



EMPLOYMENT TRIBUNALS

Claimants: Mr W Davies
Mrs S Pye
Ms A McCarthy

Respondent: Veolia ES Merseyside & Halton Limited

Heard at: Liverpool

On: 8-12 October 2018
22, 23 January 2019
(in Chambers)

Before: Employment Judge Horne
Mr M Gelling
Mrs J E Williams

REPRESENTATION:

Claimants: In person
Respondent: Mr J Feeney, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimants were not unfairly dismissed.
2. The respondent did not discriminate against the claimants because of race.
3. The respondent did not victimise Mr Davies.
4. The respondent did not discriminate against Mr Davies because of disability.
5. The respondent did not discriminate against Mr Davies arising from disability.
6. The Tribunal has no jurisdiction to consider whether or not the respondent failed to make adjustments for Mr Davies. The claim was presented after the expiry

of the statutory time limit and it is not just and equitable for the time limit to be extended.

7. The Tribunal has no jurisdiction to consider Mr Davies' complaint of unlawful deduction from wages. The claim was presented after the expiry of the statutory time limit and it was reasonably practicable for the claimant to have presented his claim before the time limit expired.

8. In any event the respondent did not make an unlawful deduction from Mr Davies' wages.

9. The respondent did not make unlawful deductions from the wages of Ms McCarthy.

10. The Tribunal has no jurisdiction to consider whether or not the respondent made unlawful deductions from the wages of Mrs Pye during the period when she was acting up as foreman. Her claim was presented after the expiry of the statutory time limit and it was reasonably practicable for her to have presented her claim before time limit expired.

11. The respondent did not make unlawful deductions from the wages of Mrs Pye during the period when she was employed as a recycling assistant.

REASONS

Delay

1. The tribunal apologises to the parties for the delay in sending this judgment to the parties. Our panel was unable to reconvene to deliberate until January this year owing to the pressure of hearing other cases. The parties were informed of the delay at the conclusion of the hearing.

Complaints and Issues

The claim forms

2. By a claim form presented on 16 November 2017, Mr Davies raised the following complaints:
 - 2.1. Unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");
 - 2.2. Direct discrimination because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");
 - 2.3. Direct discrimination because of disability, contrary to the same provisions of EqA;

- 2.4. Discrimination arising from disability, contrary to sections 15 and 39 EqA;
- 2.5. Failure to make adjustments contrary to sections 20, 21 and 39 EqA; and
- 2.6. Victimisation contrary to sections 27 and 39 EqA.
3. In claim forms presented on 1 January 2018, Mrs Pye and Mc McCarthy raised the following complaints:
 - 3.1. Unfair dismissal contrary to the same provisions as above; and
 - 3.2. Direct discrimination because of race contrary to the same provisions as above.
4. All three claimants presented a further claim form to the Tribunal on 23 January 2018. This form contained a single complaint of unlawful deduction from wages, contrary to section 13 ERA.
5. At the start of the final hearing we spent some time clarifying the issues.

Unfair dismissal issues

6. We start with the complaint of unfair dismissal. The issues were:
 - 6.1. Could the respondent prove the sole of principal reason for the dismissal of each claimant?
 - 6.2. If so, was that reason one which related to that claimant's conduct?
 - 6.3. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?
7. Had the dismissal of any of the claimants been found to have been unfair, further issues would have arisen in relation to remedy.
8. Before moving on to the remainder of the claim, it is important to note that the complaint of unfair dismissal did not require us to determine whether or not any of the claimants had actually committed the misconduct of which they had been accused during the disciplinary process. The claimants expressly confirmed that they were not bringing a claim for damages for their notice pay. We quite consciously avoided making any finding about the claimants' guilt or innocence of the alleged misconduct.

Race discrimination issues

9. All three claimants complained of direct race discrimination.
10. Mr Davies is of dual British and Irish nationality. Mrs Pye has Irish nationality.
11. Ms McCarthy relies on two links to Ireland which she says are relevant to her protected characteristic of race. The first is that her ex-husband, though born in Britain, has Irish parents. The second is that she has kept his surname, which is commonly associated with Ireland. Her self-description gives rise to an issue particular to her: do her connections with Ireland amount to a protected characteristic of race? (Different considerations might arise if the respondent had mistakenly thought that Ms McCarthy was of Irish national origin or nationality, but Ms McCarthy never suggested that the respondent had made such a mistake.)

12. All three claimants contend that, because they are Irish (in the way we have described), they were treated less favourably in two different ways:
- 12.1. In a series of emails in 2013, Mr Jefferies made derogatory comments amount Irish people. These came to the attention of Ms McCarthy in 2015.
 - 12.2. Each of the claimants was dismissed.
13. In relation to the emails, we had to determine:
- 13.1. whether or not it was just and equitable to extend the time limit. (One factor relevant to that exercise was the extent of the delay. Did the limitation clock start to run from when Mr Jefferies sent the emails or from when the claimants found out about them?)
 - 13.2. whether or not they amounted to less favourable treatment of each of the claimants; and
 - 13.3. whether or not the treatment was because of the protected characteristic of Irish nationality.
14. So far as the dismissals were concerned, we had to ask ourselves, first, who had made the decision to dismiss. Once the decision maker was identified, we had to determine whether that person was significantly motivated, in the case of any of the claimants, by that claimant's Irish nationality (or other protected characteristic in Ms McCarthy's case).

Victimisation issues

15. The next set of issues relate to the complaint of victimisation, which is brought only by Mr Davies. It was common ground that Mr Davies had done a protected act by agreeing to act as a witness in relation to a grievance brought by a colleague. We shall refer to this colleague as "Mr W".
16. Mr Davies alleged that, because he had done this protected act, he was subjected to the following detriments:
- 16.1. An investigation was commenced into alleged misconduct;
 - 16.2. He was subjected to bullying during a meeting on 30 May 2017; and
 - 16.3. He was dismissed.
17. There was no dispute that Mr Davies had been subjected to a detriment in the commencement of the investigation and the decision to dismiss him. We had to decide whether he was also subjected to a detriment in the form of alleged bullying.
18. In the case of all of the detriments, we had to ask ourselves why the claimant was treated as he was. Was it because he had done the protected act? Or was it wholly for other reasons?
19. Finally, in relation to victimisation, we had to consider the time limit. So far as the dismissal was concerned, the claim had undoubtedly been presented in time. When it came to the other detriments, however, we had to decide whether they formed part of the same ongoing state of affairs as the dismissal. If they did not,

we would have to decide whether it was just and equitable to extend the time limit.

Disability discrimination issues

20. We next clarified the issues in relation to disability discrimination. This was another claim brought solely by Mr Davies. It was common ground that at all relevant times Mr Davies was disabled with the mental impairment of Asperger's. The respondent accepted that it at least ought to have known of Mr Davies' disability.

Direct discrimination

21. The complaint of direct discrimination involved two allegations of less favourable treatment, both arising out of an investigation meeting on 30 May 2017. Mr Davies alleged that the respondent had:

- 21.1. refused to permit an audio recording of that meeting; and
- 21.2. bullied him during the course of that meeting.

22. The first issue that arose in relation to the direct discrimination complaint was the time limit. Were the events of 30 May 2017 part of a continuing discriminatory state of affairs that lasted until a date for which the claim had been presented in time? If not, was it just and equitable for the time limit to be extended?

23. If the Tribunal had jurisdiction, it would then have to ask itself whether the alleged less favourable treatment occurred and, if so, what was the reason why the claimant was treated as he was? Was it because he had Asperger's or was it wholly for other reasons?

Discrimination arising from disability

24. Mr Davies also brought a complaint of discrimination arising from disability. The respondent treated him unfavourably by dismissing him. What the Tribunal had to decide was:

25. In reaching the decision to dismiss, was Miss Browning significantly motivated by the fact that the claimant had regularly and early been in the accommodation block at particular times of the day?

26. If so, did the claimant's regular presence in the accommodation block at those times arise in consequence of his disability?

27. In the event that the Tribunal answered those two questions in the affirmative, the respondent did not seek to justify the dismissal as being a proportionate means of achieving a legitimate aim.

Duty to make adjustments

28. The final strand of disability discrimination was a complaint of failure to make adjustments. Mr Davies relied on one provision, criterion or practice ("PCP"). This was the requirement of a foreman to interact with other staff. There was no doubt that such interaction was required as part of a foreman's role. The issues for the Tribunal were:

- 28.1. Did that PCP put the claimant at a substantial disadvantage compared to persons without Asperger's?
- 28.2. Was the respondent aware of that disadvantage?
- 28.3. Could the respondent have been reasonably expected to know about that disadvantage?
- 28.4. Was it reasonable for the respondent to have had to make the adjustment of providing "man management" training? (The respondent did not contend that it had actually provided such training).
- 28.5. When should the failure to provide such training be treated as having been "done" for time limit purposes?
- 28.6. Was the failure part of a continuing state of affairs that lasted until a date for which the claim was present in time?
- 28.7. If not, was it just and equitable to extend the time limit?

Wages issues

29. All three claimants complained that unlawful deductions had been made from their wages. There were a number of components to this part of the claim.

Were the claimants paid for all their basic hours?

30. We start with a complaint that is common to all three claimants. This related to the number of hours for which they were paid. Each of their contracts specified that their hours of work were "35.63 hours per week, but contractual overtime" in accordance with agreed roster. Their payslips recorded basic pay for 34.25 hours plus other payments. The Tribunal had to decide whether or not the claimants had been paid for all their hours worked.

31. The respondent accepted that, under this heading, Ms McCarthy and Mrs Pye had presented their claims within the time limit. Mr Davies accepted that he had not done so. His final pay date was 4 August 2017. In his case, therefore, we had additionally to consider whether it was reasonably practicable for him to present his claim within the statutory time limit and, if not, whether he presented his claim within a reasonable period afterwards.

Foreman's hourly rate

32. Mr Davies additionally complained that he was being paid at the wrong hourly rate. He relied on an alleged express term of his contract of employment. It was his case that, as a foreman, he was entitled to 50 pence per hour more than the hourly rate for a recycling assistant. We had to decide whether a foreman's hourly rate was pegged to a recycling assistant's hourly rate in that way, or whether the contract provided for a flat hourly rate for a foreman. In addition, we had to consider whether or not it was reasonably practicable for Mr Davies to have presented his claim within the time limit.

Acting foreman's rate of pay when not on shift

33. Mrs Pye also had a wages complaint unique to her. It related to a period of time when she had been acting up as foreman. For the days on which she actually worked, she was paid at the foreman's hourly rate. There were, however, days on

which she did not work but for which she alleges she was entitled to be paid at the foreman's rate.

34. So far as this part of Mrs Pye's claim is concerned, the respondent did take issue with the time limit. It was common ground that Mrs Pye stopped acting up as a foreman in about October or November 2016. We had to decide whether it was reasonably practicable for Mrs Pye to present her claim within the time limit and whether she presented her claim within such further period as we considered reasonable. If the Tribunal had jurisdiction, we had to decide whether the hourly rate was payable in respect of any periods of time when Mrs Pye was not actually working.

Evidence

35. We considered documents in an agreed bundle which we marked "CR1".
36. We heard oral evidence from four witnesses for the respondent. These were Mr McIver, Miss Browning, Mr Sears and Mrs Ellis. Each of the claimants gave evidence on their own behalf. They also called Mr Swift and Mr Wilkinson as witnesses.
37. In his closing arguments, Mr Davies made a submission that it had been unreasonable for Miss Browning to dismiss him, because she ought to have known of a close connection between Mr Jefferies and an individual (the Luton van driver) who featured heavily in the disciplinary allegations. Unfortunately, that point had not been put to Miss Browning during the course of her oral evidence. The Tribunal considered the possibility of recalling Miss Browning so that she could have a fair opportunity to answer. The respondent resisted that suggestion. Having considered the respondent's arguments, we agreed that Miss Browning should not be recalled. We gave oral reasons for our decision at the time. Our decision did not mean that Mr Davies was automatically barred from pursuing his argument. What it did mean, however, was that we had to bear in mind when considering the strength of his argument that Miss Browning had not had a fair chance to deal with it.
38. On 18 January 2019, shortly before the Tribunal reconvened to deliberate, Mr Davies sent an email to the Tribunal on behalf of all three claimants. Broadly speaking, the email and an attachment described an alleged data breach by the respondent in which personal data of the claimants had been disclosed to a third party. The respondent was not copied into the e-mail and had no chance to comment on the email. We considered the possibility of delaying our deliberations in order to give the respondent that opportunity. Our decision was that such a course would be incompatible with the overriding objective. There had already been substantial delay in reconvening the Tribunal because of the pressure of other cases. The Tribunal wished to avoid prolonging the case any longer than necessary. Moreover, it would have been disproportionate to delay our deliberation. The issue of whether there had been a data breach or not seemed to us to be of only marginal relevance to the issues we had to decide. If we were to take it into account without giving the respondent any say in the matter, there would have been a risk of unfairness. We therefore decided not to take the new material into account.

