made aware that the respondent was automatically taking 20 minutes from his salary to account for breaks
vi. the only time he ever went to car boot sales was to get things for the respondent's jiffy vans
vii. it was not appropriate for the respondent to take a whole lump sum from his final wages
viii. Mr Oram had already made up his mind that he was going to dismiss him on Friday [27th] which is why he was not paid at the same time white employees were paid on Friday morning
ix. he was not provided with all relevant facts and information about the allegations such that he was able to defend himself

90. The appeal and grievance were heard by Mrs Oram, although Mr Oram assisted by interviewing witnesses (see at 105-118).

91. The claimant expressed concern about Mrs Oram handling the grievance and appeal. Mrs Oram replied explaining that the respondent was a small company with limited resources (R84).

92. The claimant was invited to meetings to discuss his appeal and grievances (R97). The claimant replied making further accusations but did not agree to attend any meeting (C37-41).

93. Because the claimant raised issues of discrimination Mrs Oram decided to interview all staff who worked with the claimant to investigate evidence of discrimination.

94. Mrs Oram also spoke to Mr Oram who showed her evidence of his investigation into the claimant's conduct. Mr Oram explained that given the volume of information he selected a sample week. The week chosen was said to provide evidence of stops made by the claimant. Mrs Oram concluded that there could be no conceivable legitimate explanation for van's movements and whereabouts.

95. Between the 1 and 8 of June 2016 Mrs Oram interviewed a number of employees.

96. According to the respondent, the interviews revealed far greater misconduct than originally realised. This conduct is disputed by the claimant. In particular, he says he does not believe Mrs Oram because she gave staff alcohol to drink while serving food at a school.

97. After the investigation Mrs Oram discussed the interviews with Mr Oram.

98. She concluded that there was no satisfactory evidence of discrimination against the claimant but there was evidence of bullying and discriminatory behaviour by the claimant against others. She also found that the claimant's allegations about breaks were self-contradictory and untrue.

99. During the period of investigation the claimant emailed the respondent using foul and aggressive language (see at R93-102).

100. On 11 June 2016 the claimant emailed saying it was around April time that he was reminded that monies were being deducted (R101).

101. The outcome of the appeal was emailed to the claimant on 13 June 2016 (R103-142).

102. Within hours Mrs Oram started to receive personally abusive emails from the claimant (see at R144).

103. The claimant also requested further documentation (see at R145).

104. Because the claimant made accusations about the conduct of other employees the respondent examined tracking data of other drivers. Mr and Mrs Oram concluded that no other employee had committed misconduct.

Outline of relevant law

(i) Whistleblowing / protected disclosures

105. In general terms, the Employment Rights Act 1996 (ERA) sets out six categories of subject-matter (the 'relevant failures') about which a disclosure can be made. These are termed 'qualifying disclosures'. This means that disclosures of information concerning any of these six matters - but only these - can qualify for protection.

106. Whether or not a particular disclosure is actually protected depends on whether the other conditions in S.43B(1) are also met, and whether one of the six legitimate methods of disclosure - as set out in Ss.43C-43H ERA - has been adopted.

107. Section 43G provides that "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in the section, including that someone committed a criminal offence and/or had failed to comply with a legal obligation. A qualifying disclosure that is made to the worker's employer will be a protected disclosure - S.43C(1)(a).

108. Section 103A ERA 1996 provides that an employee will be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal was that the employee had made a protected disclosure.

(ii) Direct race discrimination

109. Section 13 Equality Act 2010 ("EqA") provides that an employer directly discriminates against a person if (a) it treats that person less favourably than it treats or would treat others and (b) the difference in treatment is because of a protected characteristic. S23(1) EqA 2010 provides that on a comparison for the purpose of establishing direct discrimination there must be 'no material difference between the circumstances relating to each case'. Further any treatment must be because of the protected characteristic.

110. In relation to direct discrimination a complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. In the majority of cases, the best approach to deciding whether allegedly discriminatory treatment was 'because of' a protected characteristic is to focus on the reason why, in factual terms, the employer acted as it did. The EHRC Employment Code makes the point, at para 3.14, that the motive or intention behind the treatment complained of is irrelevant. In other words, it will be no defence for an employer, faced with a claim under S.13(1), to show that it had a 'good reason' for discriminating.

111. The provisions relating to the burden of proof are to be found in section 136 EqA, which provides that if there are facts from which the tribunal 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. However this does not apply if A shows that A did not contravene the provision.

112. This provision is substantially similar to its predecessor provisions from the historic discrimination statutes. In our judgment the legacy case law thus gives guidance on how these provisions should be interpreted.

