EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Mendez**		
Respondent:	**Plasflow Limited**		
Heard at:	**Sheffield**	**On:**	**8 and 9 October 2020**
	(26 October 2020 in Chambers)		
Before:	**Employment Judge Little**		
	Mrs K Grace		
	Mr K Smith		

Representation

Claimant:	In person
Respondent:	Mr J A F Walker, Managing Director

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that :-

1. The complaint of direct race discrimination succeeds in part (dismissive approach to racial comment issue).
2. The complaint of harassment related to race succeeds.
3. The complaint of unfair dismissal succeeds.
4. However, the claimant contributed to the dismissal to the extent of 30% and so in due course remedy for unfair dismissal will be adjusted accordingly.

REASONS

1. **The complaints**

   Mr Mendez presented his claim to the Tribunal on 21 July 2019. During the course of three case management hearings, it was clarified that the following complaints were being brought:-

   - Harassment related to race
   - Direct race discrimination
   - Unfair dismissal

2. **The issues**

   At the third case management hearing, which was conducted by Employment Judge Cox on 28 April 2020, the annex to the Judge's Order helpfully sets out the relevant alleged less favourable treatment in respect of the direct race discrimination complaint and the alleged unwanted conduct in relation to the harassment complaint. We should add however that references to matters occurring on 8 May 2019 (the majority of the complaints) should, we are now aware, have referred to the date 3 May 2019.

   At the beginning of our hearing, and taking into account the clarification of the claim which had been obtained during the series of case management hearings, we were able to set out the following issues for determination by this Tribunal. Having set out those issues both parties agreed that they were the issues we had to determine.

   <u>Direct race discrimination</u>

   2.1. Did the following less favourable treatment occur –

   - Requiring the claimant, who is black British, to operate two CNC machines whereas the other operators who were all white were only required to work one (alleged perpetrators Mr Craig Oglesby (general manager) and Mr John Sanderson (operations manager)).
   - On 3 May 2019, Mr Phil Hamshaw, factory operator reporting to Mr Sanderson that the claimant had been operating his machine (a machine saw) unsafely. (We should add that during this hearing we learnt that Mr Hamshaw had not made that report on that date. He had in fact made it on 14 February 2019 but it only came to be actioned by Mr Sanderson on 3 May 2019.) The claimant alleges that others who were also operating their machines unsafely including Mr Hamshaw himself, Mr Stocks and Wayne Fereday, were not reported. In fact we would learn that Mr Fereday was working with the claimant on 14 February 2019 and is also mentioned in Mr Hamshaw's near miss report.
   - On 3 May 2019 Mr Sanderson subsequently instructing Mr Dwane Whitehouse (team leader) to conduct a toolbox talk to discuss the claimant's unsafe working practices – but not the unsafe working practices of other white employees.

- On 3 May 2019 Mr Whitehouse allegedly raising the unsafe working issue with the claimant but not raising such issues with other white employees.
- On the afternoon of 3 May 2019, during a telephone conversation, Mr Oglesby allegedly telling the claimant that an allegedly racist comment made by Mr Hamshaw to the claimant earlier that day was irrelevant and Mr Oglesby had failed to suspend Mr Hamshaw, although he had suspended the claimant.
- The claimant's dismissal on 10 May 2019 by Mr Oglesby. The claimant contends that an incident some three years previously whereby Mr Hamshaw and another employee had held down a third employee and put marker pen on his face had not resulted in any disciplinary action whereas the claimant had been dismissed for violent, abusive and intimidating conduct towards Mr Hamshaw on 3 May 2019.

2.2. If one or more of those incidents of alleged less favourable treatment occurred, was that because of the claimant's race?

Harassment related to race

2.3. On 3 May 2019 did Mr Hamshaw during the course of an altercation between the claimant and Mr Hamshaw say to the claimant words to the effect "*shut up you black cunt, we are not at school*"?

2.4. If he did, there can be no doubt that such a comment was unwanted conduct related to race nor that such conduct had either the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

Unfair dismissal

2.5. Can the respondent show the potentially fair reason to dismiss of a reason related to conduct?

2.6. If it can, was that an actually fair reason having regard to the test set out in the Employment Rights Act 1996 section 98(4) and in particular:-

- Did the respondent carry out a reasonable investigation?
- If so did that investigation provide the basis for the respondent to have a genuine belief that the claimant had been guilty of misconduct?
- Was the claimant treated inconsistently in comparison with other employees who had been guilty of the same type of offence or an offence of similar gravity? In particular, had Mr Hamshaw been guilty of misconduct on 3 May 2019 as well? (he received no disciplinary sanction and was not subjected to a disciplinary process). Was there inconsistency because of the marker pen incident involving Mr Whitehouse and Mr Hamshaw drawing on the face of another employee, Mr Caswell, with a marker pen when no disciplinary action was taken against them?

- Would a reasonable employer have taken into account mitigation for the claimant's conduct on 3 May if the alleged racial slur by Mr Hamshaw had been made to the claimant.
- Whether in all the circumstances the decision to dismiss the claimant came within the band of decisions open to a reasonable employer?

2.7. If the claimant was unfairly dismissed from a procedural point of view, would a fair procedure have made any difference and if so what? How should that be reflected in terms of remedy?

2.8. Did the claimant contribute to his own dismissal and if so to what extent? How should that be reflected in terms of remedy?

3. **Evidence**

The claimant has given evidence but called no other witnesses. The respondent's evidence has been given by:-

Mr P W Hamshaw, factory operator;

Mr J P Sanderson, operations manager (with responsibility for health and safety);

Mr D D Whitehouse, team leader;

Mr C A Oglesby, general manager and dismissing officer;

Mr C A Stott, director and appeal officer.

4. **Documents**

The Tribunal have had before them an agreed bundle which comprised 454 pages. During the course of the hearing various additional documents were requested by the Tribunal and one document, the near miss report was disclosed during the course of Mr Hamshaw's evidence when he pulled that document from his pocket.