Facts

39. The respondent is a company with 130 employees. It provides waste management and recycling services to Local Authorities, including Halton Borough Council. Before the respondent took over the contract, the previous supplier of those services was Mersey Waste Holdings Limited (“MWHL”).
40. In 2002 Mrs Pye commenced employment with MWHL as a recycling assistant. Mr Davies is Mrs Pye’s son. He started as a recycling assistant in 2003. Both worked at the Picow Farm Household Waste Recycling Centre in Runcorn.
41. Mrs Pye is a citizen of the Republic of Ireland. Mr Davies has dual nationality, both British and Irish.
42. Ms McCarthy is Mr Davies’ aunt. She has kept her name from her former marriage. Her ex-husband is British but born to Irish parents. Ms McCarthy began her employment directly with the respondent on 7 January 2012. Initially she worked at the respondent’s Huyton site. She subsequently transferred to Picow Farm where she worked alongside Mr Davies and Mrs Pye.
43. The claimants’ pay was calculated, at least following transfer to the respondent, in a manner that was opaque to say the least. It took us a considerable amount of time simply to follow the internal logic of the respondent’s explanation. Here is how the claimants’ hours and pay were dealt with by the respondent’s payroll system.
- 43.1. The contract of employment for each claimant provided that their hours of work were “35.63 hours per week, plus contractual overtime in accordance with the attached roster”.
- 43.2. The rosters depended on the time of year. During the summer period, the longer daylight hours meant that the site could remain open for longer. Conversely, site hours were restricted during the winter period because of health and safety risks. Each period was exactly six months long. During each period, the recycling assistants and foremen worked to a four-week roster.
- 43.3. During the summer period, the claimants worked 50 hours during weeks 1 and 3 and 37.5 hours during weeks 2 and 4. This meant that their average actual hours worked during the summer was 43.75 hours per week.
- 43.4. If an employee worked more than 37 hours per week, they would be paid at a premium rate. Overtime rates would be time and a half or double time, depending on when the work was done. Confusingly, some overtime premiums were “enhanced” by adding additional notional hours worked at the basic hourly rate.
- 43.5. On the respondent’s payroll, the claimants’ pay was divided into four categories. These were “basic hours”, “enhancements”, “overtime at 1.5” and “overtime at 2.0”.
- 43.6. The total number of hours worked in every week exactly matched the sum of the basic hours and the hours worked at the two premium rates. For example, in week 1 during the summer:

- 43.6.1. basic hours were recorded as 39.75,
- 43.6.2. overtime at time-and-a-half was 9.75 hours and
- 43.6.3. overtime at double time was recorded as 0.5 hours.

That makes a total of 50 hours worked.

- 43.7. During the summer months, the average of all the “basic hours” for each week across the whole 4-week roster was 37.
 - 43.8. The “enhancements” category was a device to allow for hours worked to be paid at enhanced rates. So, for example, in week 1, a total of 12 hours was notionally assigned to the “enhanced” category, but this did not mean that an additional 12 hours had been worked. What it meant was that some of the 50 hours that had actually been worked had attracted additional payment.
 - 43.9. Across the whole summer roster, average weekly enhancements were 8.31 hours.
 - 43.10. The respondent then used a formula to devise a notional total number of paid hours. This was quite different from the actual number of hours worked. It reflected overtime and enhancements. So, staying with week 1 in the summer, the total number of notional paid hours was 67.38, as against the actual number of 50 hours worked. The figure was arrived at by multiplying the 9.75 overtime hours by 1.5, adding 0.5 hours multiplied by 2.0, adding to that sum the 39.75 basic hours at single time, and finally adding the 12 hours of enhancements.
 - 43.11. The average notional paid hours per week for the summer across the whole 4-week roster was 55.56.
 - 43.12. For the winter months the process worked much the same. Here, because of the shorter opening hours, there was much less overtime to be worked. There were still enhancements, however, to reflect work done at increased rates at particular times of day or weekends. No hours were separately recorded as having been worked at the double time premium rate.
 - 43.13. In winter, the average weekly hours worked were 36.75. The total notional paid hours were 45.56. The average hours in the “basic hours” category were 34.25.
 - 43.14. The average of the hours recorded in the “basic hours” category across the year as a whole can be determined by adding the summer hours figure of 37 to the winter hours figure of 34.25 and dividing by 2. The resulting sum is 35.63. That is the same figure for basic hours as is found in the claimants’ contracts.
44. So far, the respondent’s pay arrangements have an internal logic, albeit a complicated one. Unfortunately, this method of calculation could not be discerned from the pay statements that the claimants received. In their payslips, their pay was divided into “salary” and three categories of “contractual overtime”. The “salary” element in the payslips was not broken down into hours and hourly rates. It was merely expressed as a single amount. By dividing that amount by their

hourly rate of pay, the claimants worked out that their “salary” element of their pay had been based on 34.25 hours per week.

45. It appeared to all the claimants and their trade union that their basic pay, apparently calculated on the basis of 34.25 hours per week, was less than their contractual 35.63 hours for which they ought to have been paid. They therefore sought an explanation.
46. In response to the claimants’ queries, Mr McKnight, Senior HR Business Partner, offered an explanation which gave some but not all of the methodology we have set out above. Explaining the difference between the 34.25 hours in the payslips and the average weekly “basic pay” element of the actual pay calculation, Mr McKnight stated:

“Picow Farms rosters require a basic working week of 37 hours in the summer and 34.25 hours in winter. Our payroll system automatically sets the basic hours at 34.25 hours, therefore during summer the system applies an additional 2.745 hours to the Enhanced Hours due in the same week.”

47. What this explanation means to us, knowing what we do about the actual pay calculation, is that the payslips were misstating the number of hours’ work for which the claimants were receiving basic pay. During the summer, on average, the payslips made it look as if they were working 34.25 hours at the basic rate when, on average, they were actually working 37 hours at the basic rate. Basic pay for the additional 2.75 hours was hidden away in the “contractual overtime” category on the pay slips when, actually, it was not overtime at all.
48. The claimants did actually receive their pay at the proper rate for all the basic hours that they worked.
49. The rates of pay for recycling assistants and foremen were set with effect from April each year. The following table shows the hourly rates for various years:

Year	Foreman (£)	Recycling Assistant (£)
2013	7.18	6.76
2014	7.34	6.91
2015	7.55	7.06
2016	7.63	7.20
2017	7.73	7.50

50. The table shows that the difference between the foreman’s rate and the recycling assistant’s rate was never exactly 50 pence. From 2015 to 2017 the margin decreased from 49 pence to 23 pence per hour. This is likely to have reflected the increase in the National Minimum Wage.

51. Mr Davies' original statement of terms from MWHL fixed his pay at "£5.5295 per hour". It did not peg his pay to that of any other role.
52. Amongst the many items of household waste that were recycled at Picow Farm were electronic equipment and textiles. Electronics such as radios and computers were collected in a large skip known as the "WEEE skip". There they remained until the skip was removed. There was a separate container for televisions. Textiles were deposited in a separate container at a different part of the site.
53. Recycling assistants were provided with facilities in what was known as the "accommodation block". Inside the accommodation block was a small communal area with facilities for making hot drinks, a changing room and a toilet. Members of the public were not allowed in the accommodation block, which was capable of being locked to keep them out.
54. Management of waste electrical equipment is heavily regulated. The respondent and its predecessors held a waste management licence which had numerous conditions relating to the management of such waste. Breach could result in revocation of the licence. This was not mere red tape. If potentially faulty items of electrical equipment were allowed to be re-used by members of the public, it presented a risk of fire or electric shock.
55. For reasons such as these, the respondent had strict rules preventing the sorting, segregation and removal of waste. Members of the public were not allowed to remove items from the skips. Whilst recycling assistants were expected to remove contaminants (items that had been placed in an incorrect skip), they had no business to remove from skips items that had been correctly placed there.
56. Over the years recycling assistants were warned of the potential consequences of segregation and removal of waste. Amongst the various warnings given to them were the following:
- 56.1. On 1 September 2008 the Managing Director of MWHL specifically reminded all staff of "unauthorised activities" which would "likely result in the dismissal of employees involved". The activities included "staff segregating materials for sale" and "staff removing waste items from site".
- 56.2. Ms McCarthy's job description from the respondent included, at paragraph 6, that she was responsible for "ensuring that unauthorised persons are not allowed to sort, disturb or interfere with any waste on the centre, request such persons to leave the centre and seek further assistance from the Operations Manager and/or the police where required".
- 56.3. On 10 May 2003 the respondent's Operations Director again warned that staff segregating materials for removal or staff removing waste items would "likely result in the dismissal of employees involved".
- 56.4. On 18 June 2016, Mr Jefferies informed all staff that there had been disciplinary action taken against colleagues and emphasised (with original type-setting) **"YOU ARE NOT PERMITTED TO REMOVE ITEMS FROM SITE"**.

57. By the time of the events with which we are concerned, all three claimants believed that if they were caught helping third parties to remove items from the site they would be dismissed.
58. From time to time the respondent and MWHL granted “franchises” to individuals permitting them to deal with items deposited on site. The franchisees were well known to staff and managers on site. If they abused the terms of their franchise it could be revoked.
59. At times, the job of recycling assistant and foreman could be challenging. Members of the public did not always cooperate with site rules. One problem was illegal tipping. Tradesmen and women were not allowed to bring their vehicles onto the site without a permit for which they had to pay. Human nature being what it is, they would attempt to deposit waste items for free by parking their vehicle outside the site and carrying items in manually. Another frequently encountered problem was the removal of waste items of potential value. The WEEE skip and television containers were prime targets. If a member of staff challenged a member of the public, they risked being ignored or even abused.
60. One of the main defences that the respondent and MWHL had against activities of this kind was CCTV. There was a camera permanently monitoring the area which included the WEEE skip. The same camera also showed comings and goings in and out of the accommodation block. The respondent did not have sufficient management resource to monitor the cameras in real time or routinely check every minute of footage. Rather, they relied on the recycling assistants and foremen to report incidents, following which a decision would be made whether or not to review the CCTV. The mechanism by which incidents were reported was known as “RIVO”. This was an electronic system with which Mr Davies was familiar. Information could be input onto RIVO directly from the computer based on site. If a member of staff was, for any reason, unable to use the computer, they could log the incident on a hard copy RIVO form. There was a photocopier on site so that, if the stock of RIVO forms was running low, they could be replaced.
61. Both the hard copy form and the computerised version contained fields in which the operator was expected to enter information about the identity of anyone involved in the relevant incident. Amongst the information prompted by these fields was a description and the registration number of any vehicle that had been involved.
62. It was comparatively rare for management to take enforcement action based on RIVO reports. They would often be filed whilst the relevant manager waited to see if a pattern had emerged. From time to time, information was passed to Halton Borough Council to take enforcement action. The police were also informed about incidents of theft but the impression given to the respondent’s managers was that the police treated it as a low priority.
63. Mr Mclver, Operations Manager, tried to visit each site about once per week. He was not always successful. The Area Supervisor visited more frequently but his visits were still intermittent. There was no established system in place for the manager or supervisor proactively enquiring of the foremen or recycling

assistants whether there were identifiable members of the public carrying out illegal activities or otherwise making a nuisance of themselves. The onus was on the recycling assistants and the foremen to raise reports on RIVO. In our view this was a missed opportunity. Proactive management support could have helped to identify problem members of the public and to view relevant CCTV footage at a much earlier stage. It could have prevented staff at the Picow Farm site from witnessing members of the public acting with apparent impunity. The less management interference there was in the illegal activities of the public on site, the greater the temptation to think “if you can’t beat them, join them”.

