



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE HYDE  
**MEMBERS:** MRS C WICKERSHAM  
MS M FOSTER-NORMAN

**BETWEEN:**

Claimant MR T JEZIORANSKI

AND

Respondent RENDALL AND RITTNER LIMITED

**ON:** 28, 29 and 30 September and 1 October 2020;  
And in-chambers on 14 and 15 October 2020

**APPEARANCES:**

For the Claimant: In Person  
Interpreter: Mr R Konop (Polish/English)  
For the Respondent: Mr T Fuller, Consultant

## **RESERVED JUDGMENT**

The Judgment of the Employment Tribunal is that: -

1. The claim for a redundancy payment, having been withdrawn, was dismissed.
2. The claim for holiday pay, having been withdrawn by the Claimant during the hearing, was dismissed.
3. The complaints of unfair dismissal under sections 98(4) and 103A of the Employment Rights Act 1996 were not well founded and were dismissed.

4. The complaints that the Claimant had been subjected to detriments by reason of having made protected qualifying disclosures (the whistle-blowing detriment complaints) were not well founded and were dismissed.
5. The complaint of indirect religious discrimination was not well founded and was dismissed.
6. The claim for damages for wrongful dismissal/breach of contract by way of notice pay was not well founded and was dismissed.
7. The claim for damages for breach of contract in relation to reimbursement of travel expenses was not well founded and was dismissed.

## **REASONS**

### **Preliminaries**

1. Reasons are provided in writing for the above Judgment as it was reserved.
2. The reasons are set out in writing only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost. Thus, whilst all the points made and evidence produced by the parties were considered, only those which the Tribunal considered it necessary to record are set out in these reasons. This is also in accordance with the duty on the Tribunal to conduct itself in a way which is proportionate: Rule 2 of the Employment Tribunals Rules of Procedure 2013.
3. Finally, all findings of fact were reached on the balance of probabilities.
4. By a claim form presented on 16 February 2019, the Claimant brought complaints of unfair dismissal, race and religious discrimination, and claims for a redundancy payment, notice pay, unpaid wages, holiday pay and expenses. The Respondent defended all the claims as set out in the grounds of resistance which were presented with the response on 9 May 2019.
5. At a hearing before Employment Judge Siddall on 17 March 2020 the Claimant was given permission to pursue whistle blowing detriment and dismissal claims. Unfortunately, these claims remained insufficiently particularised by the start of the hearing, but as appears below, the Tribunal and the Respondent attempted to clarify their scope during the hearing.
6. For the avoidance of doubt, it is recorded that two duplicate claims brought by the Claimant (2300483/2019 and 2300568/2019) raising

identical complaints as in the current claim were dismissed on withdrawal by a Judgment sent to the parties on 21 September 2019 by Employment Judge Andrews.

7. The Tribunal told the parties at the end of the hearing on 1 October 2020 that it would be reconvening on 12 and 13 October 2020 to consider the case in chambers. In the event, this proved not to be possible, so the Tribunal reconvened on the dates set out above.

## The Issues

8. At the case management discussion which took place before Employment Judge Siddall on 17 March 2020, the list of issues for the Tribunal to determine was recorded. It has been cut and pasted below bearing the same paragraph numbers as in the Judge's Summary, save that minor amendments such as stating the main statutory provisions under which each complaint has been made, have been inserted, in italics. As is apparent from the text below, the Claimant had not provided all the necessary detail of his complaints. The issues identified were as follows: -

### 11. Unfair dismissal claim - *Section 98(4) Employment Rights Act 1996*

11.1 What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

11.2 Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?

11.3 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

11.4 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.

11.5 Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

### 12. Public interest disclosure claim/s (whistleblowing claims)

12.1 What did the Claimant say or write? The Claimant asserts that he raised concerns about health and safety matters in his grievance lodged with the Respondent.

12.2 In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show one of the following? Identify only the one/s upon which the Claimant relies.

12.2.1 A person [who?] had failed to comply with a legal obligation [what obligation?] to which he was subject [how/why?]

12.2.2 The health or safety of any individual [who?] had been put at risk [how?]

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

**Detriment complaints - Sections 43A & B Employment Rights Act 1996**

12.4 If protected disclosures are proved, was the Claimant, on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that

- 12.4.1. The Respondent failed to deal with his grievance appropriately
- 12.4.2. He was refused a meeting with a director
- 12.4.3. He was given more work and additional responsibilities

**Unfair dismissal complaints (sic) [Section 103A Employment Rights Act 1996]**

12.5 Was the making of any proven protected disclosure the principal reason for the dismissal?

- 12.5.1. Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?
- 12.5.2. Has the Respondent proved its reason for the dismissal, namely misconduct?
- 12.5.3. If not, does the tribunal accept the reason put forward by the Claimant or does it decide that there was a different reason for the dismissal?