5. **The relevant facts**

5.1. The claimant was employed by the respondent as a CNC machine operator. That employment had commenced on 10 March 2008 although the claimant had probably undertaken some work for the respondent prior to that as an agency worker. The respondent is part of a group of companies which overall are concerned with what is described as symphonic rain water management. The respondent is concerned with the fabrication of HDPE pipe and we understand that the other company or companies within the group undertake the installation of such piping within the water and nuclear industries. Overall the group employs some 75 people of whom approximately 20 are employed by the respondent company.

5.2. Much of the machinery used by the respondent is potentially dangerous and accordingly the respondent is particularly concerned that all necessary health and safety requirements are followed. As part of those arrangements the respondent has a procedure for what are called

toolbox talks. The rationale for this procedure is contained in the employee handbook and particularly at page 106. It refers to the concept of safety intervention whereby every employee has the right and duty to intervene when they identify what is described as an at risk behaviour or condition. Interventions are not to include personal criticism.

5.3. On 14 February 2019 Mr P Hamshaw prepared a near miss report. This was after observing the claimant showing another employee, Wayne Fereday, how to cut piping on a saw. Mr Hamshaw believed that this had been undertaken dangerously because the claimant was holding the pipe in question on the saw whilst Mr Fereday was using the saw. The report which he prepared is now at page 455 in the bundle. It was not a document which the respondent had disclosed during these proceedings. It only came to light when Mr Hamshaw pulled a crumpled copy of the document from his pocket during the course of giving evidence before us. We should add that the respondent appears not to have taken any legal advice about this claim and that it does not have an HR function. We understand that it may have available the services of an external provider of HR advice but they do not seem to have been engaged in this case.

5.4. After what the respondent admits to be an undue delay, this near miss report came to the attention of Mr Sanderson on the morning of 3 May 2019. Mr Sanderson instructed Mr Whitehouse to arrange for a toolbox talk so that this matter could be raised. The respondent's evidence was that the approach taken for a toolbox talk was not to "name and shame" the employee or employees who may have been the subject of a near miss report. It was instead intended to be a learning opportunity.

5.5. In the event and for the reasons explained below, no toolbox talk in fact took place.

5.6. Mr Whitehouse began to make arrangements for the toolbox talk and that included inviting the claimant to attend it. As we understand it all the claimant's shop floor colleagues would have been attending it as well. It appears that, probably against the required protocol, Mr Whitehouse told the claimant that the catalyst for the meeting was a near miss report concerning the claimant himself. In his evidence Mr Whitehouse describes the claimant flying into a rage when being given this information and asking for the identity of the employee who had reported him. Perhaps unwisely, and again we would imagine against the spirit of the 'no blame' approach to toolbox talks, Mr Whitehouse told the claimant that it had been Mr Hamshaw who had prepared the report.

5.7. It is not in dispute that receiving this information further infuriated the claimant and he went to look for Mr Hamshaw for whom, or at whom, he was shouting.

5.8. The claimant then went to find Mr Sanderson and burst into his room whilst he was on the telephone conducting a meeting with other colleagues within the group. The claimant left, but would return.

5.9. The claimant then located Mr Hamshaw and told him that he was a grass. Mr Hamshaw describes the claimant as 'swaying and shouting abuse' in his direction. It is also common ground that the claimant threw a cup of coffee at the factory wall, although it is accepted that the claimant subsequently cleared this up. The claimant said that they, himself and Mr Hamshaw, should go into the canteen to sort it out.

5.10. During the course of this altercation it is common ground that Mr Hamshaw remained relatively calm, but he accepts that he did say to the claimant words to the effect "*grow up, we are not at school"*. Mr Hamshaw denies that that comment was prefaced by a reference to "*shut up you black cunt*".

5.11. When Mr Sanderson had finished his telephone call he entered the factory and observed Mr Hamshaw by the shutter door with the claimant halfway down the workshop. Voices were being raised and he believed that threats of violence were being made because the claimant had invited Mr Hamshaw to join him in the canteen to sort out their differences. Mr Sanderson observed the claimant heading towards the canteen and was of the opinion that he had clearly lost his temper. It is common ground that the claimant approached the canteen door so quickly that his hand slipped off the doorknob and he hit his head on the door, such was his momentum. This was subsequently described by others and the claimant as him headbutting the door, but it seems to have been in a sense, unintentional. In those circumstances, after the claimant had entered the canteen, Mr Sanderson positioned himself at the door of the canteen to prevent Mr Hamshaw entering. He tried to diffuse the situation.

5.12. Whilst Mr Sanderson was attempting to diffuse the situation and talking to the claimant, the claimant indicated that he needed to take an immediate holiday "*before he hurts somebody"*. Mr Sanderson took the view that the claimant was not in a fit state to continue working that day and that he might be a danger to himself or others. In those circumstances the claimant was permitted to go home and did so.

5.13. Once the claimant had left the factory Mr Sanderson telephoned Mr Oglesby the general manager to report what had happened. Mr Oglesby was not in the factory that day. Mr Oglesby decided that the claimant should be suspended. He sent him a text at 12:32 and a copy is at page 412 in the bundle. Mr Oglesby wrote that he would not accept the claimant's request for a half day holiday (although of course this had already been granted by Mr Sanderson). Mr Oglesby thought that leaving the factory without any discussion or negotiation and just saying "*book me a holiday before I kill someone*" was not acceptable. The claimant was asked to report for an investigation meeting on 8 May 2019 so that the facts could be ascertained. On receipt of this text the claimant endeavoured to speak to Mr Sanderson on the telephone from home. He was eventually able to speak to Mr Oglesby and the claimant's evidence is that he told him that Mr Hamshaw had referred to him as a black cunt and so it was Mr Hamshaw who should have been suspended. The claimant's evidence is that Mr Oglesby said that that was irrelevant. Mr Oglesby's evidence is that the claimant did not tell him what Mr Hamshaw had allegedly said.