64. In 2009 a number of employees, including Mr Davies, brought a civil claim for holiday pay with the assistance of their trade union. The claim was successful. Mr Davies did not experience any repercussions.

65. At some stage in Mr Davies’ employment, he informed MWHL’s Human Resources that he had been diagnosed with autism. On 21 June 2010, Dr Helliwell, accredited specialist in occupational medicine, reported to Mrs Ellis of Human Resources about Mr Davies’ diagnosis. Describing the claimant’s condition, she observed that Mr Davies had

“preferences about how he takes in information, processes information, learns new information and interacts with other people. His preferences are to be very internally motivated, very internally reliant, and avoiding social contact or other communication contacts if he can”. She recommended, “Looking at...needs for any particular type of training that he undertakes (e.g. safety or manual handling), and taking his preferences for communication styles into account if there is any important management information that needs to be cascaded to him”.

66. In Dr Helliwell’s opinion, Mr Davies could function normally in a work environment.

67. From 2011 to 2013 Mr Davies had a series of annual appraisals with Mr Jefferies. At some point during this period he was promoted to the role of foreman. His April 2012 appraisal was particularly glowing. There was no identification of any difficulty at work at that stage.

68. As part of the claimant’s development as foreman, he undertook training in WEEE management. Mr Davies familiarised himself with the WEEE handbook which included ten rules. The last of these was:

“Under no circumstances can WEEE items leave site other than by your Veolia WEEE scheme approved authorised treatment facility.”

69. In October 2014, the claimant had a performance review meeting with his manager, Mr Carroll. He was rated “very good” against every criterion. They discussed what training and development needs Mr Davies would have for the forthcoming 12 months. Two training areas were identified. Neither of these included people management.

70. On 25 November 2015, Mr Davies had a further performance review, this time with Mr Kieran Flynn. Again, he was rated “very good” in all areas. They did, however, identify “man management development, in particular dealing with

difficult individuals”, as an agreed area for improvement. He did not ask for further training under this heading although he did ask for “management support”. The training that he did request related to health and safety and potential progression to the role of Area Supervisor. There is no evidence that Mr Davies mentioned his Asperger’s at this meeting. Nor is there evidence that he gave any hint that his need for development in dealing with difficult individuals was related to any general difficulty with social interaction. It is hard to know exactly what Mr Davies told Mr Flynn partly because of the passage of time and partly because we have not heard evidence from Mr Flynn. We do not know what training opportunities were available at that time and whether they included “man management” training. Nor do we know whether any such training would have addressed any particular difficulties experienced by people with Aspergers in dealing with difficult individuals.

71. Mr Flynn reviewed the claimant's performance again on 6 August 2016. It was noted that the claimant had received no additional training. There was no specific complaint about people management training and no follow-up to the claimant's identified need for “management support” in dealing with difficult individuals. The claimant's ratings ranged on this occasion from “satisfactory” to the highest rating of all (“exceeds targets”). It appeared to Mr Flynn that Mr Davies seemed slightly demotivated due to his not yet having progressed to the Supervisor role.
72. Mr Davies never raised a grievance about the respondent's failure to provide him with suitable training.
73. In October 2016 Mr Flynn left the respondent's employment.
74. We now rewind the clock to deal with some events that principally concern Ms McCarthy. In about November 2014, Ms McCarthy opened a desk drawer to find an envelope containing some printed emails. It has never been established how the emails got there. Amongst the emails in the envelope were the following:
 - 74.1. A thread from 22 April 2013 in which Mr Jefferies referred to Ms McCarthy as “the Dwarf”.
 - 74.2. A thread from 18 July 2013, apparently relating to some vandals who had started a fire, in which Mr Jefferies had written “time to shoot the pikeys”.
 - 74.3. A thread on 29 July 2013 containing a conversation about visitors to the respondent's Wirral sites. In answer to a suggestion that visitors be required to hold a driving license, Mr Jefferies added “and not be Irish...”. Later that day he added “all in jest 😊 #dignity at work”.
 - 74.4. A thread on 20 August 2013 relating to an Irish colleague called Gerry. Mr Jefferies made a light-hearted observation that Gerry might have ordered “shirts” rather than “shorts”. He signed off his email “#Irish”.
 - 74.5. Another thread about Gerry, this time from 31 August 2013, referring to him as “the lepricorn” [sic]. This time the email ended with “#potato”.
75. Ms McCarthy was offended at the contents of the emails, especially the reference to her as “the Dwarf”. It is unclear what step she took next. What we do know is that shortly afterwards Mr Jefferies faced a disciplinary investigation. By letter dated 16 November 2014 he was informed that a decision had been taken not to

take formal disciplinary action. Instead he was given strong management advice. He was reminded of respondent's expectations of senior managers and informed that his emails "could have been construed as inappropriate, offensive and...outside of the IT acceptable use policy and a breach of the Dignity at Work policy". It is unclear whether the e-mails about which Mr Jefferies was warned were the same e-mails that Ms McCarthy discovered.

76. Mr Jefferies' inappropriate language was not the only concern. An investigation was also carried out into how the e-mails had come to be leaked. The investigation was conducted by Miss Browning, Senior Operations Manager. On 12 February 2015 Ms McCarthy met with Miss Browning to discuss the matter. Ms McCarthy asked to "tape record" the meeting but Miss Browning refused her request. It is obvious that, by this time, some e-mails had come to light. We also know, however, that Ms McCarthy was holding on to some e-mails which Miss Browning had not yet seen. Miss Browning repeatedly asked her if she would be prepared to disclose the content. Ms McCarthy's reply was that the emails were with her solicitor. She added that she was contemplating some sort of civil claim.
77. The events of this meeting demonstrate two things to us. First, the respondent had a practice of not allowing audio recording of investigation meetings. This practice was applied to at least one person who did not have Asperger's. The other significance of this meeting is that it shows Ms McCarthy had taken legal advice about the content of the emails by February 2015.
78. Ms McCarthy raised a grievance in relation to the emails but withdrew it on 9 March 2015.
79. For a number of years, the respondent encountered difficulty with a gentleman to whom we shall refer as "Mr M". He and his family had been illegally tipping at the respondent's sites and stealing items that had been deposited there. Their activities were reported to the police, following which Mr M and one other person were prosecuted. They pleaded guilty and received conditional discharges. Part of the evidence in the case was a statement from Ms McCarthy of what she had witnessed. After Mr M's court appearance, Ms McCarthy received comments from users of other sites that she was a "grass". Afterwards she was more reluctant to report illegal activities on site.
80. On 19 December 2016 Ms McCarthy attended a meeting to discuss a grievance that she had brought. The subject matter of the grievance is not especially relevant, but it is clear that it badly affected her health. It also affected her relationship with her partner at home. She began taking antidepressant medication and was absent from work from December 2016 until April 2017.
81. On 9 February 2017, Mr Davies made an entry on the RIVO system. This RIVO was to feature in the subsequent disciplinary investigation because it was Mr Davies' case that it related to the driver of a red Ford Fiesta vehicle. In the RIVO report, Mr Davies described how a member of the public had asked he could buy a television and had been told that televisions were not for sale and that people were not allowed to take them. When his colleague, Mr W, checked the TV

container a few minutes later, the television had gone. Mr Davies did not provide the registration number, make, model or any description of the vehicle.

82. On 3 February 2017 an incident took place involving Mr W, a recycling assistant at Picow Farm, and Mr Jefferies. It is not necessary for us to relate the precise details of the incident. At this stage it is sufficient to note that Mr W subsequently raised a grievance about the incident and, following an investigation, Mr Jefferies received some further management advice about his conduct.
83. On 7 April 2017 Mr Unsworth at Halton Borough Council sent an email to Mr Kevin Furlong, the respondent's Area Supervisor. In his email, Mr Unsworth expressed concern about the activities of the driver of a large white van at the Picow Farm site. Attached to the email was a series of photographs which Mr Unsworth explained in the narrative section of his email. In one of the photographs it could be seen that a second white van (which came to be known as the "Luton van") was seen parked near the site. The driver of the first van had been seen going to the Luton van with some bags of items apparently taken from the textile bank. Mr Unsworth asked Mr Furlong to investigate.
84. On receipt of the email Mr Furlong viewed the relevant CCTV footage and made enquiries of site staff. He managed to establish the identity of the first van and was reassured by staff that the driver had an innocent explanation for his activities. Looking at the CCTV, Mr Furlong discovered, however, that the Luton van driver had been behaving suspiciously. He had been removing bags of items from the site and loading them into the Luton van. More worrying from Mr Furlong's point of view was the fact that Mr W could clearly be seen helping him. Mrs Pye was present and had done nothing to prevent it or report it. Mr Furlong made all of these observations on or before 19 April 2017, when he replied to Mr Unsworth's enquiry.
85. On 3 May 2017, Mr W raised a formal grievance concerning the event in February 2017 involving Mr Jefferies. We have not seen a copy of the written grievance. In particular, there is no evidence about whether or not Mr W mentioned the names of any witnesses in his initial grievance letter.
86. On 7 May 2017, Mr Furlong emailed Mr Jefferies and Mr McIver with his analysis of the CCTV footage. He attached numerous still images with running commentary. According to the commentary, which was consistent with the images, Mr W had been opening the main gate so as to allow the Luton van driver to leave site with two bags. The Luton van driver had been into the accommodation block whilst Mr W was inside and had emerged later on with a drink in his hand.
87. In a separate event on 7 May 2017, an anonymous note was found addressed to Mr Jefferies and Mr McIver. It stated:
- "Check out [account name ending 0711] on eBay...for list of the things for sale. This is [Mr W]'s partner, [Mr W's partner's first name]. All stuff robbed from site. Ed [Davies] is a follower cos he's in on it."
88. Mr Jefferies immediately requisitioned footage from a selection of dates in April 2017. He also investigated the eBay account ending 0711. There he discovered sales of electrical goods to the total value of £3,761 of which approximately £800

had been during the past year. The electrical goods were of the kind that were routinely deposited in the WEEE skip. One of the followers of the eBay account was a second account called "e_pye1981". "Pye" was Mr Davies' mother's name. 1981 was the year of his birth.

89. Mr Mclver set about reviewing the CCTV footage. He uncovered numerous examples of Mr W assisting the Luton van driver to remove and segregate electrical items. They then drove away together in the Luton van.
90. There was also extensive footage of Mr Davies that caught Mr Mclver's interest. This included:
- 90.1. At 18:37 hours on 20 April 2017, Mr Davies could be seen looking through the WEEE skip and lifting items whilst at the same time using his mobile phone. Mobile phones were not permitted to be used in the vicinity of the skips.
- 90.2. At 19:07 on the same day Mr Davies could be seen having a conversation with the driver of a red Ford Fiesta. Mr W was also involved in the conversation. The red Fiesta driver entered the accommodation then walked to the WEEE skip. He jumped into the WEEE skip and looked for items. He could be seen placing a TV in the boot of his vehicle before entering the accommodation building where Mr Davies and Mr W were present.
- 90.3. At 19:22 hours the same day Mr Davies and the red Fiesta driver walked to the WEEE skip. Mr Davies was not wearing a hard hat. The Fiesta driver sorted through the WEEE skip without interference before returning to the accommodation directly behind Mr Davies.
- 90.4. At 19:42 hours on the same day, Mr Davies went to the TV container followed by the red Fiesta driver. By this time, Mr Davies had finished his shift and got changed. He was not wearing any personal protective equipment. He had no need to inspect the cabinets.
- 90.5. At 20:02 hours the same day Mr Davies left the site carrying what appeared to be a large box.
- 90.6. At 18.24 hours on 23 April 2017, Mr Davies could be seen removing a box from the WEEE skip and taking it into the accommodation block. At 20.03 hours the same evening, just before he left the site, he took what appeared to be the same box out of the accommodation block.
- 90.7. At 19.40 hours that evening, Mr Davies, wearing his own clothes and no PPE, entered the TV container with the driver of the red Fiesta. He emerged from the TV container and went to the WEEE skip. There he was joined by the red Fiesta driver. Both were observed talking together very comfortably. Mr Davies could be seen lifting items whilst the red Fiesta driver continued to sort through the WEEE skip. (Contrary to what Mr Davies was later to assert, the red Fiesta driver was not following Mr Davies around: Mr Davies was also following him.) Mr Davies could be seen walking towards the red Fiesta driver. They were both looking into skips and talking at the

same time. Mr Davies then walked back to the accommodation whilst the Fiesta driver continued to sort through waste.