**13. Section 13 [Equality Act 2010]: Direct discrimination because of race**

13.1 Has the Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act, namely:

- 13.1.1. Failing to deal with his grievance appropriately
- 13.1.2. Refusing a meeting with a director
- 13.1.3. Giving him additional work and responsibilities
- 13.1.4. Dismissing him

13.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators: Graham Wollard and Diego Palacio and/or hypothetical comparators.

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

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

**14. Section 19 [Equality Act 2010]: Indirect discrimination in relation to religion**

Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely requiring the Claimant to attend a disciplinary hearing on boxing day 2018? The Claimant is catholic and he asserts that the calling of this meeting interfered with his observance of his faith over the Christmas period (although he agrees that the meeting date was later changed)

Does the application of the provision put other people of that religion at a particular disadvantage when compared with persons who do not have this protected characteristic?

Did the application of the provision put the Claimant at that disadvantage in that he was not able to prepare properly for the hearing as the Christmas period is one where persons of his faith are expected to observe aspects of their religion such as reading the bible?

Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

**15. Time/limitation issues**

Does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

**16. Unpaid annual leave – Working Time Regulations**

What was the Claimant's leave year?

How much of the leave year had elapsed at the effective date of termination?

In consequence, how much leave had accrued for the year under regulations 13 and 13A?

How much paid leave had the Claimant taken in the year?

How many days remain unpaid?

What is the relevant net daily rate of pay?

How much pay is outstanding to be paid to the Claimant?

**17. Breach of contract**

It is not in dispute that that Respondent dismissed the Claimant without notice.

Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed gross misconduct? NB This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct.

To how much notice was the Claimant entitled?

Is the Claimant owed money in respect of travel expenses he incurred for travelling to attend an investigation meeting, disciplinary meeting and appeal meeting away from his usual work site on 23 August 2018, 11 January 2019 and 26 February 2019?

**18. Remedies**

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

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

9. As often occurs in cases prosecuted by litigants in person, the Claimant's evidence and submissions were not restricted to the issues identified. It was clear however that the central issue was whether the dismissal was justified on the grounds relied on by the Respondent.
10. At the case management discussion before Employment Judge Siddall, the Claimant confirmed that he had withdrawn his redundancy payment claim. During the final hearing, he also told this Tribunal that he wished to withdraw his annual leave claim. The Tribunal therefore dismissed those

complaints as set out above.

### **Evidence Adduced**

11. A bundle containing the majority of the papers to which the Tribunal was referred was prepared by the Respondent and consisted of approximately 550 pages. It included some of the Claimant's documents and was marked [R1]. In addition, the Claimant produced a bundle containing approximately 36 pages of supplemental documents which the Tribunal marked [C1].
12. The Tribunal heard evidence from the Claimant who confirmed his reliance on the contents of his claim form. The Tribunal treated this as his witness statement as he had not prepared a separate witness statement for the hearing. The ET1 form was therefore marked [C2].
13. The Claimant also called as a witness, Mr B Ipacs, a former colleague at the Respondent. His witness statement was marked [C3] and was dated 27 July 2020. By his witness statement [C2], Mr Ipacs up-dated a statement which he had previously written and which was contained in the bundle of documents.
14. On behalf of the Respondent, Mr Simon Leech, Team Leader; Mr Liam Side, Property Team Manager; and Ms Nicola Milburn, Area Director all gave evidence. They relied on witness statements as their evidence in chief marked respectively [R3] – [R5].

### **Closing Submissions**

15. At the close of the evidence, Mr Fuller presented very detailed written closing submissions dated 1 October 2020 in which he addressed the facts which had been presented to the Tribunal. It ran to 30 pages. He supplemented those submissions by addressing the Tribunal orally in more global terms.
16. Due to the detail in Mr Fuller's written submissions, the Tribunal heard initial oral submissions from the Claimant, then gave him the opportunity of either adjourning to read Mr Fuller's submissions and then addressing us further orally, or considering the written submissions at his leisure and sending any further submissions in writing to the Tribunal with a copy to Mr Fuller by 8 October 2020. The Claimant chose the latter course. His written submissions were sent to the Tribunal in hard copy and he helpfully inserted his comments on each of Mr Fuller's submissions in a document which therefore ran to approximately 71 pages. The format also allowed the Tribunal to consider both parties' points conveniently in one document.
17. As there was insufficient time to hear all the closing submissions and to

deliberate, the Tribunal adjourned to meet in chambers on two days shortly after the end of the evidence.