5.14. The claimant duly attended for the investigatory interview on 8 May 2019 and it appears that on the same date, but in separate meetings, Mr Oglesby also interviewed Mr Sanderson, Mr Whitehouse and Mr Hamshaw. Within the bundle at pages 47 to 48 is a document which purports to be a summary of these four separate interviews. This is clearly unsatisfactory as it is very difficult to work out what comments are to be attributed to which interviewee. When asked questions about this by the Tribunal Mr Oglesby admitted that he had taken some handwritten notes on the day and that these had then been passed on to a Ms Leanne Butler, who is a personnel officer who works for one of the group companies, Fullflow. It was Ms Butler's task to compile the summary from the handwritten notes of Mr Oglesby together with what Mr Oglesby had told her about various interviews he had conducted on that day. As was pointed out by one of the non-legal members during the hearing, that explains why there are things in the typewritten summary which do not appear in the handwritten notes. Although Ms Butler signed various letters on behalf of managers or directors of the respondent, she had limited involvement in the process. She did, however, attend the dismissal appeal hearing as a note -taker.

5.15. The handwritten notes of Mr Oglesby are among the additional papers that were added to the bundle at the Tribunal's request as the hearing proceeded. His notes of these interviews are now at pages 48A to 48C in the bundle.

5.16. In the brief handwritten notes which cover the interview with the claimant, the claimant is recorded as saying that Mr Hamshaw had recently been trying to wind him up at work and requiring him to work two machines was an example of that. The claimant said that both Mr Hamshaw and Gavin Stocks had committed the same type of infringements as was alleged against the claimant in relation to the saw (We should add that the disciplinary process was not however in respect of any alleged breach of health and safety regulations, or for that matter with regard to the claimant leaving the factory abruptly on 3 May). The claimant had also referred to Mr Hamshaw 'cutting him up' when leaving the factory car park the previous day. The claimant appeared to accept that he had been shouting at Mr Hamshaw. The claimant is quoted as saying that he was so angry that he headbutted the canteen doors although we refer to the alternative explanation for his head hitting the door above. The claimant said that he felt that the situation would have escalated if he had not left the factory.

5.17. The notes of Mr Hamshaw being interviewed (48B) record that he had prepared the near miss report approximately two months prior, when he saw the claimant within what is described as the light beam area within the saw. Mr Hamshaw believed that on 3 May the claimant had got confrontational with Mr Whitehouse about the proposed toolbox talk and the claimant had then got in Mr Hamshaw's face and called him a grass. The claimant had challenged Mr Hamshaw to go outside or into the canteen to sort it out. Mr Hamshaw said that it was at this stage that he made a comment about not being in the school playground. He too reported that the claimant had headbutted the canteen door.

5.18. Mr Whitehouse when interviewed (48C) reported that the claimant had on 3 May started to 'kick off' when told about the proposed toolbox talk and the reason for it. The claimant had then gone off trying to find Mr Hamshaw and when he found him he was in his face and confrontational. Mr Whitehouse had heard Mr Hamshaw make the comment about not being in school and also had heard the claimant inviting Mr Hamshaw outside or into the canteen.

5.19. The interview with Mr Sanderson (48A) reported that the claimant had on 3 May come into his office several times during the course of the telephone conversation which Mr Sanderson was having with colleagues and Mr Sanderson had been aware of a commotion and foul language. When he entered the factory floor he described the claimant as 'ranting' and that he had headbutted the canteen door. The claimant had tried to get Mr Hamshaw to come into the canteen. Mr Sanderson described the claimant's manner as being aggressive. Mr Sanderson had gone into the canteen but had left the door open to ensure that he was safe and he tried to calm the claimant down. It was at that stage that the claimant had said that he wanted a half day holiday as he must get out of the place.

5.20. Also on 8 May 2019 a letter was written to the claimant inviting him to a disciplinary hearing. A copy of that letter appears at page 50 in the bundle. The letter appears to be from Mr Oglesby but it has been signed 'pp L Butler'. Mr Oglesby said that the letter had been drafted by Ms Butler but that he was aware of its contents even though he had not signed it. The claimant was notified that there was to be a disciplinary hearing on 10 May 2019. The purpose of that meeting was to consider the allegation that there had been gross misconduct because the claimant had used violent and intimidating behaviour in the workshop on 3 May 2019. The claimant was warned that if the allegation was upheld one of the sanctions could be dismissal without notice.

5.21. The disciplinary hearing duly took place on 10 May 2019. Mr Oglesby conducted that meeting. In the invitation letter the claimant had been told that Mr Sanderson would be present to take what were described as independent minutes. In the event Mr Sanderson told us that he did not take any minutes but he recollected that Mr Oglesby was taking some notes. What appears in the bundle at pages 51 to 52 is described as a summary of the disciplinary with the claimant. As with the summary of the 8 May interviews, this too seems to have been compiled, presumably by Ms Butler, who was not present, from what transpired to be some handwritten notes which Mr Oglesby did take. For these reasons it is not an easy document to understand and it is not immediately obvious which comments are attributed to which attendee. A Mr Paul Rigby was present as a companion for the claimant and at a certain point in the meeting Gavin Stocks and Wayne Fereday were called in to be interviewed. The notes as summarised suggest that Mr Stocks was present throughout, which he was not, and do not refer directly to Mr Fereday as an attendee.

5.22. Again on the basis of the Tribunal's questions to Mr Oglesby it transpired that there were some handwritten notes and these are now in the bundle at pages 52A to 52B. Those handwritten notes do not

help in terms of what the claimant was asked about, or what he said. They are really no more than notes of what Mr Fereday and Mr Stocks said when they were called into the meeting.