- 90.8. At 19:44 hours on the same day the red Fiesta driver was seen entering the accommodation block and remaining there for eight minutes. Mr W and Mr Davies were present at the time..
- 90.9. At 19:34 hours on 24 April the red Fiesta driver could be seen leaning into the claimant's vehicle as the claimant deposited a large red holdall into it. One minute prior to this the red Fiesta driver could be seen searching through the WEEE container and removing an item and taking it into the accommodation block
- 90.10. At 19:43 hours on 28 April 2017, Mr Davies could be seen in conversation with the red Fiesta driver at the side of a car which had been previously observed to contain two deposited televisions. Four minutes later, the red Fiesta driver and Mr Davies walked into the TV container together and then to the WEEE skip. Mr Davies was not wearing his PPE.
91. On 11 May 2017, Mr Davies reported that he had had an accident on site. According to his accident report, he had pulled his back whilst lifting a bag out of the rubble skip. He stated that the accident had happened at 5.15pm on 9 May 2017. By the time Mr McIver learned of the accident report, he was already deeply suspicious about the claimant's activities. He was not prepared to take the claimant's report of the accident at face value. He therefore examined the CCTV footage of the site for the period spanning 20 minutes either side of the alleged accident time. He could not see anything that matched the claimant's description of the accident.
92. On 15 May 2017 Mr W attended a grievance investigation meeting to discuss the incident involving Mr Jefferies. At this meeting he named Mr Davies as a witness. Mr Davies was invited to an interview which he attended on 22 May 2017. He told the investigation his version of what had occurred.
93. On 23 May 2017, Mr Davies attended work and was informed that he was being suspended. His suspension was confirmed by letter the same day. According to the letter, his suspension was pending "investigations concerning your alleged involvement in the segregation, removal and theft of items/company property from Picow Farm HRWC. Furthermore, of fraudulent accident reference and recording of an alleged incident on Tuesday 9 May 2017".
94. Disciplinary procedures were also commenced against Mr W. During the course of the disciplinary investigation Mr W resigned.
95. We are now in a position to make a positive finding of fact about the reason why an investigation was commenced in relation to Mr Davies. Mr McIver was simply following the evidence. Halton Borough Council had alerted Mr Furlong to the Luton van. Investigation of the van and related CCTV footage had led them to Mr W. A tip-off, which must have occurred prior to 8 May 2017, had led Mr Jefferies to investigate the eBay accounts. They put Mr Davies in the frame. It was no more than a coincidence that Mr Davies was suspended the day after he was interviewed for Mr W's grievance. By the time Mr W had named Mr Davies as a witness in his grievance interview, Mr Davies' eBay activity had already been

highlighted. The decision to begin the overall investigation had absolutely nothing to do with either Mr W's grievance or Mr Davies' part in it. The decision to include Mr Davies in the remit of the investigation had nothing to do with Mr Davies being nominated as a witness.

96. Mr Davies was invited to an investigation meeting which, following a postponement, took place on 30 May 2017.
97. The claimant attended the meeting accompanied by Mr Mike Swift, his trade union representative. Mr Mclver conducted the meeting with support from Mrs Ellis and a notetaker.
98. During the course of the meeting, Mr Mclver questioned Mr Davies persistently about his version of how the accident happened. On a number of occasions he put to the claimant that his account was inconsistent with the footage. Mr Swift intervened and requested the footage for the whole day. Ultimately it was agreed that Mr Mclver would look at the footage for the afternoon of 9 May 2017 and that the investigation into that particular allegation would be adjourned in the meantime.
99. The meeting then turned to the allegation of removal and segregation of items. This involved playing to Mr Davies numerous extracts from the CCTV footage. Each clip took several minutes to find and get ready to display. As a result, the meeting lasted for several hours. Eventually they ran out of time without having completed the viewing of the footage. They agreed to reconvene the meeting on 6 June 2017.
100. During the course of the meeting, the claimant was asked about Mr W's partner's eBay account. Mr Davies denied all knowledge of the account and denied having followed it. He initially stated that he did not know the name of his own eBay account but confirmed that 1981 was the year of his birth. He denied knowing that Mr W was given a lift to work in the Luton van. He said he was aware of the red Fiesta driver and that he had verbally reported him to Mr Jefferies. Initially he stated that he could not email his reports because he did not have access to e-mail. This explanation was untrue: later in the interview Mr Davies confirmed that he could have emailed the reports. Mr Davies also said that he had reported the red Fiesta driver using RIVO. On his behalf, Mr Swift said that Mr Davies had reported the red Fiesta driver to the "supervisor" (who at that time was Mr Furlong) . Later, Mr Davies added that he had informed Mr Flynn.
101. There is a dispute about whether, at this meeting, Mr Mclver asked questions in a bullying manner. There are detailed notes of the meeting but they do not capture the body language or tone of voice of the people concerned. Mr Swift has given his impression of Mr Mclver's manner. Here we have to be careful of the weight we attach to Mr Swift's subjective impression. By the time of the interview, Mr Swift had already emailed the respondent's parent company's Chief Executive to complain about the respondent's treatment of Mr Davies and Mr W. That is a highly unusual step. It suggests to us that Mr Swift shared his member's sense of grievance so passionately that it had affected his sense of proportion. We also bear in mind, when trying to discern how Mr Mclver behaved, that we are looking

back over events that took place approximately six months before the claim was presented.

102. Doing the best we can, we consider that there is evidence that Mr Mclver adopted a heavy-handed approach to asking Mr Davies about the accident on 9 May 2017. It would have been relatively straightforward for him to widen the scope of his CCTV footage review or ask for clarification about the time of the accident before accusing Mr Davies of having fraudulently reported it. Otherwise, from the notes of the meeting it appears that Mr Mclver's questions were appropriate. To the extent that any bullying occurred in this meeting, we are satisfied that it was not at all motivated by the fact that Mr Davies had Asperger's, nor was it anything to do with the fact that the claimant had agreed to be a witness to Mr W's grievance. The much more likely explanation for any overbearing manner, in our view, is that Mr Mclver already had a deep mistrust of the claimant. His mistrust was based on the claimant's apparent dealings with the red Fiesta driver as seen on the CCTV footage, together with his activities on eBay. When Mr Mclver's selected 40 minutes of CCTV footage did not bear out Mr Davies' report of the accident, Mr Mclver was naturally inclined to disbelieve him.
103. At no point during this meeting did Mr Davies ask for an audio recording.
104. The reconvened meeting took place on 6 June 2017. Prior to this meeting Mr Davies did make a request for an audio recording. Mrs Ellis refused the request. Her refusal had absolutely nothing to do with the fact that the claimant has Asperger's. She believed that it was sufficient for contemporaneous notes to be taken by a notetaker. This approach was entirely consistent with Miss Browning's earlier refusal to let Ms McCarthy record her meeting.
105. By the time of this meeting, Mr Mclver had looked at more extensive CCTV footage of 9 May 2017. He had spotted something that was consistent with the claimant's version of his accident. At an early stage in the meeting Mr Mclver agreed to dismiss the allegation of fraudulent accident reporting.
106. The claimant's companion at this meeting was Ms Pat Grant. She handed to Mr Mclver a handwritten letter, apparently written by the Luton van driver. The author confirmed that he visited the site almost every morning "for a coffee and a chat" and gave a lift to Mr W to work. He said that he had been a franchisee in the past and knew a lot of the management team, including Mr Jefferies and Mr Stuart Gwilliam. It was asserted in the letter that these two managers had both had the use of the Luton van driver's caravan in North Wales. The letter did not make any mention of removing items from the site, nor did it suggest that anybody was aware that such a practice was going on.
107. During the meeting, Mr Davies was asked further questions about the Luton van driver and the red Fiesta driver. He said, "They are always on the site and have been coming on for years. They know all the managers as well". He added, "They know everyone. They were coming onto the site even before I started. The older guy talks to Anita a lot. I have no control over these two".

108. Pausing there, it is common ground that “Anita” must have been a reference to Ms McCarthy. It is also undisputed that the Luton van driver was older than the red Fiesta driver.
109. In his oral evidence to us, Mr Davies denied that he had said these words at this meeting. He said that he had mentioned an older person who had spoken to Ms McCarthy, but he was not talking about either the Luton van driver or the red Fiesta driver. Rather, he was referring to an entirely different member of the public to whom we shall refer as “Mr E”. We do not accept this part of Mr Davies’ evidence. It is quite clear from the surrounding questions and answers in Mr Davies’ interview, together with the undisputed evidence, that “the older guy” must have been the Luton van driver.
110. Mr Davies continued to assert that he had told everybody he could about the red Fiesta driver and nothing had been done. Mr Mclver countered by pointing out that Mr Davies had not told him. He continued to deny any knowledge that the 0711 eBay account belonged to Mr W’s partner.
111. By a letter dated 23 June 2017, Mr Davies was invited to a disciplinary meeting which ultimately took place on 11 July 2019. He faced two disciplinary allegations. These were, essentially:
- 111.1. That he had personally segregated and removed items from the WEEE skip; and
- 111.2. That he had been knowingly involved in segregation, removal and theft of items by third parties.
112. In anticipation of the disciplinary meeting, Mr Mclver prepared a written statement of case and Ms Grant prepared a statement of case on behalf of Mr Davies. Part of Ms Grant’s statement of case was an explanation of the eBay account. Ms Grant asserted that she had spoken to Mr W’s partner. The 0711 eBay account was indeed hers and she had an innocent explanation for it. No statement from Mr W’s partner herself was provided. The reason given was that she had had a heart attack and was in hospital. Mr Grant quite understandably did not want to put her member and his partner under any pressure. Equally understandably, no attempt was made to interview her by anyone conducting the disciplinary investigation.
113. The disciplinary investigation was chaired by Miss Browning. She had had no prior involvement in the case. With her were Mrs Ellis for HR support and Mr Mclver who presented the management case. Mr Davies was again accompanied by Ms Grant.
114. The disciplinary hearing lasted approximately an hour and a quarter. Mr Davies was asked further questions about how he had reported the activities of the red Fiesta drive and Luton van driver. It was at this point that he mentioned specifically the RIVO in February 2017 which we have described. Mr Davies mentioned two further people to whom he had made reports. In addition to his supervisor (Mr Furlong), Mr Flynn and Mr Jefferies, he also mentioned Mr Carroll and Mr Quinn. (We do not know whether there was follow-up to the claimant’s assertion that he had made reports to these last two people. None of the respondent’s witnesses were asked about it in cross examination). Mr Davies

was asked about footage which appeared to show that he had removed a radio and taken it into the accommodation block. Mr Davies replied that he intended to use it as a radio for the office. He added that he was intending to have the radio PAT tested. This struck Miss Browning as suspicious because the Luton van driver had been present in the accommodation block at the time Mr Davies brought the radio inside. Miss Browning asked Mr Davies why he was allowing the Luton van driver into the accommodation block at all. Mr Davies initially replied, "I can't stop him". When it was put to him that he could lock the door, Mr Davies replied that he would do so. Mr Davies denied that he could have seen the red Fiesta driver bringing items into the accommodation block. Miss Browning asked some follow-up questions about the 9 February 2017 RIVO. She asked him why he had not put any details of the perpetrator onto the system even though he knew who he was. Mr Davies replied, "I should have put more information on, yes. If I had more training that would have helped". He later confirmed that he had been trained on how to fill in RIVO forms.