### The Relevant Law

18. The following text is adopted from Mr Fuller's written submissions in which he accurately set out the relevant statutory provisions and case law.

#### Unfair Dismissal

1. Section 98 ERA 1996 provides:

*(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 it 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 sub section if it: -*

*(b) Relates to the conduct of the employee;*

*(3) ...*

*(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 employee 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.*

2. An employer must genuinely believe the employee is guilty, and it must have reasonable grounds for that belief, which must have been reached following a reasonable investigation (**British Home Stores Ltd v Burchell [1978] IRLR 379**).

3. If a dismissal falls within the band of reasonable responses, the dismissal will be fair. If the dismissal falls outside of the band the dismissal will be unfair (***Iceland Frozen Food v Jones [1982] IRLR 439***).
4. The reasonableness of the process followed by the employer is also subject to the range of reasonable responses test (***Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23***).
5. If an employee is unfairly dismissed, an Employment Tribunal can make a reduction to compensation where they would have been dismissed in any event had a fair procedure been followed (***Polkey v A E Dayton Services Ltd [1987] 3 ALL ER 974***).
6. Section 122 ERA 1996 states that:
  - (1) ...
  - (2) *Where the tribunal considers that any of the conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*
7. Section 123 ERA 1996 states:
  - (6) *Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*
8. The CoA in ***Nelson v BBC (No. 2) [1979] IRLR 346 (paragraphs 40-44)*** held that, in order for a deduction for contributory fault to be made, that conduct must be culpable or blameworthy in the sense that, whether or not it amounted to a breach of contract or tort, it was foolish or perverse or unreasonable or 'bloody-minded', and that it be just and equitable to do so.

#### Public Interest Disclosure

9. Section 43B ERA 1996 states:
  - (1) *In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest] and tends to show one or more of the following –*



- (a) ...
- (b) *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
- (c) ...
- (d) *That the health and safety of any individual has been, is being or is likely to be endangered,*
- (e) ...
- (f) ...

10. Section 43C ERA 1996 states:

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*

- (a) To his employer, or*
- (b) ...*

11. The EAT in **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 (paragraphs 23-24)** held that there was a distinction between disclosing 'information' and making an allegation, in that a disclosure of information meant to convey facts.

12. However, it was acknowledged by the CoA in **Kilraine v Wandsworth London Borough Council [2018] ICR 1850 (paragraphs 27-32)** that an allegation can also convey facts, but it must fall within the language used in [section 43B(1)], and so a statement devoid of factual content could not be said to fall within this section.

Public Interest Disclosure – Detriment

13. Section 47B(1) ERA 1996 states:

*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*

14. Section 48(1A) ERA 1996 states:

*A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.*

15. Section 48(2) ERA 1996 states:

*On [a complaint under section (1), (1ZA), (1A) or (1B), it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

16. In **Fecitt v NHS Manchester [2012] IRLR 64**, the CoA held that, in detriment cases, the test is whether the PID 'materially influences' (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower in determining whether the act or deliberate failure to act was done 'on the ground' of the PID.

#### Public Interest Disclosure – Dismissal

17. Section 103A ERA 1996 states:

*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

18. **Bolton School v Evans [2007] ICR 641** is an example where the CoA held that the act of an IT teacher hacking the school's computer system was separable from the act of making a PID, as the cause of the disciplinary action was not the PID but the teacher's irresponsible conduct.

#### Direct Discrimination

19. Section 13 EqA 2010 states:

*(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.*

20. Section 39 EqA 2010 states:

*(1) ...  
(2) An employer (A) must not discriminate against an employee of A's (B)*  
–

- (a) ...  
(b) ...  
(c) By dismissing B;  
(d) By subjecting B to any other detriment.*

21. Section 23 EqA 2010 states:

- (1) *On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.*

22. Section 136 EqA 2010 states that:

- (1) ...
- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

23. The CoA in **Igen Ltd v Wong [2005] IRLR 258** provided amended guidance to be considered by ETs in discrimination complaints in determining whether the burden of proof should shift to the Respondent; see annex of the judgment.

24. In **Madarassy v Nomura International PLC [2007] IRLR 246**, the CoA stated that the bare facts of a difference in status and a difference in treatment are not, without more, sufficient material from which an ET 'could conclude' that, on the balance of probabilities, the R committed an unlawful act of discrimination.

25. In respect of the time limits to present such claims, section 123 EqA 2010 states:

- (1) *Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of –*
- (a) *The period of 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.*
- (2) ...
- (3) *For the purpose 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.*

26. The above is also subject to the extension of time provisions of ACAS Early Conciliation pursuant to section 140B EqA 2010.