5.23. From the typewritten notes it appears that the claimant had pointed out that in the February 2019 near miss another employee had been involved, Wayne Fereday. Mr Oglesby is recorded explaining the purpose of toolbox talks. They were an opportunity to share experiences of good and bad practice, not to conduct a witch hunt. There is a reference to the claimant suggesting that Mr Fereday and Mr Stocks should have been interviewed. Although the minutes do not make this clear, it appears that Mr Oglesby agreed to this suggestion, whereupon the claimant left the room and, probably individually, although it is not clear, Mr Fereday and Mr Stocks were invited in and interviewed. As per the handwritten notes on page 52A, Mr Fereday was asked about the events of 3 May. He said that he saw the claimant throwing his coffee cup which smashed and he referred to the claimant ranting and raving at Mr Hamshaw. Mr Fereday was not aware of what had started the 'tension'. It seems that he acknowledged that he was the other person mentioned in the near miss report.

5.24. The notes of what Mr Gavin Stocks had to say (52A to 52B) indicate that he believed that at the beginning of the day the claimant had been in a mood because the previous day Mr Hamshaw had cut him up when leaving the car park. He too had seen the cup throwing incident and said that he had seen the claimant virtually face to face with Mr Hamshaw.

5.25. It may have been the case that Mr Sanderson had left the meeting when the other two employees were interviewed. He cannot remember and the notes do not make it clear. In any event it appears that the claimant was then invited to return to the meeting. Obviously he had not been present when the other two individuals were interviewed but Mr Oglesby's evidence was that he read back to the claimant the handwritten notes to which we have referred. It follows that the claimant had no opportunity to ask Mr Stocks or Mr Fereday any questions.

5.26. Although the typewritten notes make no reference to it, the claimant asked the respondent to make a decision at that meeting because the claimant was about to go on holiday and wanted to know his situation before he did. The claimant was informed that he was being dismissed for gross misconduct. The typewritten notes (and for that matter the handwritten notes) make no reference to the claimant being told that he was dismissed.

5.27. Later on the same day Mr Mendez wrote to Mr Oglesby appealing against that decision. A copy of that brief letter is at page 53. The claimant indicated that he felt that he had been victimised, harassed and also "racially abused to which you have chosen to ignore". He requested copies of statements which the respondent had obtained. He went on to say that he felt that he had been treated differently to other members of staff at the respondent.

5.28. Although the claimant made the reference to racial abuse in his appeal letter, it is common ground that he did not raise that issue at the

disciplinary hearing. He says that that was because he felt there was no point as when he had allegedly raised the matter with Mr Oglesby in the telephone conversation on 3 May, Mr Oglesby had said that it was irrelevant.

5.29. The letter confirming the claimant's dismissal was not written until 13 May 2019 and a copy of appears at page 54 to 55. The reason given for the claimant's dismissal was that he had "used violent, abusive and intimidating conduct on Friday 3 May 2019."

5.30. Mr Stott was appointed to hear the appeal and the appeal hearing was set for 5 June 2019 at a hotel in Rotherham. Mr Stott was accompanied by Ms Butler who, as noted earlier, took the minutes . These minutes are, in contrast to the minutes of the two earlier important meetings, of the type which one would expect a reasonable employer to have prepared. The minutes are at pages 62 to 70. Refreshingly they indicate what people said, what they were asked and what they answered. The claimant said that Mr Hamshaw was always pulling him up on his work and cutting him up in the car park. He said that that had been going on for months and had been happening since Mr Hamshaw's brother, Dave Hamshaw, had been dismissed. It is common ground that Mr David Hamshaw had apparently some years previously made a racial comment towards the claimant (we do not know the detail) and had been dismissed for that. The claimant alleges that shortly after Mr David Hamshaw's dismissal (which was also done by Mr Oglesby) Mr Oglesby approached the claimant and said that the decision to dismiss David Hamshaw had been a mistake. Mr Oglesby denies that any such comment was made.

5.31. Giving his account of 3 May, the claimant said that Mr Whitehouse had told him that he wanted to have a meeting with him that day and that it was about the claimant's work on the saw. The claimant had said that two people had been working on the saw. The claimant learnt that it had been Mr Hamshaw (Phil) who had put in the report. The claimant then said that he had gone to see Mr Sanderson and then he had gone to see Mr Hamshaw to ask him why he had put him on the report. On the respondent's case the claimant then mentioned for the first time that Mr Hamshaw responded to him to the effect "*I haven't, shut up you black cunt we are not at school."*

5.32. The claimant accepted that he was "fuming", but did not make any further admissions about his conduct, although he said that he felt that he needed to take half a day and therefore made that request to Mr Sanderson.

5.33. The claimant is recorded as saying that when he received the suspension text from Mr Oglesby the claimant had called him "and asked him why and told him what had happened". However the claimant did not say during the course of the appeal hearing that he had allegedly told Mr Oglesby about the 'black c***' reference, or that Mr Oglesby had said that that was irrelevant.

5.34. The claimant went on to point out that there had been things that had gone off at the respondent which had not resulted in dismissal and he

referred to Mr Whitehouse once holding a person down on the shop floor and drawing on his face.

5.35. The claimant alleged that that person had gone home upset, but no disciplinary action had been taken. The claimant also alleged that Mr Hamshaw had been clocking other people in but had only received a written warning for that. The claimant also alleged that Mr Whitehouse had made threats towards someone called Shaun Incley and had taken him off site allegedly to do him harm. The claimant referred to Dave Hamshaw being dismissed and said that Mr Oglesby had subsequently told him that he thought the dismissal had been a mistake. The claimant also complained about being required to work two machines.

5.36. The claimant denied that he had been threatening Mr Hamshaw, he was just arguing with him. He admitted that his voice did get loud when he was arguing.

5.37. The claimant then handed to Mr Stott some Facebook entries which appear at pages 66 to 69. They are entries on Mr P Hamshaw's Facebook account. The first purports to be an application for British Citizenship where the question is posed "Do you like bacon? yes/no". When we asked Mr Hamshaw about this he acknowledged that it was something that he had forwarded but suggested that the 'joke' was directed against vegetarians. The next document shows a map of Africa with the United Kingdom superimposed with the comment "Let's just put this immigration thingy into perspective … I mean, the migrants have obviously got nowhere else to go." The next page is a reference to support for the far right leader Tommy Robinson. The final document which was placed before Mr Stott was of Mr Hamshaw updating his profile picture for Facebook to show what apparently is the symbol or badge of an organisation known as Britain First, whose motto appears to be "Taking Our Country Back".