113. The guidance in *Barton v Investec Securities Ltd [2003] ICR 1205 EAT* as revised by Lord Justice Peter Gibson in *Igen v Wong [2005] IRLR 258 CA* sets out how we should approach this at paragraph 17; at the first stage the claimant is required to prove facts from which the tribunal could in the absence of an adequate explanation conclude that respondent has committed, or was to be treated as having committed, an unlawful act of discrimination against the complainant. If the claimant does so the burden passes at the second stage to the respondent to prove that it did not commit or is not to be treated as having committed the unlawful act.

114. The protected characteristic need not be the sole or even principal reason for the treatment so long as it has significantly influenced the reason for the treatment (*Nagarajan v London Regional Transport [1999] IRLR 572 HL*).

115. The Court of Appeal in *Madarassy v Nomura International [2007] IRLR 246* which addressed s.63A SDA 1975 reminded us that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status such as sex and a difference in treatment. We were cautioned that those bare facts 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.

116. In *Madarassy* the court made plain that although s.63A(2) involved a two-stage analysis of the evidence, it did not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the claimant; or that the comparators chosen by the claimant or the situations with which comparisons are made are not truly like the claimant or the situation of the claimant; or that, even if there has been less favourable treatment of the claimant, it was not on the ground of her sex or pregnancy. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. It approved the approach adopted in *Laing v Manchester City Council [2006] IRLR 748* by Elias LJ as he now is.

117. We also note that courts and tribunals have emphasised on a number of occasions that discrimination cannot be inferred from unreasonable conduct alone. For example, In ***Bahl v Law Society 2004 IRLR 799***, *CA*, the Court of Appeal noted that proof of equally unfair treatment is one way of avoiding an inference of unlawful discrimination.

(iii) Harassment related to race

118. Section 26 EqA 2010 provides that "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.

119. In deciding those questions, the Tribunal must take into account: B's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

120. Unlike direct discrimination, harassment does not require a comparative approach; it is not necessary for the worker to show that another person was, or would have been, treated more favourably. Unwanted conduct "related to" a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic. Protection from harassment also applies where a person is generally abusive to other workers but, in relation to a particular worker, the form of the unwanted conduct is determined by that worker's protected characteristic.

121. The Equality and Human Rights Commission's Code of Practice on Employment notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' - para 7.7.

(iii) Victimisation

122. Section 27 EqA deals with victimisation and provides:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or

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

123. The protected acts are defined in section 27(2).

124. If there was a protected act, the issue for the tribunal is whether the claimant was subjected to detriment because of it. When considering whether the act complained of constituted a detriment the starting-point is how it would have been perceived by a reasonable litigant

(iv) Unlawful deductions from wages

125. Under section 13(1) Employment Rights Act 1996 ("ERA"), a worker has the right not to suffer unauthorised 'deductions'. A deduction is defined in the following terms: 'Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated… as a deduction made by the employer from the worker's wages on that occasion' - S.13(3).

126. Section 13(1) ERA states that an employer must not make a deduction from the wages of a worker unless: the worker has previously signified in writing his or her agreement to the deduction - S.13(1)(b). This phrase is defined in S.13(2) as a provision contained in: one or more written contractual terms of which the employer has given the worker a copy before the deduction is made - S.13(2)(a), or one or more contractual terms (whether express or implied and, if express, whether oral or in writing) whose existence and effect (or combined effect) the employer has notified to the worker in writing before the deduction is made - S.13(2)(b).

Conclusions

127. The first issue for us to determine is whether or not the claimant made a protected disclosure. In particular, as set out in the issues agreed at the start of the hearing, was information disclosed which in the claimant's reasonable belief tended to show that a person, Mr Oram, had committed a criminal offence and/or had failed to comply with a legal obligation in relation to the declaration of income for tax purposes to which he was subject.

128. The Claimant relies on a text message sent to Mr Oram on 25 May 2016 (it was clarified that the other disclosures referred to in the amendment letter of 22 July postdated the dismissal). The said text states: Also we have a expanation (sic) to declare to the taxman tax invasion (sic) carry a prison sentence Mr Oram and you are also involved with other members of staff. You have completely broken down the mutual confidence and trust through being one sided lissen too (sic) other members of staff tell you lies so I would be without Employment. As I said I am not in no shape to attend the disciplinary (R74).

129. There is a distinction between "information" and an "allegation." For example "the [hospital] wards have not been cleaned for two weeks. Yesterday sharps were left lying around" is information. "You are not complying with Health and Safety requirements" is an allegation. These were hypothetical examples used in argument and adopted in the judgment in *Cavendish Munro v Geduld* [2010] IRLR 38. The case itself concerned a statement of position that the claimant employee, director and member of the company was an oppressed minority shareholder contrary to Companies Act 2006 s. 994. The principle was applied by the EAT (Slade J presiding) in *Smith v London Metropolitan University* [2011] IRLR 884: a grievance that the employee had been required to teach subjects beyond her professional competence was not a disclosure of information. A statement by an employee's solicitor that he believes he has been ill-treated, and that if not treated better he will resign and claim constructive dismissal, is not a disclosure of information but a statement of the employee's position.