#### Indirect Discrimination

27. Section 19 EqA 2010 states:

*(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

*(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if*

–

*(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*

*(b) It puts, or would put, persons with whom B shares the protected characteristic at a particular disadvantage when compared with persons with whom B does not share it,*

*(c) It puts, or would put, B at that disadvantage, and*

*(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

#### Breach of Contract

28. The C claims that he was entitled to notice pay. The R must prove, on balance, that C committed an act of gross misconduct.

29. In **Neary v Dean of Westminster [1999] IRLR 288 (paragraph 22)** it was held that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.

30. The C also claims R breached his contract in failing to pay travel expenses on 23<sup>rd</sup> August 2018, 11<sup>th</sup> January 2019 and 26<sup>th</sup> February 2019.

#### Unlawful Deduction of Wages

31. Section 13 ERA 1996 states:

*(1) An employer shall not make a deduction from wages of a worker employed by him unless –*

*(a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*

*(b) The worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised –*

*(a) In one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*

*(b) In one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

## **Findings of Fact and Conclusions**

19. The Claimant commenced employment with the Respondent towards the end of May 2013. He had worked for some months prior to May 2013 on a temporary basis but was employed permanently from May 2013. His employment terminated by way of summary dismissal on 1 February 2019. His role for the Respondent was that of a cleaner/estate operative/estate caretaker. The Respondent is a limited company whose business is best described, for the purposes of this case, as that of property and facilities management. Among other developments, it ran the large residential development (Kidbrooke Village) at which the Claimant worked.
20. The Respondent employed 1800 people in the Country at the time the grounds of resistance were presented (p18) and 36 at the place where the Claimant was employed. The organisation had many sites in the Country.

21. Prior to the termination of his employment, the Claimant was placed on suspension for some six months.

*Unlawful deduction of wages complaint*

22. In relation to the unlawful deduction of wages complaint which the Claimant substituted for the holiday pay claim, he maintained that he had not been paid wages for 29, 30 and 31 January and 1 February 2019.
23. In determining this complaint, we took into account that the burden of proof is on the Claimant. It did not appear that the Claimant had raised this complaint before asserting this at the beginning of the hearing. However, the Tribunal was shown the payslips for the relevant period and for the period before that, and was satisfied on the balance of probabilities that the Claimant had been paid for all the days that he worked up to 1 February 2019 in that the payslips show that the pay day was the 28<sup>th</sup> of the month in all those months but that it covered the pay period of the whole month. The Claimant had therefore failed to show that he had not been paid the correct amount. In the alternative, the Respondent had established that he had been paid the correct amount. That claim was therefore not well founded and was dismissed.

*Outline Chronology in respect of remaining complaints*

24. At about 8am on 25 July 2018 the Claimant was involved in a dispute at a group meeting concerning the placement of a year planner on the wall at his place of work. The Claimant was alleged to have been aggressive towards his line-manager, Diego Palacio, Estate Manager and the Building Manager, Ria Chilton. Both Mr Palaccio and Ms Chilton recorded the events of the day in statements prepared on 25 July 2018 (pp220 - 221).
25. On the same day at approximately 10.30pm, the Claimant sent an email to the Senior Property Manager and his second line manager, Liam Side, setting out various concerns about Mr Palacio and complaining about the use of the wall planner (p222). This was one of the documents relied upon by the Claimant as a protected qualifying disclosure.
26. Mr Side acknowledged receipt of the Claimant's email at approximately 11.00am on 26 July 2018 (p222), suggested that the Claimant's email be treated as a formal grievance and confirmed that arrangements would be put in place to address it formally by Human Resources. He asked the Claimant in the meantime to "continue to undertake [his] duties and conduct [himself] in a professional manner."
27. On 31 July 2018 Mr Side visited the site at which the Claimant was working but did not talk to the Claimant during the visit. The Tribunal accepted Mr Side's evidence that he had attended for a management

meeting and that there was no reason specifically for him to have had a discussion with the Claimant on that occasion given that he had informed the Claimant that the issues he raised in his email of 25 July were being taken forward as a grievance by the Respondent.