5.38. The minutes show that Mr Stott then asked the claimant whether he had provided those documents to prove that Mr Hamshaw was a racist and the claimant said 'yes'. When towards the end of the meeting the claimant was asked whether there was anything else he would like Mr Stott to take into account the claimant replied "*it's just the inconsistency".* Mr Stott then concluded the meeting by indicating that he would review all the documentation and that if he needed anything else he would ask the respondent.

5.39. In his witness statement (paragraph 6) Mr Stott relates that following this meeting he visited the respondent's premises in order to interview six individuals - Mr Sanderson, Mr Rigby, Mr Stocks, Mr P Hamshaw, Mr Whitehouse and a Chris Watling. He goes on to say that the reason for that was the allegation of racial discrimination that had been raised. In paragraph 11 of his witness statement Mr Stott says that during the interviews that he held, either by telephone or at the respondent's offices, he "specifically drilled down on this point and all witnesses told me that Mr Hamshaw had not used racist language."

5.40. As there were no notes of these six interviews in the bundle we asked Mr Walker, the respondent's representative, if there was anything that

needed to be added to the bundle. We were provided with a one page document handwritten which is now at page 456 in the bundle.

5.41. In relation to the interviews with Mr Stocks and Mr Whitehouse, nothing is recorded other than their phone numbers. Mr Stott told us that he tried to contact them by telephone but when they rang him back he was driving along the M1 and so was not able to make a note of anything they told him.

5.42. It appears that the 'drilling down' which Mr Stott conducted amounted to asking those he managed to interview whether they had heard Mr Hamshaw make the alleged black c*** comment.

5.43. Mr Sanderson said that he had never heard such a comment whilst he was working at the respondent and specifically had not heard that said during the altercation on 3 May.

5.44. Mr Rigby had not witnessed anything on 3 May. His only involvement had been as a companion to the claimant at the disciplinary hearing.

5.45. The notes in respect of Mr Hamshaw's interview indicate that he said that he had not called the claimant a black c*** and had made no racist remarks whatsoever. Mr Hamshaw suggested that a further witness may have been someone called Nathan, although the note goes on to say that somebody, possibly Mr Stott, had spoken to Nathan who had told him that he was outside and had not seen anything. Mr Hamshaw referred to the claimant as 'effing and jeffing'. It appears that Mr Hamshaw was not asked about any of the Facebook entries which Mr Stott had been shown by the claimant at the appeal hearing.

5.46. Somebody called Rachel was apparently interviewed about the holiday request and the availability of holiday request forms.

5.47. Chris Watling apparently did not overhear anything other than what is described as a 'rant' from the claimant.

5.48. On 7 June 2019 Mr Stott wrote to the claimant and a copy of this letter is at pages 60 to 61 in the bundle. Mr Stott stated that it was not contested that the claimant had been working unsafely and it had therefore been appropriate for Mr Hamshaw to put in a report. The fact that the claimant had subsequently chosen to confront Mr Hamshaw and challenge him for this intervention was, Mr Stott said, entirely unacceptable. The letter goes on to inform the claimant that Mr Stott had "subsequently interviewed all witnesses individually", although it appears that such notes as we have referred to were not provided to the claimant. Mr Stott went on to write that there was no evidence to support the claim that Mr Hamshaw had called him a black c*** or used any other racially motivated language. Mr Stott believed that the claimant had only raised the issue of race discrimination after being dismissed.

5.49. On the question of consistency, Mr Stott said that from the information available to him he found it difficult to assess the true validity of that allegation, although he acknowledged that the claimant might be correct that there had been some historic inconsistency. Nevertheless Mr Stott

did not feel that that had a specific bearing to the claimant's case. He went on to write:

"*What is clear to me is that Plasflow's management does have a specific violence and aggression policy with which you are fully familiar … your behaviour on Friday 3 May 2019 directly contravened this policy and that of* (a section of*) the employee handbook which defines 'violent, abusive or intimidating conduct' as gross misconduct."*

Mr Stott rejected the claimant's suggestion that he had merely been having an argument with Mr Hamshaw. He said that the evidence which he had gathered suggested that the claimant's manner was indeed threatening and that he had used abusive language and had headbutted and shoulder charged the canteen door. (We are not sure where the reference to shoulder charging the door comes from).

Mr Stott also pointed out that the claimant had invited Mr Hamshaw into the canteen alone or into the car park. Accordingly the appeal was not upheld.

6. **The parties' submissions**

6.1. Claimant's submissions

Mr Mendez told us that he just wanted to be treated equally. He believed that the respondent had ignored the things that he had put forward. Other things that were done on the shop floor had been ignored but the claimant was penalised for standing up to a bully. He had been treated unfairly.

6.2. Respondent's submissions

Mr Walker said the respondent had followed due process and was entitled to dismiss in accordance with the rule book and its policies. Mr Walker contended that the facts were not disputed with regard to the claimant's violence and abuse. The claimant had got a new job soon after leaving the respondent on the same pay. There was no evidence to support the allegation that the claimant had been subjected to racial abuse. There were no witnesses to that. Health and safety was important and racial abuse would not be tolerated. Because the claimant had been employed by the respondent and trained by it for some 11 years that suggested there was no racism. Mr Walker said that it had been 10 or 11 years prior that Mr Dave Hamshaw had been dismissed for making racial comments to the claimant (although we note that respondent witnesses said it was more recent.). The requirement to use two CNC machines was not discriminatory as everyone had to do that. The Facebook entries of Mr Hamshaw were personal to him. The claimant had demonstrated that he is a violent man with a history of violence. (We assume that this is a reference to a verbal warning which the claimant was issued with on 5 July 2010 after pulling a door off its hinges when in a rage (see page 90) – we were not informed of any other disciplinary matters on the claimant's record although of course being dismissed for gross misconduct connotes that that conduct is in itself sufficient to justify dismissal). The claimant contended that he had been singled out because he was black but the near miss report had referred to both the claimant and a white

colleague. Mr Walker suggested that the claimant had run a coach and horses through the respondent's health and safety policy. There was no evidence of race discrimination and the respondent requested the Tribunal to dismiss the claimant's claim.