115. The disciplinary meeting reconvened on 17 July 2017. This time the meeting lasted 3½ hours. It was attended by the same group of people. Mr Davies was asked about the footage showing him appearing to remove a box on 23 April 2017. Mr Davies said that the box was an empty box from a burglar alarm system and that he was taking it to the accommodation block so that he could take a photograph of it with a view to buying a similar system for his own home. Miss Browning asked him why he did not simply photograph the box where he found it, to which Mr Davies replied, "it was just because the sun reflects off it". Miss Browning found that answer to be suspicious because it was clear from the footage that the area where the claimant had found the box was in the shade. When asked whether he was carrying the same box out of the site later that day, Mr Davies replied that it was actually his towel. Miss Browning thought it looked more like a box.
116. Miss Browning took Mr Davies through the remainder of the footage. She repeatedly asked him why he thought the red Fiesta driver would take items into the accommodation block rather than put them directly in his car. Mr Davies' explanation was that he thought that the red Fiesta driver was taking advantage of his routine. Miss Browning did not accept that explanation. She could tell from the footage that the red Fiesta driver was not just searching for items when Mr Davies was in the accommodation block. He was doing so when Mr Davies was outside with him. She thought that Mr Davies was deliberately turning a blind eye.
117. Following the reconvened disciplinary meeting, Miss Browning made further enquiries. First, she asked Mr Mclver to interview Mr Jefferies to see if Mr Davies had reported the Luton van driver to him or any other manager in the past. It appears that Mr Mclver did not actually interview Mr Jefferies, but did obtain a brief signed statement from him. The statement denied knowledge of any dialogue with Mr Davies in relation to the Luton van driver. He said that he had not witnessed that individual on site during his visits for many years.
118. It does not appear that Mr Mclver asked Mr Jefferies any questions about his close connection with the Luton van driver, and in particular whether he had

rented a caravan from him. The most likely explanation is that Mr McIver had already discounted the entirety of the Luton van driver's letter. He knew from the CCTV footage that the Luton van driver had been visiting the sites for considerably more than "a cup of coffee and a chat". Nevertheless, in our view this was a missed opportunity. The closer the connection between Mr Jefferies and the Luton van driver, the more likely it would be that a senior manager was aware of his activities. That in turn would add some credibility to Mr Davies' explanation for why he had not reported the Luton van driver's behaviour when he witnessed it.

119. Miss Browning also obtained a brief statement from Mr Furlong. In an email dated 18 July 2017, Mr Furlong confirmed that neither Mr Davies nor Mr W had approached him to report any white box van nor any red car as being implicated in thefts from site.
120. Having gathered the evidence, Miss Browning set out making a decision. In her opinion the CCTV footage clearly demonstrated that Mr Davies had a friendly relationship with both the Luton van driver and the red Fiesta driver. He appeared to welcome them on site and spend a substantial amount of time with them in the office. He had allowed the red Fiesta driver to look into his car. Miss Browning considered that Mr Davies had been very evasive about the relationship between those two drivers and Mr W.
121. The footage showed to Miss Browning that Mr Davies had been himself rooting through skips and segregating items. The red Fiesta driver and the Luton van driver had not only been removing items from the skips but taking them into the accommodation block where Mr Davies and Mr W had been present. They had then removed the items from site. The only motive that Miss Browning could think of for them to do so would be because they wanted to sell the items onwards. Miss Browning took into account the fact that Mr Davies was active on eBay and following Mr W's partner's account. She formed the belief that Mr Davies was not only aware of the actions of the two drivers but was working with them to facilitate the segregation, removal and theft of items from the WEEE skip for his own financial benefit.
122. Miss Browning gave Mr Davies the benefit of the doubt in relation to the other allegation. Although Mr Davies' activities with the box that he had removed were highly suspicious, and she disbelieved his explanation, she felt that there was insufficient evidence to prove that he personally was stealing items from the site.
123. Miss Browning then went on to consider Mr Davies' points in mitigation. One of his arguments that he had raised was that he would have no incentive to allow third parties to remove items from site because it would have a negative impact upon his bonus. Miss Browning did not accept this argument. She thought that he was receiving a financial benefit from the removal of electrical items which outweighed his bonus payments. (Although this was not part of Miss Browning's own reasoning, it chimes with the thought processes brought to bear on the same argument by Mr Sears on appeal. Mr Sears confirmed to us that bonuses are calculated by weight of recycling material. In this regard, by far the most significant categories of waste were garden waste and timber. Thefts from the WEEE skip would not make any significant difference).

124. In Miss Browning's opinion, the only appropriate sanction was summary dismissal for gross misconduct. The seriousness of his actions made the alternative disciplinary outcomes unsuitable.
125. Miss Browning recorded her decision and the reasons for it in a detailed letter dated 25 July 2017. The letter was delivered to Mr Davies the same day. He was informed of his right to appeal.
126. We are now in a position to make findings as to the motivation of Miss Browning in reaching her decision. First, we are able to make a positive finding that the decision to dismiss was made by Miss Browning alone, without any influence from Mr Jefferies.
127. We are also quite satisfied that the only reason in Miss Browning's mind was her belief that Mr Davies had been helping third parties move WEEE items from site for financial gain. Relevantly to his claim:
- 127.1. Her decision had absolutely nothing to do with the fact that one of Mr Davies' nationalities is Irish. She did not have anything to do with Mr Jefferies' 2013 e-mails about Irish people, other than to do her best to persuade Ms McCarthy to disclose them so she could investigate.
- 127.2. She was not significantly motivated, either consciously or subconsciously, by the fact that Mr Davies routinely spent particular times of day in the accommodation block. Rather, she was influenced by the fact that Mr Davies appeared to be allowing members of the public to come into the accommodation block with items that they had removed from the WEEE skip. She thought that he knew that they were coming in with items because he had been with the red Fiesta driver as he roved through the WEEE skip. It seemed inherently unlikely to her that he would be completely unaware of their presence in the accommodation block. He had done nothing to report them and not locked them out.
- 127.3. Miss Browning was not motivated, consciously or subconsciously, by any consideration that Mr Davies had been nominated as a witness for Mr W's grievance. She made the decision on the evidence before her.
128. Mr Davies appealed against his dismissal by a letter dated 1 August 2017. The letter raised potentially three grounds of appeal on his behalf. These were:
- 128.1. That Mr Davies had been victimised for his part in Mr W' grievance;
- 128.2. That the respondent had been building a case against Mr Davies rather than properly investigating; and
- 128.3. That the respondent should have considered action short of dismissal.
129. Mr Davies was invited to a meeting on 30 August 2017 to discuss his appeal. The meeting was chaired by Mr Jeff Sears, Director, supported by Ms Rachel Doherty and Mr Richard Walkland. The claimant was accompanied by Ms Grant. In preparation for the meeting Mr Sears read a large pack of documents and spent time with Mr McIver looking at the CCTV footage.
130. The appeal meeting lasted just over one hour. Ms Grant read a written statement of case out loud. Mr Sears then asked some questions directly of Mr

Davies. In summary, Mr Davies' position remained that he had not been aware of the activities of the Luton van driver and the red Fiesta driver, as his back had been turned when they were stealing from site. Mr Davies reiterated his stance that he had previously reported the red Fiesta driver and nothing had been done.

131. Following the appeal meeting, Mr Sears made his decision. A relevant factor in Mr Sears' mind was the fact that, by this time, Mr W had resigned as an alternative to facing disciplinary action. Mr Sears' starting point was that Mr Davies must have some substance to his grounds of appeal, otherwise he would have taken the easy way out like Mr W. Looking at the evidence, however, Mr Sears was satisfied that Mr Davies had not been victimised. He accepted, as we have done, that the investigation into Mr Davies' activities had stemmed from the initial enquiry raised by Halton Borough Council.
132. As part of his deliberations, Mr Sears examined the CCTV footage relevant to the disciplinary allegation that Mr Davies had personally removed WEEE items from site. The reader will remember that Miss Browning had found this particular allegation unproven. Having looked at the footage, and considered Mr Davies' explanation, Mr Sears took the view that he would have found that allegation substantiated. Nevertheless, he acknowledged that he was stuck with Miss Browning's findings and did not seek to overturn them.
133. When it came to the disciplinary allegation upon which Miss Browning had actually decided to dismiss Mr Davies, Mr Sears was satisfied that Miss Browning had had sufficient evidence to make that decision. In view of the seriousness of the findings against Mr Davies and the weight of the evidence against him, Mr Sears could see no grounds to warrant a sanction other than dismissal. By a letter dated 8 September 2017, Mr Sears informed the claimant that his appeal had been unsuccessful.
134. Whilst the disciplinary process was proceeding against Mr Davies, further investigations were being carried out into the activities of his colleagues. One of these colleagues, who is not a claimant, is a man whom we shall call "Mr H". In due course, Mr H attended a disciplinary meeting with Miss Browning, who decided that he should be dismissed. Mr H appealed against his dismissal and his appeal was heard by Mr Sears. At the appeal meeting, Mr H put forward mitigation that he had reported the activities of third parties on site to Mr Davies. He was only a weekend worker and did not have the ties of a friendship and family as the claimants had to each other. He confessed to burying his head in the sand and failing to escalate his concerns beyond Mr Davies. Mr Sears thought that Mr H's explanation was compatible with what he saw on the CCTV. In Mr Sears' opinion, a final written warning was sufficient to reflect the seriousness of Mr H's shortcomings. His dismissal was therefore overturned.
135. As the disciplinary investigation went on, the attention of managers was drawn to the activities of Mrs Pye and Mc McCarthy. It will be remembered that Mr Furlong's original analysis of the CCTV included observations of the behaviour of Mrs Pye at the time when the Luton van driver was behaving suspiciously.

136. The investigation into Mrs Pye and Ms McCarthy was focussed around six days in May 2017. Of particular interest on these occasions was the behaviour of the Luton van driver and the claimants' interaction with him. The footage appeared to show:

136.1. On 10 May 2017, at 07.52 hours, the Luton van driver was present on site before its official opening time. He could be seen to be looking through the WEEE container whilst Mrs Pye and Ms McCarthy walked past.

136.2. At 07.47 hours on 11 May 2017, again before opening time, Ms McCarthy entered the accommodation block followed by the Luton van driver who was then in turn followed by Mrs Pye. Thirteen minutes later, the Luton van driver headed to the container bay area and re-emerged with a white bag. He then went back into the accommodation, left to open to the main gate, re-entered the accommodation and at 08.05 left the accommodation block once more, this time carrying a blue bag. He deposited the bag in his vehicle whilst Ms McCarthy was present.

136.3. On 14 May 2017, from 07.54 hours, the Luton van driver was seen entering the accommodation block whilst Ms McCarthy was present. He remained there for approximately four minutes. He then left and started segregating items from containers.

136.4. On 15 May 2017, at 07.33 hours, Mrs Pye entered the site followed by the Luton van driver in his vehicle. In order to get his vehicle onto site, the Luton van driver opened the height barrier which he should have been prohibited from doing. He then headed back to his vehicle and started to deposit items. Whilst the Luton van driver was still depositing items, both Mrs Pye and Ms McCarthy were nearby and apparently doing nothing to try and stop him. Twenty minutes later, the Luton van driver was seen removing an item from the WEEE container and heading into the accommodation block where Ms McCarthy was present. After 9 minutes inside, the Luton van driver left the accommodation block apparently carrying the same item, entered his vehicle and left the site.

(We examined the footage from 15 May 2017 for ourselves, because a dispute arose during the oral evidence about whether the Luton van driver had actually gone inside the accommodation block, or had merely been in the vicinity of the doorway. It was clear from the footage that the Luton van driver had actually gone inside.)

136.5. At 07.37 hours on 19 May 2017, the Luton van driver could be seen entering the accommodation block whilst Mrs Pye was already inside. One minute later, Ms McCarthy also entered the accommodation block. Shortly afterwards, the Luton van driver left the accommodation block and started opening containers. He looked into the WEEE container as Ms McCarthy was exiting the accommodation block. After about ten minutes, the Luton van driver emerged from a textile container with an item and headed into the accommodation block. Mrs Pye and Ms McCarthy were present in the block at the time. They had both been in the vicinity of the textile container whilst the Luton van driver was in it.