28. The Claimant took umbrage at the fact that Mr Side did not speak to him. He sent Mr Side an email at just after 7.00pm after the end of his working day in which he expressed himself in a somewhat sarcastic tone and raised further matters of grievance (pp225-226).
29. Then, sometime during that night (31 July – 1 August 2018), the Claimant posted a series of comments on the Respondent's intranet platform called 'Life Works'. The Tribunal accepted that the purpose of this platform was generally to acknowledge achievements of members of staff and provide positive feedback and comments about others. It was not accessible to the public or to the Respondent's clients, but it was accessible to all personnel within the Respondent company.
30. These comments were the grounds relied on eventually by the Respondent for the dismissal of the Claimant. The Claimant contended that his dismissal was not genuinely based on this but was a whistle-blowing and/or race discrimination dismissal. The Claimant also challenged the dismissal under section 98(4) of the Employment Rights Act 1996, i.e., that it was in general terms unfair.
31. Before the next morning the Claimant posted fifteen separate comments about both his immediate and more senior managers, and about the Respondent company. It was not in dispute that these entries had been posted overnight.
32. Some examples of the comments he posted are set out below.
  - i. A colleague, Ms Brandham had been recognised by the Head of Human Resources and seven others. She responded just over a week before the Claimant's comments by thanking those who had recognised her and commented in turn that it was definitely a team effort from everyone. Ms Brandham's message was followed by a simple congratulation from Mr Guy. Then six days before the Claimant's message there was a similar message from another Manager, Mr Grieve. The Claimant then made the following contribution: -

*"Thank you for responding on my email, unfortunately, no one leasing (sic) [listening] about h&S at KV".*

It was agreed that KV was a reference to Kidbrooke Village, the site at which the Claimant was employed. It was apparent to the Tribunal in relation to this entry that the Claimant's contribution was

gratuitous and did not flow from anything that anybody else had written.

It was also sarcastic and negative.

- ii. A chain had been started in relation to recognising Diego Palacio, the Claimant's direct line-manager and Paul Hyams, an Estate Manager employed by the Respondent (pp 237-238). Mr Cadena noted his thanks for their help by the Hub. Two others endorsed this. The Claimant then made a series of four comments as follows: -

*"Thank you for not recognised the [real] problems at the Hub.*

*Thank you [for] not implementing anything just making everyone angry and better if Diego not doing nothing at all.*

*This company is a joke.*

*How [?Who?] really work me and Graham without us it wouldn't be done anything what Jame you talk about it?"*

- iii. The final example is an entry addressed to a Catherine Riva, one of the Respondent's Directors (paragraph 18 of Simon Leech witness statement). Mr Jezioranski described her as "*just fake of the fake*" and implied that she was uncaring about the "*suffering*" being experienced by the staff. He also complained that many good people had left because they had never been recognised (p238).
- iv. Further, after Mr Jamie O'Loughlin had posted his thanks to two colleagues for working hard to have the storerooms cleared and organised so quickly, the Claimant appeared to endorse the thanks, but followed this with four derogatory comments (p241). First, he thanked the subjects of the compliments for making all the work difficult in the estate; then for not making the place look good and not showing any management skills whatsoever. He then mentioned Mr Palacio in a negative context; and followed this with a further derogatory comment. Mr O'Loughlin, some seven hours later, entered: "*Tomasz, I don't find this appropriate for this platform. As you know me and Liam are speaking with you separately.*"

The Tribunal was satisfied that this was a reference by Mr O'Loughlin to the outstanding grievance issues.

- v. In at least a couple of the entries, the Claimant characterised either the Respondent or one of his colleagues as "*a joke*".



33. During the afternoon of the next day, 1 August 2018, the Claimant was called to a meeting by Mr Side. He was accompanied at the meeting by Mr Ipacs, and Mr O'Loughlin took notes. The Tribunal noted that under the ACAS procedure, an employer is not required to allow an employee to be accompanied at an investigatory meeting, although under the Respondent's procedures he was entitled to be accompanied at the investigation meeting.
34. The Claimant was asked at the meeting about the posts. He denied that the posts were derogatory and inappropriate (p246) and failed to respond to the question put to him by Mr Side as to whether he considered that the posts were offensive. On the contrary, he stated that he felt that he needed to raise it as he was doing the work and felt that it was unacceptable to do this for such a long time and "not get praise". He indicated that he had taken the action because he wanted people in senior positions to hear his voice and he wanted "*to inform about the truth*" (p246). He described that people getting praise was "*fake*" (p247) and he denied on more than one occasion that the comments were derogatory. There was no dispute that by the time the Claimant made these comments, he knew about the Respondent's grievance procedure not least because Mr Side had written to him following the letter of 25 July 2018 to inform him that his issues would be raised in a grievance process. Mr Side, reasonably in the Tribunal's opinion, considered that these answers were unsatisfactory.
35. At some point after that meeting on 1 August 2018, the Claimant was put on what the Respondent characterised as 'precautionary suspension' (p 255). By email sent and letter dated 14 August 2018, from Ms Orezzi, the Head of Human Resources, the Claimant was sent written confirmation of the suspension and was invited to a formal disciplinary investigation meeting to take place on 17 August 2018 (pp253-257).
36. The Claimant was told by the Respondent that the disciplinary investigation was in relation to "inappropriate and derogatory comments on the Life Works platform". They also indicated that they would be investigating aggressive and inappropriate behaviour towards Ria Chilton and Mr Diego Palacio on 25 July 2018 in response to the implementation of a year planner being displayed on the wall. In the event, the Respondent did not take disciplinary action against the Claimant in relation to the wall planner incident.
37. The second letter dated 14 August 2018 (from Ms Orezzi) (pp258-259) invited the Claimant to a meeting about the complaints that the Claimant had sent to Mr Side. She erroneously referred to them in the letter as having been sent on 26 and 30 July 2018 but there was no dispute about this being a reference to the Claimant's emails of 25 and 31 July 2018. Ms Orezzi confirmed that these were being treated by the Respondent as