7. The Tribunal's conclusions

7.1. The direct race discrimination complaint

7.1.1. Was the claimant required to operate two CNC machines whereas the other operators, who were white, were only required to work one?

As we have noted, this is the claimant's contention. He is not complaining that he had to operate two machines more often than any other operator but simply that he was the only person who had to operate two machines. The claimant has dealt with this very briefly in his witness statement where in paragraph 3 he simply asserts that he worked two machines whilst other employees only worked one.

We have taken into account also what Mr Sanderson had to say about this. He explains in paragraphs 10 and 11 of his witness statements that operators are required to operate two machines at once when they are manufacturing what are described as Full flow bends. He says that those bends are of low technology and are easily produced with very little skill being required. These bends are required to be produced in quantity and are costed on the basis that they will be manufactured by one operator utilising two machines simultaneously.

Mr Sanderson has exhibited to his witness statement statements from five employees, but we have heard from none of them. The statements are in identical terms and purport to confirm that each employee, who it is agreed is white, had been regularly assigned to operate two CNC Butt Fusion Machines. We give little weight to these statements as we have not heard from the makers. However, we have heard from Mr Whitehouse who, in paragraph 10 of his witness statement also says that it was not only the claimant who was required to work two CNC machines

Mr Sanderson also exhibits to his statement a brief selection of rotas. They appear to be random sheets from November 2018, January 2019, February 2019 and April 2019. The claimant is shown operating two machines ("2 machines please") on one occasion (12 November 2018). A Mr Vadims Bulans is shown operating two machines on one occasion (4 February 2019) and Wayne Fereday is shown operating two machines on 1 April 2019.

In these circumstances we are satisfied on the balance of probability that it was not only the claimant who was on occasion

required to operate two machines at the same time. We find that the claimant was not less favourably treated when he was instructed to carry out work on two machines. Accordingly, this part of his direct race discrimination complaint fails at that point.

7.1.2. Mr Hamshaw preparing the near miss report which referred to the claimant

As we have clarified in our findings of fact, Mr Hamshaw did not directly report this to Mr Sanderson on 3 May 2019. Instead it seems that the near miss report which was made on 14 February 2019 (now page 455) only came to Mr Sanderson's attention on 3 May 2019.

We accept that being referred to in a near miss report could reasonably be regarded as less favourable treatment.

We then have to go on to consider whether the claimant has proved facts from which we could conclude that the near miss report was prepared because of the claimant's race. If the claimant was able to prove that we would then look to the respondent for a non-discriminatory explanation. This is the approach we must take because it is the burden of proof set out in the Equality Act 2010 section 136.

Whilst we have concluded as will be seen later in these reasons that there is material from which we can properly make adverse inferences in respect of the harassment complaint, we find that those do not apply to the matter under consideration. If Mr Hamshaw had been motivated to make this report by the claimant's race (rather than a genuine concern that he had observed an unsafe work practice) we would have expected him to have 'chivvied' Mr Sanderson when weeks and then months passed in-between the report being made in February and its eventual actioning in May. We also note that the content of the near miss report is quite specific as to what work was being undertaken, on what machine and as to the relative positions of the claimant and the other employee, Wayne Fereday. That suggests that this was not a casual attempt to get the claimant into trouble. Further as Mr Fereday was also named, if the report was false, Mr Hamshaw would be running the risk that Mr Fereday would dispute the factual account given.

For these reasons we conclude that the claimant has not discharged the burden of proof which is on him and accordingly this part of the direct race discrimination complaint must fail.

7.1.3. Mr Sanderson subsequently instructing Mr Whitehouse to conduct a toolbox talk

Mr Sanderson gave this instruction once he was aware of the content of the near miss report and it seems that he only became aware of it on 3 May 2019. We accept that the progression of the

near miss procedure in this way can properly be regarded as less favourable treatment.

However again we do not consider that the claimant has discharged the initial burden of proof of establishing that Mr Sanderson took this action because of the claimant's race. The claimant has not put any evidence before us which would support such a conclusion. We are satisfied that Mr Sanderson was simply following the procedure once he became aware of the near miss report. Accordingly we find that this part of the race discrimination complaint also fails.

7.1.4. Mr Whitehouse raising the issue with the claimant

We find that Mr Whitehouse did not handle this matter as well as he might have done. If, as we are told, the reporting of near misses and the consequential training by way of toolbox talks is supposed to be on a no blame basis, this is hardly likely to be achieved if a team leader informs an employee that he is the cause of what is going to be discussed at the toolbox meeting. Further, whilst this might be easier said than done in the circumstances, responding to the claimant's question about who had 'shopped him' does not seem to be in the spirit of the 'no blame' approach to safety issues.

However there is a significant difference between these shortcomings and the claimant's contention that Mr Whitehouse's approach was because of the claimant's race. We also remind ourselves that the way in which this part of the complaint has been defined is that the complaint is Mr Whitehouse raising unsafe working issues with the claimant but not raising such issues with other white employees. We need to bear in mind that the context is this particular 14 February near miss report. Whilst two employees are named, the claimant and Wayne, it is clear from the way in which the brief report is written that the alleged problem was with the claimant's actions. It appeared that he was showing Wayne how to cut some piping in a dangerous fashion – because the claimant was holding the piece of pipe that was being cut.

In these circumstances, as Mr Whitehouse's approach was, wrongly, to provisionally attribute blame, it is hardly surprising that he felt that it had been the claimant who was at fault rather than Wayne.

As the toolbox talk never in fact took place, it will never be known whether, given the opportunity, Mr Whitehouse might have made some comments about Mr Fereday's involvement on 14 February. In any event we find that the claimant has not discharged the initial burden of proof which is on him.