- 136.6. At 07.45 on 20 May 2017, the Luton van driver could be seen looking into the WEEE container as Ms McCarthy was exiting the accommodation block, and then opening the textile container as Mrs Pye was exiting the accommodation block. Five minutes later, the Luton van driver came out of the textile container area carrying a white bag and entered the accommodation block which he left four minutes later, still carrying a white bag. One minute later, he and Ms McCarthy and Mrs Pye all appeared to be heading from the exit gate area and back into the accommodation block.
137. On 20 July 2017, Mr Brian McFarlane, Area Supervisor, wrote to Mrs Pye and Ms McCarthy to invite them to a “fact-finding/investigation interview” which took place on 7 August 2017. For reasons which we will later explain, it is unnecessary to relate in any detail what was said at this meeting by either claimant. The invitation letter did not warn either claimant that they themselves were suspected of any misconduct; nor did it state that the interview would be taking place under the respondent’s disciplinary procedure.
138. Following the meeting, Mr McFarlane wrote to both claimants requiring them to attend a disciplinary meeting scheduled for 8 September 2017. Acting on the claimant’s behalf, Ms Grant emailed Mrs Ellis to express her concern about the apparent breach of the respondent’s procedures. Possibly in anticipation of this complaint, Mr McFarlane had already written to Mrs Pye and Ms McCarthy on 6 September 2017 to invite them to investigation interviews on 13 September 2017. Mrs Ellis replied to Ms Grant’s email on 11 September 2017. By this time, it appears that the meetings arranged by Mr McFarlane had been rescheduled for 25 September 2017. Mrs Ellis clarified that these meetings would be treated as investigation meetings and not disciplinary hearings.
139. Mrs Pye’s investigation meeting on 25 September 2017 was chaired by Mr McFarlane, supported by Mr McIver and a notetaker. Ms Grant was Mrs Pye’s companion.
140. Mrs Pye explained that the Luton van driver used to be a franchisee and worked alongside Mr W. In her view, this had given him the mentality of behaving like a member of staff. She confirmed that the Luton van driver was not allowed to enter the site before it opened, but added that she was unable to lock the gate on her own due to the new signage. Mrs Pye acknowledged that the Luton van driver appeared to have free rein of the site including entering the accommodation block and the WEEE container and textile container. Mrs Pye added that she had reported his activities to supervisors. She later named the supervisors as Mr Flynn and Mr Furlong.
141. Mr McFarlane then took Mrs Pye through some of the CCTV footage in detail. Mrs Pye did not try to deny what the footage showed. At one point, Mr McIver interjected, “Looking at whole package we have discussed, none of this looks good. You are complicit with it and I do think it’s down to the association with Keith”. To this comment Ms Pye replied, “I have to agree with you”. During her oral evidence, Mrs Pye was asked about this exchange. Mrs Pye told us that she had said these words, but she understood the word “complicit” to mean the same as “complacent”. Mrs Pye never made this point during the disciplinary process.

142. After a further examination of the footage, Mrs Pye was asked if she had anything to say. She replied, "I have been complacent. You can only do what you can do". She later apologised for "not doing my job properly".
143. The same day, Ms McCarthy attended her investigation meeting. Present in the room were the same people who had attended Mrs Pye's meeting.
144. Mr McFarlane asked Mrs McCarthy about the Luton van driver. Ms McCarthy said that she did not know his name. She said she did not like him and had nothing to do with him. Later, she said "I believe he is a friend of [Mr W's], that's all I know about him. She was shown footage of 10 May 2017 apparently showing the Luton van driver in the WEEE container as Ms McCarthy walked past him. Ms McCarthy said that she had not seen him because she had been talking to Mrs Pye. She added that she was still on medication at that time because it was her first day back at work after being on long-term sick leave. Even if she had seen him, she said that she would not have reported it anyway because of her experience with Mr M in 2015.
145. Mr McFarlane took her to an image of her apparently pointing at the Luton van driver shortly after he had been rooting in the WEEE skip. Ms McCarthy replied, "I am obviously pointing because I am concerned about what he is doing". This answer appeared to contradict her earlier version which was that she had not seen him at the WEEE container.
146. Further footage was shown to Ms McCarthy. In general terms, Ms McCarthy said that she could not remember because she was on medication.
147. There was then a discussion of the footage from 15 May 2017. Mr McFarlane put it to Ms McCarthy that the Luton van driver had taken an item from the WEEE skip, gone into the accommodation and been followed into the accommodation block by Ms McCarthy. He then appeared to leave the site with the same item. Mr McIver added, "This shows that you are letting third parties onto the site before opening hours and you are letting him remove items". The minutes of the meeting show that Ms McCarthy's reply to this comment was "I agree". In her oral evidence, Ms McCarthy told us that she thought she was replying to a different point. This was not an argument that she raised at any time during the disciplinary process. In any event, the next question and answer in the minutes tend to show that what Ms McCarthy was agreeing with was the proposition that she had been aware that the Luton van driver had been taking items. These answers appeared to clash with assertions made at other times during this interview that she had not seen the Luton van driver take anything. At the conclusion of the meeting Ms McCarthy confirmed that she thought that she had had a fair hearing. So did Ms Grant.
148. By a letter dated 29 September 2017, Mrs Pye and Ms McCarthy were invited to disciplinary meetings which took place on 3 October 2017. According to the letter, the subject matter of the meeting was "your alleged awareness and involvement in the segregation and removal of items/material from Picow Farm HWRC by third parties". The claimants were warned that if the allegation was proven, it might lead to their dismissal.

149. The first meeting to take place was that of Ms McCarthy. It was chaired by Miss Browning, with Mr McFarlane presenting the management case. Once again, Ms Grant attended as a companion and a colleague attended to take notes.
150. Miss Browning asked Ms McCarthy what action she had taken on 10 May 2017 in response to the Luton van driver attending site before it opened to the public. Ms McCarthy replied that she could not remember because she had been on medication. Miss Browning asked Ms McCarthy whether the Luton van driver had been “an issue in the past”. Ms McCarthy replied, “Not that I am aware of but I was off for six months”. Following up this line of enquiry, Miss Browning asked, “So he never came in before the six months?”. Ms McCarthy replied, “No”. She denied having any recollection of the Luton van driver being in the accommodation block. She denied seeing the Luton van driver with any item in his hand. When asked about the appropriate procedure or reporting members of the public who should not be on site, Ms McCarthy confirmed that she should “write it in the RIVO book”. If there were no forms available, she would “just put it on a bit of paper”. She had not seen him opening containers on 20 May 2017. Once again, Miss Browning asked Ms McCarthy if she had seen the Luton van driver before 10 May 2017. She replied that she had not. She was unable to explain why the Luton van driver habitually went into the accommodation block with items in his hand. Not all of the footage was shown to her. Ms McCarthy confirmed that she was satisfied that it was accurately recorded in a written transcript which had been provided to both her and Miss Browning.
151. At the meeting Ms McCarthy presented some handwritten mitigation. Essentially, her mitigation was that she could not remember what had happened and that she had been put off reporting illegal activities because of her experience with Mr M and the lack of managerial support she had received at that time.
152. Mrs Pye’s disciplinary meeting took place later that day. She reiterated that she had previously reported the Luton van driver to Mr Flynn. As in her investigation meeting, Mrs Pye took an apologetic tone. She acknowledged that she had “not been professional”. When it was put to her that the Luton van driver had been in the accommodation block with her and he had had an item with him, and that he had then left the site with the item, Mrs Pye said “he’s very arrogant”. Mrs Pye confirmed that she had known the Luton van driver “for years, he has always been around, he is part of the fixtures and fittings”. Mrs Pye said that she did not have access to RIVO on the computer, but Miss Browning expressed her view that with a photocopier on site they should at least have a paper form on which to make a report. Miss Browning asked Mrs Pye about the Luton van driver’s presence in the accommodation block. Mrs Pye confirmed that the door could be locked and it would have been possible to lock the Luton van driver out.
153. Mrs Pye’s mitigation document took issue with the procedure that had been followed for the initial fact-finding meeting.
154. Miss Browning agreed that there had been a procedural irregularity at the first investigation meeting. She therefore excluded the notes of both Mrs Pye’s and Ms McCarthy’s initial fact find meetings from her consideration.

155. Following the disciplinary meetings, Miss Browning obtained a brief statement from Mr Jefferies and a further email from Mr Furlong. According to Mr Jefferies, Ms McCarthy had never complained to him about any repercussions following the prosecution of Mr M. Mr Furlong confirmed that he did not recall Mrs Pye making any report to him of any incident involving a white van being involved in removing materials from the site.
156. Miss Browning then set about making her decision. Having reviewed the evidence, Miss Browning firmly concluded that both Mrs Pye and Ms McCarthy knew the Luton van driver well. She did not believe Ms McCarthy's protestation of not knowing the Luton van driver at all. She could not ignore the fact that both Mrs Pye and Mr Davies in their disciplinary hearings had made it clear that the Luton van driver had been coming to the site for years, was well-known to everyone and, according to Mr Davies, had regularly chatted to Ms McCarthy. Moreover, other employees in their disciplinary hearings had also made very clear statements that Ms McCarthy was very friendly with the Luton van driver and even made him cups of tea while he was on site. The CCTV footage told the same story: it appeared that Ms McCarthy was friendly with the Luton van driver.
157. In Miss Browning's opinion, there was no reasonable explanation why Mrs Pye and Ms McCarthy had failed to report the Luton van driver. The fact that they did not believe management would take action or that the situation would not be dealt with did not, in Miss Browning's view, excuse the claimants from complying with their duty to report unauthorised on-site activities. To Miss Browning's mind, the most likely explanation was that they were turning a blind eye.
158. Having reached these conclusions, Miss Browning went on to consider why Mrs Pye and Ms McCarthy were allowing the Luton van driver to behave as he had been, and whether they were aware that he was regularly stealing from site. Were the claimants merely "sloppy"? Had they lost faith in the system? Had they been avoiding the inconvenience of trying to take action? Or were one or both of them aware of the Luton van driver's activities and complicit with them?
159. Miss Browning decided that the latter of these possibilities was the most likely. Given the apparent familiarity between the three individuals, and the fact that Mrs Pye and Ms McCarthy appeared to be allowing the Luton van driver into the accommodation block whilst carrying items, Miss Browning could see no alternative conclusion other than that they were well aware of what the Luton van driver was doing and were actively permitting it to happen.
160. Miss Browning considered the mitigating points of each of the claimants. Mrs Pye had considerable length of service and had apologised at the disciplinary meeting. Ms McCarthy's ill health and medication were factors working in her favour. Nevertheless, Miss Browning thought that the only suitable option was dismissal. In her opinion, a final written warning could not be justified because of the seriousness of their actions.
161. By letters dated 17 October 2017, Mrs Pye and Ms McCarthy were informed that their employment was being terminated. The letters provided detailed reasons in support of the decision.

162. We were able to find positively that Miss Browning's decision was hers alone. It had nothing to do with Mrs Pye's Irish nationality, nor did it have anything to do with the fact that Ms McCarthy had previously been married to a man whose parents were Irish or that she had kept his Irish sounding surname.
163. Both Mrs Pye and Ms McCarthy appealed against their dismissals. In a letter dated 20 October 2017, Ms Grant made essentially the same points as Ms McCarthy had made during the disciplinary meeting. It remained Ms McCarthy's position that she could not remember the Luton van driver. A letter of the same day on behalf of Mrs Pye repeated the contention that Mrs Pye had reported the activities of the Luton van driver to Mr Furlong. (By that time, Mr Furlong's email of 13 October 2017 had not been shown to Mrs Pye.) The letter drew attention to the lack of detailed reporting protocols for recycling assistants who did not have access to computers.
164. By a letter dated 25 October 2017, both claimants were invited to appeal meetings which took place on 3 November 2017. Mr Sears chaired the appeal meetings as he had done with Mrs Davies. In preparation for the meeting, Mr Sears viewed the CCTV footage. He formed the immediate impression that Mrs Pye, Ms McCarthy and the Luton van driver appeared to be very familiar with one another and seemed to spend a lot of time together on site, including time in the accommodation block.
165. Mrs Pye's meeting proceeded first. Mr Sears was accompanied by an employee relations specialist and a notetaker. Once again, Ms Grant was Mrs Pye's companion.
166. At the meeting, Ms Grant drew Mr Sears' attention to the emails that Mr Jefferies had sent back in 2013. Mrs Pye described them as "racist". Mr Sears took Mrs Pye through the grounds of appeal. They discussed the apparent clash of evidence between Mrs Pye and Mr Furlong about whether activities of the Luton van driver had been reported. By this time, Mr Furlong was no longer employed by the respondent. Mr Sears agreed to look at the CCTV. He also agreed to look into the procedures that had been followed in the initial factfinding meeting.
167. Ms McCarthy's meeting followed shortly afterwards the same day. It was attended by the same group of people. Ms McCarthy also drew attention to the emails from 2013. She was taken through the grounds of appeal.
168. Mr Sears reviewed the evidence starting with the e-mails from 2013. He regarded them as inappropriate and unprofessional. He could not, however, see any reason why they had a bearing on the matters at hand. Mr Jefferies, who had sent the emails, had not been a decision maker in the process.
169. Looking again at the CCTV evidence, it seemed very clear to Mr Sears that both Mrs Pye and Ms McCarthy were very much involved in the Luton van driver's activities in removing items from site. In his view their participation amounted to gross misconduct. Nevertheless, he considered their grounds of appeal. He took into account their arguments that there was no clear procedure for reporting unauthorised activities on site. In his opinion, the absence of such procedures did not help their appeal because both claimants had indicated a

clear awareness that any illegal activities should be reported to management. Indeed, Ms McCarthy had told him how she had reported illegal activities of Mr M in the past. Mr Sears did not accept that Ms McCarthy had been put off making reports to management about illegal activities following the Mr M incident, because he was aware that Ms McCarthy had subsequently reported other matters which had been documented. He was satisfied that Ms McCarthy and Mrs Pye had not reported the Luton van driver. In particular, he rejected her contention that she had reported the Luton van driver's activities to Mr Furlong.