a formal written grievance.

38. The Claimant followed these notices with further correspondence raising a number of issues (pp 260-262). He asked for more time to address both the grievance and the disciplinary meetings which were due to take place on the same date. The Respondent agreed to the request for postponement and rearranged the meetings for 23 August 2018 (p272). The disciplinary investigation meeting was to take place first with Mr Side commencing at 9.30am and the grievance meeting was scheduled to commence at 11.45am (pp297-315).
39. The meetings took place as scheduled and at both meetings the Claimant was accompanied by his friend and colleague, Mr Ipacs.
40. The Respondent then took some time to consider the grievances. The Claimant was notified of the outcome by way of a grievance outcome letter signed by Mr Side which was attached to an email sent to the Claimant by Ms Migwi, HR Manager/Employee Relations (pp315 and following). She also attached the minutes of the meeting.
41. In the letter, Ms Migwi confirmed that the investigation/disciplinary process had been put on hold pending the grievance outcome but now that the grievance had been resolved, that process would resume. To that end, she informed him that she would shortly send the Claimant a separate email with a letter inviting him to a disciplinary hearing on 2 January 2019 at the Respondent's Royal Arsenal office.
42. The outcome of the grievance was that all but part of one of his allegations was dismissed. Mr Side also acknowledged the concerns expressed by the Claimant and indicated that some of the practices in relation to hygiene had been up-graded and he dealt with each of the points that he understood the Claimant had raised over some five pages.
43. The Claimant followed up by lodging an appeal and further grounds of appeal in emails sent on 28 December 2018 and 2 January 2019 (pp 322-323 and 324-327). In the latter email sent on 2 January 2019 he expressed the belief for the first time that he had been subjected to race discrimination.
44. The Respondent sent the Claimant notice of the grievance appeal hearing to take place on 9 January 2019 (pp328-329); and a letter inviting the Claimant formally to a disciplinary hearing to take place on 9 January 2019 also, at 3.15pm, after the grievance appeal (pp330-331).
45. The disciplinary invitation letter was said to be for the purpose of addressing the following allegations: -

- *Posting inappropriate, derogatory and offensive comments about other employees on the company Lifeworks platform – the company considers this to be a breach of the Dignity at Work standard;*
- *Making derogatory comments about the company on Lifeworks – we consider these actions as bringing the company into disrepute.*

The letter then stated that the Respondent considered that these allegations were potential gross breaches of company procedures and serious failures to embody and promote the company values of integrity, professionalism and trust and responsibility. The Claimant was warned that should they be proven, this would amount to gross misconduct thereby justifying the Claimant summary dismissal. The Claimant was given the usual and necessary information about who would be chairing the hearing and about his entitlement to be accompanied at the hearing. Ms Migwi also identified the information that the Respondent would be relying on and told the Claimant that he would have an opportunity to give his explanations at the hearing. The documents were sent to the Claimant in advance of the hearing.

46. The documents that the Respondent listed as relevant to the allegations were as follows: -
  - Minutes of the initial investigation meeting on 1 August 2018;
  - Minutes of the further investigation meeting on 23 August 2018;
  - Copies of Lifeworks postings made by the Claimant about other employees;
  - Copy of the Dignity at Work Standard.
47. The Claimant was informed that if he wished to rely on any other documentation, he should provide a copy to Mr Leech at least twenty-four hours in advance of the hearing. He was also told that the hearing would be conducted in accordance with the Respondent's Disciplinary Standard and a copy of that document was enclosed.
48. He was finally invited to contact Ms Migwi if he had any specific needs at the hearing, for example, as a result of a disability.
49. The Claimant responded by email dated 7 January 2019 to Ms Migwi, copied to Mr Leech and Mr Side and other administrative members of staff amongst other things requesting an extension of time in relation to the proposed hearings from 9 January, the date he had been notified, and suggesting the alternative date of 11 January 2019. He drew attention to the time scale to which he was entitled namely five working days.
50. Ms Migwi wrote back to the Claimant on 7 January 2019 at approximately

5.30pm (pp333-334). She addressed a number of points which were outstanding from the Claimant's email and agreed to the extension of time to 11 January. She referred to the fact that the meetings had been re-scheduled on two occasions at the Claimant's request and warned him that the 11 January hearing would not be re-scheduled again and that a failure by the Claimant to attend without good reason would be a breach of his suspension terms and would mean that the hearings may take place in his absence.