7.1.5. Mr Oglesby's alleged dismissive approach to the claimant's notification of an alleged racial comment

The claimant contends that this occurred during the course of a telephone conversation between the claimant and Mr Oglesby on

the afternoon of 3 May 2019. As we have noted, the claimant contends that during the course of that conversation he told Mr Oglesby that during the claimant's exchanges with Mr Hamshaw earlier that day Mr Hamshaw had made the 'black c***' comment. The claimant says he told Mr Oglesby that he believed that in those circumstances Mr Hamshaw should have been suspended as well, but that Mr Oglesby responded by saying that it was irrelevant.

Mr Oglesby denies that the claimant made any reference to Mr Hamshaw racially abusing him and so he also denies that he made any such comment about its relevance. In paragraph 9 of his witness statement he says that the claimant's allegation is untrue because no such conversation took place. It is however agreed that there was a telephone conversation between the two on that day. Mr Oglesby goes on paragraph 9 to say that he believes that it is significant that the claimant thereafter failed to refer to this matter during the course of the disciplinary hearing which Mr Oglesby himself conducted.

The claimant explained to us that the reason he did not raise the matter during the disciplinary hearing was that he felt there was no point because Mr Oglesby had already said it was not relevant.

In respect of this aspect of the case, we consider that the claimant has put before us evidence from which we could conclude that Mr Oglesby did dismiss the racial slur comment. The claimant has told us that when, some years previously, Mr Hamshaw's brother David was dismissed for making a racial comment to the claimant, Mr Oglesby had then told the claimant that he thought the dismissal had been a mistake.

When the Employment Judge asked Mr Oglesby about this he said that he could not remember saying it was a mistake and there was nothing to make him think that dismissing Mr David Hamshaw had been a mistake.

We note that during the course of the appeal hearing the claimant raised the "mistake" comment – "*Craig came over to me and said I think I've made a mistake*" (see page 63). Further, at page 65 in the minutes, Mr Stott summarises what the claimant said during the hearing as:-

"You were approached by CO (Mr Oglesby*) regarding the dismissal of DH and he stated that he thought he had made a mistake and DW* (Mr Whitehouse*) and PH* (Phil Hamshaw*) said that you were out of order for reporting it. This has left you feeling "what is the point?".*

Whilst we acknowledge that here Mr Stott is simply reporting his understanding of what the claimant had told him, we consider that for the claimant to raise the issue in this sort of detail adds to credibility. That supports the claimant's explanation for not raising the racial abuse matter for a second time before Mr Oglesby, that is at the disciplinary hearing, as he felt that there

was no point having already raised it on 3 May and being told that it was irrelevant.

In these circumstances we find that there was less favourable treatment and that it was because of the claimant's race. Turning a blind eye to what, if proven would obviously have been a racist comment, was in itself in our judgment an act of unlawful race discrimination. This aspect of the race discrimination complaint therefore succeeds.

7.1.6. <u>The claimant's dismissal</u>

Later in these reasons we consider the dismissal on the basis of whether or not it was fair, but here we are considering whether it was also less favourable treatment because of the claimant's race. Clearly being dismissed is less favourable treatment.

The claimant contends that his dismissal was an act of race discrimination because the respondent had failed to dismiss two white employees, Mr Phil Hamshaw and Mr Whitehouse, who are both white, for the 'marker pen incident' some years prior. However we find that this is not an apt comparison. It appears that the behaviour of Mr Hamshaw and Mr Whitehouse in the incident involving Mr Caswell, whilst being puerile, comes into the category of 'horseplay'. In addition whether, as Mr Hamshaw now alleges, Mr Caswell was a willing participant in that horseplay or not, he did not report the matter and so there was no disciplinary procedure.

In contrast, it is common ground that the claimant's behaviour on 3 May 2019 was in a different category. This was not horseplay but rather a very angry employee (and for the reasons we set out later, with some justification) who by common account was intending to do violence towards a fellow employee.

Further, whilst we have found that Mr Oglesby discriminated against the claimant by discounting his complaint about the racial slur, that does not support an argument that Mr Oglesby decided to dismiss the claimant because of his race. There was clearly significant misconduct which any employer would need to address. Accordingly we find that this part of the direct discrimination complaint also fails.

7.2. <u>Harassment</u>

The essential question here is whether Mr Hamshaw did use the words "*shut up you black cunt, we are not at school*". The claimant asserts that he did and unsurprisingly Mr Hamshaw denies it. At least he denies the 'black c***' prefix whilst accepting that he said words to the effect "we are not at school".

As it would be very unusual for anyone to admit to racially harassing a colleague, it is generally accepted that it is permissible for an Employment Tribunal to draw inferences if there is evidence before them which permits that approach.

We start by noting that the only evidence we have heard about this alleged comment has been from the claimant, Mr Hamshaw and Mr Whitehouse. That is despite the altercation between the claimant and Mr Hamshaw having been witnessed by all those on the shop floor.

Mr Whitehouse's evidence was that all he heard Mr Hamshaw say was *"grow up as we are not at school*" and that he did not hear any statement of a discriminatory nature. (See paragraph 9 of his witness statement).

We are told that other employees subsequently interviewed by the respondent gave similar accounts. However we have not had the benefit of hearing from and so assessing those witnesses ourselves. Nor have we had the benefit of anything like a clear written statement taken contemporaneously by the respondent from any of those potential witnesses. We have already made adverse findings about the significant shortcomings at least in terms of recording such investigation as took place.

The next evidence that we consider is the Facebook material emanating from Mr Hamshaw's account. Whilst we accept that free speech is an important principle in any democracy, the Facebook entries suggest that Mr Hamshaw has, or at least sympathises with, some fairly extreme views on race. We were not impressed with his answers to the questions put to him by the Tribunal about the Facebook entries. His suggestion that the "*do you like bacon*" reference was supposed to be a joke directed at vegetarians rather than Muslims was not impressive. His comment about the image at page 67 in the bundle ("*the migrants have obviously got nowhere else to go")* was that he felt it was a good statement and was not racial. He suggested that he had sent a copy of it to his "African friend". In relation to his Facebook profile picture, we were not impressed by his suggestion that he had added the badge and logo of Britain First ("*Taking our country back*") because he liked the Union Jack.