130. The claimant explained in his evidence that the disclosure is said to relate to payments of "cash bonuses" by the respondent to its employees after attending events for the purposes of avoiding tax. However, that information is not set out or included in the text relied on. In our judgment, the text falls within the parameters of an allegation, rather than

information. It simply alleges that Mr Oram was involved in tax evasion. No information is provided indicating why or how this is said to have been done. Accordingly, we conclude that the text was not a protected disclosure.

131. In any event, we also conclude that the claimant did not reasonably believe that Mr Oram was involved in tax evasion in the way the claimant has suggested. The claimant's evidence on this issue was contradictory and changed over time. His original text message was vague and brief. No mention was made of the allegation in the combined grievance and appeal. In his claim form the allegation seems to relate to the payment of "cash in hand" rather than being paid hourly and then also paid a bonus on top for the 7 May event. We were told by the claimant that he had been paid cash bonuses on previous occasions for the purpose of avoiding tax. Had the claimant reasonably believed what he is now telling us then he would, in our opinion, have set out the allegation clearly in his witness statement which he failed to do.

132. In any event, we conclude, as set out below that the principal reason for dismissal was conduct.

133. The next complaint raised by the claimant is harassment related to race. The issue for us to determine is did the respondent engage in unwanted conduct in that it invited the claimant to a disciplinary meeting by asking him to choose between 3 options which, the claimant believed, was an act of harassment.

134. As we have set out above, Mr Oram texted the claimant on 25 May 2016 proposing three options: rearrange the date, conduct the meeting by telephone or submit a written email statement. Although Mr Oram offered changing the meeting date he only offered the 26 or 27 May 2016. Accordingly, the claimant was only provided with a very short window in which to agree to have the hearing.

135. We are satisfied that this is unwanted conduct. However, the next issue for us to determine is was the conduct related to race. No comparator is required.

136. We have some concerns about the process deployed by the respondent and the limited options proposed to the claimant. Further, the claimant was only given one day to prepare for a disciplinary hearing. The process adopted by the respondent was poor and unfair. The claimant was given insufficient time to prepare for a disciplinary hearing with next to no information. No reasonable or adequate investigation was made by the respondent into the claimant's ill-health. It could be said that a reasonable employer would have sought a report from the claimant's GP at least to see how long he was likely to be incapacitated, if he was incapacitated at all.

137. The respondent failed to refer to the ACAS guide or code on disciplinary procedures. The former suggests that if an employee "*repeatedly* [our emphasis] fails to attend a meeting" then, among other things, consideration could be given to obtaining medical opinion on whether the employee is fit to attend the meeting. It goes on to say that where an employee *continues* to be unavailable to attend a meeting the employer may conclude that a decision will be made on the evidence available.

138. However, the respondent's actions must be seen in the context of the claimant's employment status. We are satisfied that Mr Oram undertook research which indicated to him that the three options proposed were a reasonable course of action. Further, the

claimant had fewer than two years' service and so the respondent had limited incentive to deploy what might otherwise be regarded as a fair and reasonable procedure. In addition, the respondent's own disciplinary policy provided that it may not be deployed for employees with fewer than two years' service. We also take into account that the evidence gathered by the respondent was such that it was difficult to see how the claimant would have been able to defend some of the allegations.

139. In particular, Mr Oram had strong evidence which suggested that:

i. The claimant had been driving at very high speeds
ii. He had taken breaks at home without permission
iii. He had taken much longer on certain routes with no conceivable explanation

140. We also note that the respondent had an additional incentive to dismiss the claimant before month end. Not only could they thereby avoid paying him but it also meant they were in a position to deduct monies owing to them.

141. Taking all this into account, although the process adopted by the respondent was unfair, we are satisfied that even if the burden of proof shifts the respondent has established that the decision to offer the claimant the three options was nothing whatsoever to do with race. We therefore conclude that it was not harassment related to race or direct race discrimination.

142. The next set of allegations are of direct race discrimination. The claimant alleges that he was treated less favourably because of his race. We must first determine whether the claimant was treated less favourably than his actual or hypothetical comparators. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of race (in this case his race)?

143. The first allegation is failing to inform and/or misleading the Claimant as to the basis of his payments of wages. The Claimant alleges that he lost 20 minutes from his pay each day.

144. As we have set out above, the respondent changed its clocking in system such that breaks were auto deducted. The contract of employment provided for unpaid breaks. The claimant, like all comparator staff, was informed about the process. The claimant was treated the same way as David Robertshaw, a named comparator, who also had a 15 minute deduction applied when working over a six-hour period when clocking no breaks. In fact, the claimant was treated favourably in comparison to some other staff who had a 20 minute deduction is applied.