170. Although it was not mentioned in the appeal letters, Mr Sears took the claimants to be saying during their appeal meetings that they considered that the respondent had used the disciplinary allegations as an excuse to remove the claimants from the business. Mr Sears did not think that this allegation was true. He was satisfied that Miss Browning acted independently. He followed up the procedural point that the claimants had raised in relation to the fact-finding meeting. He put the point to Miss Browning, who confirmed to him that she had removed both sets of initial factfinding minutes from the disciplinary pack and had not taken them into account. Mr Sears accepted her explanation. Whilst Mr Sears was of the view that the departure from procedure had been unsatisfactory, he could not see how it had affected the fairness of the decision to dismiss Mrs Pye and Ms McCarthy.
171. Having considered the grounds of appeal, Mr Sears concluded that the decision to dismiss the claimants should stand. In letters dated 23 November 2017, Mr Sears informed the claimants that their appeals were unsuccessful.
172. On 27 September 2017, Mr Davies commenced early conciliation with ACAS. He obtained his certificate on 27 October 2017. During his oral evidence, he was asked why he did not present his claim to the tribunal earlier. Mr Davies agreed that there was no practical barrier to his bringing a claim whilst still employed by the respondent, but he preferred to "speak to the company first" and raise issues directly with them.
173. Ms McCarthy notified ACAS and obtained her certificate on the same day, 27 October 2017. Mrs Pye's early conciliation began on 27 November 2017 and her certificate was issued on 7 December 2017.

Relevant law

Direct discrimination

174. Section 13(1) of EqA provides:
- (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.
175. Section 23(1) of EqA provides:
- (1) On a comparison of cases for the purposes of section 13...there must be no material difference between the circumstances relating to each case.
176. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating

primarily on why the claimant was treated as he was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

177. Less favourable treatment is “because” of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council*, where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker’s mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.
178. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons (“the decision-makers”) who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.
179. Direct discrimination requires a perfect correlation between the reason for the less favourable treatment and the protected characteristic. So, for example, treatment that was because of “vulnerable immigration status” was not because of race, because there are many non-British people whose immigration status is much more secure: *Taiwo v. Olaijbe* [2016] UKSC 31.

Duty to make adjustments

180. By section 20 of EqA, the duty to make adjustments comprises three requirements.
181. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice (PCP) of the employer’s puts a disabled person at a substantial disadvantage in relation to the employer’s employment in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
182. Section 20(3) defines the third requirement. Where, but for an auxiliary aid, the employee would be at a substantial disadvantage compared to persons who are not disabled, the employer is required to take such steps as it is reasonable to have to take to provide that auxiliary aid.
183. A disadvantage is substantial if it is more than minor or trivial: section 212(1) of EqA.
184. Paragraph 6.28 of the Equality and Human Rights Commission’s *Code of Practice on Employment* lists some of the factors which might be taken into

account when deciding what is a reasonable step for an employer to have to take:

- 184.1. Whether taking any particular steps would be effective in preventing the substantial disadvantage;
 - 184.2. The practicability of the step;
 - 184.3. The financial and other costs of making the adjustment and the extent of any disruption caused;
 - 184.4. The extent of the employer's financial and other resources;
 - 184.5. The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and
 - 184.6. The type and size of employer.
185. Before a respondent is required to disprove a failure to make adjustments, there must be sufficient facts from which the tribunal could conclude not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made: *Project Management Institute v. Latif* UKEAT 0028/07.

Discrimination arising from disability

186. Section 15(1) of EqA provides:
- (1) A person (A) discriminates against a disabled person (B) if-
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
187. Langstaff P in *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14 (19 May 2015, unreported) explained (with emphasis added):
- "The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages."
188. As with direct discrimination, the focus must be on the conscious or subconscious motivation of the person or persons who decided on the unfavourable treatment: *IPC Media Ltd v Millar* [2013] IRLR 707.
189. These principles have been affirmed in *Phaiser v. NHS England* [2016] IRLR 174.

Victimisation

190. Section 27(1) EqA defines victimisation. Relevantly the definition reads:

“A person (A) victimises another person (B) if A subjects B to a detriment because - (a) B does a protected act [etc]”

191. As in direct discrimination cases, tribunals hearing victimisation complaints are encouraged to adopt the “reason why” test (*Chief Constable of West Yorkshire Police v. Khan* [2001] ICR 1065). Victimisation may occur sub-consciously as well as consciously.

Time limits

192. Section 123 of EqA provides, so far as is relevant:

(1)... proceedings on a complaint [of discrimination in the field of work] may not be brought after the end of—

(a) the period of 3 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.

...

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

193. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”. I shall read out the

48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an ‘act extending over a period’...

52. ... The question is whether that is ‘an act extending over a period’ as distinct from a succession of unconnected or isolated specific acts,

for which time would be given to run from the date when each specific act was committed"

194. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.
195. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650, CA.
196. The time limit starts to run from the date on which the discriminatory act is done, and not from when the claimant finds out about it: *Virdi v. Commissioner of Police for the Metropolis* [2007] IRLR 24.
197. In *Matuszowicz v. Kingston on Hull City Council* [2009] EWCA Civ 22, the Court of Appeal held:
- 197.1. that an ongoing failure to make adjustments is not an act "extending over a period"; it is a "failure to do something", the date of which is to be determined according to the statutory provisions (now in section 123 EqA);
- 197.2. if the respondent does not assert that the time limit started to run from a date earlier than that put forward by the claimant, the tribunal should proceed on the basis of the claimant's alleged date; and
- 197.3. that where confusion over the time limit provisions causes an unwary claimant to delay presenting the claim, the confusion can be taken into account as a factor making it just and equitable to extend the time limit.
198. It follows from *Matuszowicz* and section 123(4) that, where an employer acts inconsistently with the duty to make adjustments, the time limit runs from the date of the inconsistent act. If there is no such act, time begins from when the date on which claimant contends a reasonable period of time expired for the making of the adjustment, unless the respondent argues – and the tribunal accepts - that the reasonable period in fact expired sooner.
199. Where, on the other hand, an employer keeps the question of whether to make an adjustment under review and periodically decides not to make the adjustment, the time limit restarts from the date when each decision was taken.
200. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.
201. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the

limitation period in personal injury cases): *British Coal Corp'n v. Keeble* [1997] IRLR 336. These factors include:

- 201.1. the length of and reasons for the delay;
- 201.2. the effect of the delay on the cogency of the evidence;
- 201.3. the steps which the claimant took to obtain legal advice;
- 201.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and
- 201.5. the extent to which the respondent has complied with requests for further information.

Burden of proof

202. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

203. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

- (1) ... it is for the claimant who complains of ... discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
- (2) If the claimant does not prove such facts he or she will fail.
- (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of ... discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
- (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
- (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw ...from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts...This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

204. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913, *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18.

205. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong*, but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshurun Hebrew Congregation* [2016] UKEAT 0190/15.

206. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the

tribunal is in a position to make positive findings on the evidence one way or the other.

Unfair dismissal

207. Section 98 of ERA provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it...(b) relates to the conduct of the employee...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends 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 a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

208. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

209. Where the reason for dismissal is the employee's misconduct, it is helpful to ask whether the employer had a genuine belief in misconduct, whether that belief was based on reasonable grounds, whether the employer carried out a reasonable investigation and whether the sanction of dismissal was within the range of reasonable responses: *British Home Stores Ltd v. Burchell* [1978] IRLR 379, *Iceland Frozen Foods Ltd v. Jones* [1983] ICR 17.

210. In applying the test of reasonableness, the tribunal must not substitute its own view for that of the employer. It is only where the employer's decision is so unreasonable as to fall outside the range of reasonable responses that the tribunal can interfere. This proposition is just as true when it comes to examining the employer's investigation as it is for the assessment of the decision itself: *J Sainsbury plc v. Hitt* [2003] ICR 111.

211. The tribunal must consider the fairness of the whole procedure in the round, including the appeal: *Taylor v. OCS Ltd* [2006] IRLR 613.

Unlawful deduction from wages

212. Section 13(1) of the Employment Rights Act 1996 prohibits an employer from making a deduction from the wages of a worker employed by him. The prohibition does not apply where the deduction has been authorised in one of a

number of prescribed ways, but there is no suggestion that any deduction was authorised in this case.

213. By section 13(4), where the total amount of wages paid to a worker on any occasion is less than the total amount of wages properly payable on that occasion, the deficiency shall be treated as a deduction from the wages on that occasion.
214. Section 23(1) of ERA gives the tribunal jurisdiction to consider complaints of unlawful deduction from wages. By section 23(2), “an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with ... the date of payment of the wages from which the deduction was made.” Where the complaint is about a series of deductions, the time limit runs from the last of the deductions in the series (section 23(3)). Subsection (4) provides that “where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.”

Conclusions

Direct race discrimination - dismissal

215. Our findings at paragraphs 126, 127 and 162 dispose of the complaints of direct race discrimination in relation to the decision to dismiss the claimants. The treatment was not because of Mr Davies’ or Mrs Pye’s Irish nationality, or because of Ms McCarthy’s connections to Ireland.
216. We have an additional reason for dismissing Ms McCarthy’s race discrimination complaint. Ms McCarthy does not have Irish nationality or national origin. Her surname, and ex-husband’s ancestry, do not form part of her protected characteristic of race. She has not argued that there was discrimination by mistaken perception. There needs to be a perfect correlation between the reason for dismissal and a protected characteristic of race. There is no such correlation here. There are likely to be many people called “McCarthy” who are neither Irish nor from Ireland. Most Irish people have other surnames.

Direct race discrimination – e-mails

217. If the e-mails amounted to direct discrimination, that discrimination must be considered as having been “done” for time limit purposes when Mr Jefferies sent them and not when the claimants found out about them. Allowing for the series of e-mails to constitute an act extending over a period, the time limit would therefore begin to run from August 2013. The claims are approximately 4 years out of time.
218. The claimants have a very good reason for not presenting the claim before November 2014: they did not know about the e-mails. But from February 2015 Ms McCarthy not only had the e-mails, she also had legal advice specifically about bringing a claim in relation to the e-mails, yet she did not bring her claim for nearly three more years. The respondent’s ability to defend the claim properly is further hampered by the fact that Ms McCarthy did not disclose all the content

she had to the respondent and she withdrew her grievance. Because of the passage of time it is harder to explore any connection between the recipients of the e-mails and the claimants. It is also harder for the parties to put forward evidence of how the subject-matter and context of the e-mails might have been related to the claimants. Weighing the factors in the balance we do not think it is just and equitable to extend time.