51. Letters were re-issued to the Claimant dated 7 January 2019 with the new date and time but otherwise were in identical terms to the letters which had been sent to the Claimant on 4 January 2019 (pp 335-338).
52. The grievance appeal hearing commenced at just after 1.30pm in front of Mr Leech. It lasted for a considerable period although the Tribunal did not have the exact timings, but the notes of the grievance hearing were over 68 pages long. The meeting was recorded by agreement. A transcript of the recording was also provided by the Respondent to the Claimant. The Claimant agreed to the plan that the grievance appeal hearing would be conducted first, that the parties would have a short break and then would resume with a disciplinary hearing afterwards (p348).
53. The disciplinary hearing commenced at 4.50pm, later than had originally been scheduled. It was also recorded, and the transcript was some 16 pages long (pp415-430).
54. At the end of the grievance hearing, Mr Leech said that he would be making further enquiries and then get back to the Claimant with the outcome. He similarly adjourned the outcome at the end of the disciplinary hearing.
55. The Claimant then had some further correspondence with the Respondent about claiming expenses (pp341 et seq).
56. The Claimant remained on suspension and received notification of the outcome of the disciplinary hearing by letter dated 1 February 2019 (pp438 - 440). He was informed that he had been summarily dismissed, the Respondent having found that the two allegations that he faced had been made out and constituted gross misconduct. Mr Leech set out in the dismissal letter the basis for reaching the conclusion that the allegations were made out and that summary dismissal was appropriate (pp438-440).
57. At this point the Claimant had not yet received the outcome of the grievance appeal. He notified the Respondent promptly by email sent on 8 February 2019 of his intention to appeal against his dismissal. He sent a letter setting out the grounds of his appeal and also attached various documents which related to the wall planning incident and also witness statements from a couple of colleagues as to his character (pp441-441L).

58. Further correspondence ensued between the Claimant and the Human Resources department about the arrangements for attendance at the appeal hearing in particular from 21 February 2019 (pp446 and 448).
59. The disciplinary appeal hearing took place on 26 February 2019 before Ms Milburn. The Claimant was accompanied by Mr Ipacs as before. She notified the Claimant of the outcome by letter dated 9 April 2019 (p459-463). She upheld the decision to dismiss and set out the basis for that decision.
60. By letter dated 16 April 2019 from Mr Leech, the Claimant was informed of the outcome of his grievance appeal namely that it was rejected.
61. The Tribunal addressed each of the issues raised as far as possible in chronological order.

#### *Whistleblowing Disclosures*

62. In the light of the Claimant's annotated written closing submissions, the Tribunal treated the matters about which the Claimant said he made whistle blowing disclosures as follows: -
  - i. Placement of the holiday wall planner in the kitchen. Although the Claimant's note was that he disagreed that this was a complaint, his response did not indicate that this was the position as he complained about the stress that had been put on him. However, in view of the lack of clarity about this issue, the Tribunal considered that it was safer to treat it as one of the matters relied upon as a disclosure.
  - ii. The petrol tank being in the store room with the bin tub.
  - iii. The bin tub and the risk of an explosion.
  - iv. Obstruction of fire routes.
  - v. Use of the same mop for more than three months and possibly up to six months.
  - vi. Use of ladders without resistance shock, a reference to the possibility of the person using the ladder sustaining an electrical shock.
63. In addition, as recorded in paragraph 36 of the consolidated submission, the Claimant raised other issues relating to complaints about washing cloths, complaints about Mr Palacio's conduct and the pictures he took and sent with his email on 31 July 2018 (pp228-231), the requirement to

wash cloths in a sink and the weight of a door in front of an electrical meter.