In these circumstances we consider that a person who has such Facebook entries and gives such answers when asked about them is one who is more likely to refer to a black person in derogatory terms, especially when having an angry dispute with them.

We also take into account that Mr Hamshaw's brother had been dismissed for making some sort of racial comment to the claimant. Whilst we accept that the Mr Hamshaw and his brother are two separate individuals, there was something of a precedent for how members of the Hamshaw family treated their black colleague.

Finally we consider that what Mr Hamshaw admits to saying, the "not at school" reference, which is all that the witnesses say they heard, sounds as if it could be the end of a comment which may well have begun as the claimant contends. It has, unfortunately, a certain flow to it as reported by the claimant.

For all these reasons we find on the balance of probabilities that, admittedly in the heat of the moment, Mr Hamshaw did refer to the claimant as a 'black c***'.

Clearly to be called a 'black c***' is unwanted conduct and looking at the context we are satisfied that the comment had the purpose of violating the claimant's dignity. Accordingly the harassment complaint succeeds.

7.3. **Unfair dismissal**

7.3.1. Can the respondent show a potentially fair reason to dismiss?

The potentially fair reasons which an employer can dismiss for are set out in the Employment Rights Act 1996 at sections 98(1) and (2). One of those is a reason which relates to conduct. As that is the reason which this employer seeks to show and it is within the statute we find that a potentially fair reason has been shown.

7.3.2. Was it actually fair?

The starting point is the statutory test in section 98(4) of the same Act. That provides as follows:-

*"Where the employer has (*shown a potentially fair reason*) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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."

In all cases which involve misconduct it is necessary for a fair employer to carry out a reasonable investigation so that it has sufficient evidence to support any decision to dismiss which is thereafter taken. Whilst we have expressed our concerns about the way in which this employer documented its investigation, that does not necessarily mean that the investigation itself was inadequate.

We find in any event that the level of investigation required in this case was limited because the claimant broadly accepted the charge that he had used violent and intimidating behaviour on 3 May 2019. However we find that there was one significant area where the respondent failed to carry out a reasonable investigation. That was with regard to the claimant's allegation that Mr Hamshaw had during the exchange made a racial comment towards him. That in our judgment had implications for two important issues, consistency and mitigation.

7.3.3. Consistency

The claimant has pursued the consistency point on two fronts. First he has said that the 'marker pen incident' some years prior

should be accepted as the respondent taking two different approaches in what were broadly similar situations. For the reasons we have given when discussing this part of the claimant's race discrimination complaint we reject that argument.

However, the claimant has also contended that there was inconsistency in relation to the incident on 3 May and its aftermath. He contended at the appeal stage that there had been inconsistency because whilst he had been subjected to a disciplinary process and then dismissed for his conduct, Mr Hamshaw had not been subjected to any disciplinary process with regard to what the claimant alleged was misconduct by him – the racial slur. At page 63 in the minutes the claimant refers to Craig (Mr Oglesby) turning a blind eye when it suits him and it is recorded that he went on to say:

*"Phil Hamshaw saying black **** we are not at school, nothing mentioned, I get fired for standing my ground (no physical contact made)."*

Mr Stott's evidence was that he was concerned about what the claimant had alleged Mr Hamshaw had said and that this led him to conduct a series of interviews so he could specifically 'drill down' on that point (see paragraph 11 of his witness statement).

However we find that the investigation which Mr Stott in fact carried out was superficial and half hearted. Until we asked for it, the respondent had not seen fit to include within the bundle, or therefore disclose to the claimant, the fruits of this 'drilling down' investigation. When on our enquiry and request the one page handwritten note that is the result of Mr Stott's interview with seven individuals was produced, the superficiality becomes clear (see page 456).

As we have noted, during the course of the appeal hearing the claimant had presented the Facebook entries to Mr Stott. There was no indication in the extremely brief note of Mr Stott's subsequent interview with Mr Hamshaw as to what Mr Hamshaw's comments on those entries had been. When the Judge asked Mr Stott about this he told us that he did not question Mr Hamshaw about these Facebook postings, in fact that they were not mentioned at all. That was because in Mr Stott's opinion Mr Hamshaw was "entitled to his own views". Instead he accepted that he had simply asked Mr Hamshaw whether he had made the statement and his question to other potential witnesses was whether they had heard the 'black c***' comment.

In these circumstances we conclude that the dismissal was unfair. Mr Oglesby had in effect inhibited the claimant in raising the inconsistency argument at the disciplinary hearing and when the claimant did have an opportunity to raise it at the appeal hearing it was not properly dealt with it.

7.3.4. Mitigation

Whilst the claimant was obviously angry before Mr Hamshaw made the 'black c***' comment, we find that naturally this comment would have intensified the claimant's reaction. We consider that a reasonable employer would have conducted a proper enquiry into an issue raised by an employee that would, or at least could, have mitigated the conduct of the employee raising that issue. The claimant was however denied that opportunity by the respondent's failure to properly investigate the allegation against Mr Hamshaw.

That is a further reason that leads us to conclude that this dismissal was unfair. No reasonable employer would have dismissed in circumstances where a potential mitigating factor had not been properly investigated.

7.3.5. Did the claimant contribute to his own unfair dismissal?

In our judgment clearly he did because of his admitted conduct towards Mr Hamshaw. The claimant had had a very angry reaction, he was shouting, had thrown a cup at the wall and it seems likely that if he had been able to engage with Mr Hamshaw in the canteen or the car park, physical violence would have ensued. Whilst taking into account the provocation/mitigation which this respondent failed to take into account we nevertheless conclude that the claimant contributed to his own dismissal to the extent of 30%. Accordingly the remedy which he will subsequently be awarded (yet to be determined) will be subject to a 30% reduction.

Employment Judge Little

Date: 16th November 2020