219. If we are wrong about the time-limit, we would also dismissed this allegation on its merits. There is nothing to suggest that, by sending these emails, Mr Jefferies was “treating” the claimants in any particular way. The emails were not addressed to the claimants and, subject to one exception, appeared to be about entirely different people. The exception is the “dwarf” e-mail, but that e-mail had nothing to do with anybody’s race. In relation to Ms McCarthy, it is even harder to see how the comments about Irish people amounted to less favourable treatment because of race. For the reasons we have given, Ms McCarthy’s connections to Ireland do not form part of her protected characteristic.

Victimisation

220. We have found that none of the alleged detriments were because of Mr Davies’ protected act. See paragraphs 95, 102 and 127. Those findings are sufficient to dispose of the victimisation complaint on its merits.
221. We additionally decline jurisdiction to consider two of the alleged detriments. These were the commencement of the investigation and the conduct of the meeting on 30 May 2017. The claim in respect of these allegations was presented too late. They did not form part of an act extending over a period culminating in the decision to dismiss. The dismissal decision and the earlier detriments were entirely separate. We regarded it as relevant that the dismissal decision was taken independently by Miss Browning (paragraph 126) who is not accused of having victimised Mr Davies on the earlier occasions. The last day for presenting the claim in respect of the 30 May 2017 meeting was 29 August 2017. Mr Davies did not present his claim until some 10 weeks later.
222. In our view it would not be just and equitable to extend the time limit. Mr Davies had the assistance of trade union representation at every stage. More importantly, the delay has affected the quality of the evidence. One difficult area of factual enquiry in this case relates to the way in which Mr Mclver behaved towards Mr Davies in the meeting of 30 May 2017 and the extent to which it was detrimental to him (whether apt to be called “bullying” or not). As we found at paragraph 101, the facts were more difficult to find because of the delay in bringing the claim.

Direct disability discrimination

223. Again, our findings of fact (paragraphs 102, 103 and 104) make this complaint impossible to sustain on its merits. There was no refusal to audio-record the meeting on 30 May 2017 and therefore no less favourable treatment. The refusal on 6 June 2017 was not in any way because of the Mr Davies’ disability. To the extent that there was any bullying at the first investigation meeting, it was not because of the claimant’s disability.

224. The allegation is also out of time for the reasons we have given in relation to victimisation. So far as Mr McIver's conduct of the meeting is concerned, we refuse to extend the time limit because of the impact of the delay on the quality of the evidence. In relation to the allegation of refusing to audio-record the meeting we were able to make positive findings of fact and might well have extended the time limit, but there is no disadvantage to the claimant in our refusing to do so because the claim is not well-founded.

Discrimination arising from disability

225. We did not make a finding one way or the other about whether or not Mr Davies had a set routine, or whether that routine had arisen in consequence of his Aspergers. It was not necessary for us to make such a finding because we were satisfied that Miss Browning was not significantly motivated by the claimant's regular presence in the accommodation block at particular times of day (see paragraph 127.2). On the assumption that "something" (namely Mr Davies' routine presence in the accommodation block at particular times) had arisen in consequence of his disability, the unfavourable treatment of dismissal was not "because" of that "something".

Duty to make adjustments

226. In 2015, Mr Davies was having problems dealing with "difficult" individuals. It is likely, in our view, that, because of his Asperger's, Mr Davies found it harder to deal with such people than other foremen did, and the difference was more than minor or trivial. We have reached this conclusion not from any specific example, but from the generalised opinion set out in the occupational health report of 21 June 2010.

227. Without knowing exactly what Mr Davies told Mr Flynn on 25 November 2015, it is hard to reach a conclusion about whether Mr Flynn knew of this disadvantage or could reasonably have been expected to have known. We also found it hard to make findings relevant to whether or not it was reasonable for the respondent to have to provide "man management" training. In particular it was hard to know how practicable it would have been and whether the training would have reduced the disadvantage that Mr Davies was experiencing. We also think it would be relevant for us to find – if we could – whether or not Mr Davies had asked for such training.

228. There is no evidence of there ever having been a conscious decision not to provide "man management" training. We do find, however, that, at the following appraisal on 6 August 2016, Mr Flynn acted inconsistently with providing that training, by noting that no training had been provided and yet making no attempt to follow up the issue of management support for dealing with difficult individuals. If we are wrong about that, we would find that, by that date, a reasonable time period had expired for providing such training. The last date for presenting the claim was therefore 5 November 2016. The claim was actually presented over a year too late.

229. We have considered whether or not to grant an extension of time. The complexity of section 123, and the effect of *Matuszowicz*, can cause real problems for unrepresented claimants. When looking at the reasons for delay,

we bear this fact very much in mind. On the other hand, we know that Mr Davies had already brought one claim against his employer whilst still employed and did not think there was any practical barrier to his doing so. He may well have preferred to raise issues internally rather than seek recourse to a tribunal, but he did not raise any grievance. The delay has had a real impact on the quality of the evidence. Mr Flynn would be a key witness. Had Mr Davies brought a claim at any time before October 2016, the respondent would have been able to interview Mr Flynn before he left his employment. His absence, the lack of any internal grievance, and the passage of time generally, have led to the difficulties in fact-finding that we have identified above. Weighing all the factors, we think that it would not be just and equitable to extend the time limit.

Unfair dismissal

230. The reason for all three dismissals was Miss Browning's belief that the three claimants had been knowingly helping third parties to remove WEEE items from site. That was a reason that related to each claimant's conduct. We must therefore decide, in relation to each claimant, whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss.
231. In our view, Miss Browning had reasonable grounds for her belief. Mr W had been caught red-handed physically helping the Luton van driver to remove items from the site. All three claimants worked alongside Mr W. They had all been captured on CCTV observing either the Luton van driver or the red Fiesta driver sorting through the WEEE skip and/or television container without interference. CCTV footage of all three claimants appeared to show them behaving in a friendly, familiar way to these members of the public. These individuals were seen bringing items from the skips into the accommodation block and then spending several minutes there. At separate times, all three claimants at been repeatedly present in the accommodation block when this had happened. There were no RIVO reports of the Luton van driver or the red Fiesta driver. They all claimed to have alerted Mr Furlong to the activities of one or other of these members of the public, but Mr Furlong told Miss Browning that this had not happened. Additionally:
- 231.1. Mr Davies had followed Mr W's partner's eBay account and sought to deny knowledge of it;
- 231.2. Mr Davies claimed to have raised a RIVO report of the red Fiesta driver, but the report did not contain any identifying details despite the red Fiesta driver and his vehicle being well known to Mr Davies;
- 231.3. Ms McCarthy had tried to deny knowing the Luton van driver at all, her denial being inconsistent with the CCTV, the accounts of the other claimants and other people who were disciplined; and
- 231.4. The minutes of Mrs Pye's investigation meeting appeared to show her admitting to being "complicit".
232. We next turn to whether or not the investigation was reasonable. Our starting point is that the respondent is a large employer with some 130 employees. Its employees are entitled to expect that, if they are suspected of misconduct, the

respondent will devote considerable resources to setting up a fair procedure and a thorough investigation.

233. By way of an overview, each claimant was invited to at least one investigation meeting conducted by an investigator who did not make the decision to dismiss. In each claimant's case, the investigation meeting was followed by a disciplinary meetings and then an appeal meeting. Each claimant had trade union representation at every stage. By the time of the disciplinary meetings, each claimant has had a full opportunity to view the CCTV footage. Some of the points made by the claimants at the disciplinary meetings were followed up by brief further investigation prior to the decision to dismiss them.
234. This brings us to some of the claimants' specific criticisms of the process:
- 234.1. *Predetermination of guilt* – Mr McIver, as we have found, leapt too soon to the conclusion that Mr Davies had fraudulently reported his accident. Although this particular allegation was withdrawn on 6 June 2017, we have asked ourselves whether it was symptomatic of a ready-made decision to dismiss Mr Davies before the investigation was complete. We do not think that this happened. Miss Browning did not make her mind up to dismiss Mr Davies until the disciplinary hearing had concluded.
- 234.2. *Investigation into Mr Jefferies* - Mr Davies in particular was arguing that Mr Jefferies was well aware of the activities of the Luton van driver. We have dealt with this point in paragraph 118. It was a missed opportunity to conduct a full interview with Mr Jefferies. As we have found, it was partly explained by the fact that certain parts of the Luton van driver's letter lacked credibility, but in view of the importance of the point about Mr Jefferies, we would still have expected it to have been followed up specifically. When deciding how this shortcoming affected the reasonableness of the overall decision, we had to bear in mind (see paragraph 37) that the point had not been put to Miss Browning.
- 234.3. *The first "fact-find" meeting for Mrs Pye and Ms McCarthy* - There was a breach of procedure here. It did not have any significant impact on the overall fairness of the dismissal. When the procedural error came to the attention of Mrs Ellis, further investigation meetings were arranged before any disciplinary meeting took place. Nothing that Mrs Pye and Ms McCarthy said during their first meetings was taken into consideration by Miss Browning.
235. Looking at the entire procedure in the round, including the appeal, we consider that the overall process was within the range of reasonable responses.
236. Next we considered whether the sanction was within the reasonable range. Here, we bore in mind, as any reasonable employer should do, that Mr Davies and Mrs Pye were long serving employees. Any reasonable employer would also have to take into account Mrs Pye's confession and Ms McCarthy's state of health. It ought also to have been apparent to the respondent that its business model was one which might lead recycling assistance and foremen into temptation. Management responses to RIVO reports were patchy. There was no system for proactive management intervention in identifying problem members of

the public, and there was little that a member of staff could do physically to prevent a member of the public stealing from site. Making allowances for all of that, we still conclude that it was open to a reasonable employer to dismiss all three claimants. Unauthorised removal of WEEE items from site could jeopardise the respondent's licence. Once Miss Browning had formed the belief, on reasonable grounds, that the claimants were not merely failing to report thefts, but actually helping them to be carried out, she was entitled to take the view that the respondent would not be able to trust the claimants in future.

237. Our overall decision was that the respondent had acted reasonably in treating its belief as a sufficient reason to dismiss all three claimants. The dismissals were therefore fair.

Unlawful deduction from wages

Mr Davies' claim

238. The tribunal has no jurisdiction to consider any of Mr Davies' claim for unlawful deduction of wages. His final pay date was 4 August 2017. Allowing for early conciliation, his last day for presenting his claim was 3 December 2017. The claim form containing his wages claim was not presented until 23 January 2018.

239. In our view, it would have been reasonably practicable for Mr Davies to have presented his claim by 3 December 2017. He did not understand the way in which the respondent had calculated his pay, but nor did he understand it when the claim form was presented seven weeks later. As he conceded in his evidence, there was no practical barrier to him bringing a claim whilst still employed. The tribunal cannot therefore grant an extension of time.

Were the claimants paid for all their basic hours?

240. We understand how frustrating it must have been for the claimants and their trade union representatives trying to make sense of their pay slips. They did not explain how their pay had actually been calculated. Having examined the claimant's actual working hours, however, we are satisfied that they were paid the amounts properly payable for their basic hours on every occasion: see paragraphs 43 to 48. There was therefore no deduction from their wages.

Foreman's hourly rate

241. There was no express term in Mr Davies' contract that he would be paid at 50 pence per hour more than a recycling assistant. Nor did any such term arise as a matter of custom and practice. Whatever might have been the case prior to 2013, from that year onwards the margin was never 50 pence.

Acting foreman's hourly rate when not on shift

242. This part of Mrs Pye's claim was time-barred. She ceased acting up as a foreman in October or November 2016. If there was a series of deductions, the series had stopped by December 2016. By March 2017 at the latest the time limit expired. She did not put forward any reason why it was not reasonably practicable for her to have presented her claim by March 2017. The tribunal cannot therefore extend the time limit.

243. We did not reach a conclusion about Mrs Pye's wages claim on its merits, so far as it related to a foreman's pay. On the information we had, we found it hard to understand. Hourly-paid employees are usually only paid for the time they spend working. When Mrs Pye was not rostered to work, she presumably was not doing paid work, so her hourly rate would not matter. We did not understand her claim to be about the rate of pay for annual leave. The safer course, however, would be for us merely to decline to reach a conclusion as we have no jurisdiction to consider this particular complaint in the first place.

Employment Judge Horne

4 February 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 February 2019

FOR THE TRIBUNAL OFFICE

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