145. Accordingly, the claimant has not established that he was treated less favourably than actual hypothetical comparators in this regard.

146. It is sensible to do with the next two allegations together. Namely, failing to re-arrange the disciplinary meeting due to the claimant's ill health and making false allegations against the claimant which resulted in his dismissal.

147. As we have already set out above, we have some concerns about the overall fairness of the procedure deployed by the respondent when it investigated and dismissed the claimant.

148. However, there was strong prima facie evidence that the claimant was guilty of gross misconduct. Evidence gathered by the respondent showed that he took over three hours of breaks at home during 11 visits across a three week period. This alone exceeds the claimant's total time adjusted for breaks across his entire employment. Further, the tracking information evidenced the claimant speeding at in excess of 80 miles per hour on numerous occasions as well as making several unexplained stops. There was also evidence of driving routes which were not warranted but would have resulted in a greater payments to the claimant.

149. When the claimant attempted to respond to these allegations in this tribunal his explanations were unconvincing. For example, his explanation of turning a 15 mile journey into a 45 mile journey was based on, he says, a need to allow sausage rolls to cool down. We do not regard this as a credible explanation.

150. That is not to say, however, that the claimant did not have explanations which might have been accepted by the respondent had a fair disciplinary hearing taken place. For example, the claimant says that the respondent must have been aware that he drove to car boot sales because he purchased products at such events for the respondent which were receipted and invoiced.

151. However, the issue for us is whether or not the disciplinary procedure deployed by the respondent had anything to do with the claimant's race.

152. Even if the burden of proof shifts to the respondent on this issue we are satisfied that race played no part in the decision. The process was rushed and unfair. However, the respondent was keen to dismiss the claimant before the end of the month as otherwise it was unlikely that they would have been able to recover monies owed to them.

153. The next issue relates to the 7 May 2016 event. It is the claimant's case that he was not paid in cash but other white female staff were. As we have found, cash advances were paid to other employees, including to Jenny Mitchell who is a comparator (see at R78). The claimant did not receive a £20 tip because he was not present to provide service to the guests. Although the claimant was paid for the hours he worked he was not given a cash advance because he left before the end of the night. We are satisfied that this treatment had nothing to do with the claimant's race. The reason for the differentiation in payment was because the claimant had left the event early.

154. The next claim is for victimisation. The first thing for us to determine is did the claimant do a protected act? He relies upon an oral complaint to Mr Oram that he alleges was made on 24 May 2016.

155. The claimant says that when he was suspended on 24 May 2016 he said to Mr Oram on that day he was being discriminated against because of his race. There is no dispute that the claimant made later allegations of race discrimination which qualify as protected acts. However, it is not for the tribunal to determine the claimant's case for him. The only protected act he seeks to rely on is one said to be made on 24 May 2016.

156. This issue is problematic. The claimant did not mention this alleged protected act in his witness statement. Further, although the tribunal reminded the claimant of this issue and explained to him that he should question the respondent's witnesses about the issues, he did

not ask a single one of the respondent's witnesses about this alleged protected act. Further, the claimant did not mention it in any appeal or grievance submission.

157. The respondent's witnesses denied that the claimant made any allegation of race discrimination on this date. Accordingly, on the balance of probabilities we find that there was no protected act on 24 May 2016. The respondent's witnesses gave clear and cogent evidence that no such allegation of discrimination was made on this date.

158. We should say however that even if the claimant had relied on a different protected act his claim for victimisation would have failed. The document relied on by the claimant was not sent to the tribunal, as he alleges. It was included in the tribunal bundle only. In any event, it is difficult to see how this could amount to victimisation. Further, the decision to investigate and suspend the claimant was made before any protected act, even on the claimant's case. We are also satisfied that the reason for dismissal was conduct and nothing to do with any allegation of race discrimination.

159. The final issues relate to unlawful deduction of wages and holiday pay. Again, these issues were not dealt with in the claimant's statement but were clarified at the start of the claim. It does not seem to be disputed that the claimant owed the respondent the amount it deducted in its final payslip. It is also not disputed that the claimant had 25.5 hours holiday owing to him at the point of dismissal.

160. The only issue therefore seems to be whether or not the respondent was able to make such deductions pursuant to section 13 ERA. The respondent relies on clause 8 of the claimant's signed contract of employment which provides that such deductions are able to be made (R6). We conclude that this clause complies with the requirements of section 13(2) ERA. Accordingly, the claims for outstanding holiday pay and deduction from wages do not succeed.

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Employment Judge Pirani

9 February 2017

Sent to the parties on:

2nd March 2017

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For the Tribunal:

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