64. As with the first matter identified by the Respondent as a potential disclosure in the consolidated submission, the Claimant disagreed that these matters were such. However, the Tribunal agreed with the Respondent's 'belt and braces' approach and therefore considered these matters also.
65. The Tribunal considered that the Claimant was entitled reasonably to believe that the washing of a cloth in a kitchen area which may have been used for cleaning a toilet area previously was potentially a matter which could put the health and safety of his colleagues at risk. In the grievance outcome letter (p317) Mr Side recorded that he had not found "any specific risk" with the cloths being cleaned in the kitchen but he had recommended an adjustment to the cleaning process. The Tribunal considered that this adjustment tended to corroborate the Claimant's original concern. There was no evidence to support a finding that it was a matter of public interest however.
66. In relation to the placement of the wall planner, the Tribunal did not consider that the Claimant had identified any potential risk to health and safety of anyone. He talked during the hearing about contractors attending the premises and concluding or assuming that as the wall planner had the logo of an agency on it, the names on the wall planner were agency workers. He did not persuade the Tribunal that this posed a risk to anyone's health and safety. The Tribunal was thus not satisfied that the Claimant had identified any potential breach or reasonable belief in a potential ground for the matter to qualify as a protected disclosure. There was no basis for a public interest finding in this respect either.
67. In relation to the complaints about the appropriate storage of the petrol tank and the risk of explosion, the Tribunal took into account what Mr Side found in relation to his investigation of the grievance (p316). Although he considered that there was a low risk in terms of the method of storage of the bin tub, the Tribunal considered that this was, in effect, a concession that there was a risk posed by the way in which the bin tub was stored. He also recorded that bulk items "were no longer" in the same storage area which again appeared to the Tribunal to be evidence that the Respondent had up-graded their procedures which would suggest that there had been a reasonable basis for the Claimant's concerns.
68. The Tribunal considered that any reasonable concerns about a fire risk and/or risk of explosion would be in the public interest.
69. Finally, in this context, Mr Side recorded that all high-risk items such as petrol were stored in a separate COSSH cabinet in a locked room and monitored by the Cleaning and Operative Manager (p471). Once again,

the Tribunal considered that this response confirmed that it would have been inappropriate to store the petrol tank in the store room with the bin tug.

70. In relation to the use of the ladders, based on the Claimant's own evidence, the Tribunal did not consider that he had established that he or other members of staff were being asked to use an unsafe ladder to carry out lighting works. The Claimant conceded in cross-examination that there were two ladders available, one of which he characterised as safe and the other one which he characterised as unsafe. He gave no evidence of an occasion on which anyone was asked to use the unsafe ladder. The factual basis of the allegation was also disputed. In all those circumstances, the Tribunal did not find that the Claimant had made out, in relation to the use of the ladders, that he had a reasonable perception of a risk to health and safety.
71. Finally, in relation to the obstruction of fire routes, again the Tribunal accepted the evidence of Mr Side, who was best placed to provide evidence on this issue, that he had risk-assessed this issue, that it was a matter that was regularly reviewed and that there was no risk of obstruction of the fire route by reference to the placement of the planter.
72. Mr Side dealt in his grievance outcome letter with the Claimant's concern about the use of the mop. The Tribunal distinguished this issue from his concerns about the inappropriate use of cleaning cloths and the cleaning of the cleaning cloths (p318). Again, the Tribunal considered that his reference to there having been two mops "historically" suggested to the Tribunal that at the time the Claimant expressed his concern about the mop situation, that there were no longer two mops available. Mr Side reported that at the time of his investigation which was at some point prior to 21 December 2018, a revised system was in place which now incorporated different coloured mops for use in the bathroom and for general use.
73. Finally, in relation to the mop having a smell because it was musty, Mr Side indicated that that was not a matter that had come to his attention or that of other members of management, and that if the mop had been musty smelling, this would have come to their attention.
74. Also, in relation to the fire routes point, the Tribunal noted that Mr Side had initially misunderstood the area which the Claimant said was obstructed. When this was clarified during the course of the hearing, Mr Side inspected the relevant building and was able to confirm that the plants were not an obstruction in the event of a fire.
75. The Tribunal also considered that it was relevant in this context that the Respondent had, indeed, revised some of their working arrangements as a result of the Claimant raising these issues. This tended to suggest that

they had taken on board the concerns expressed constructively, although the Tribunal did not agree with the managers' estimation that there were no Health and Safety issues raised by some of the points.

76. In relation to Mr Diego Palacio's conduct, the Tribunal did not consider that the Claimant had established on the balance of probabilities that his complaint about the conduct was a qualifying protected disclosure, given the nature and terms of the complaint against him by Mr Palacio and Ms Chilton. There was no public interest element.
77. The Tribunal also noted that by the end of the grievance investigation by Mr Side in December 2018, he had looked into more issues that the Claimant had raised during the process beyond those that were set out in either of his emails in July 2018. Thus, for example, the matter raised by the Claimant in this Tribunal hearing in relation to the weight of the panel in front of the electrical meter was not a matter that he raised during the internal process. He raised a different issue about it.
78. In relation to moving the panel, the Claimant recorded disagreement with a point made by the Respondent in relation to this being a protected disclosure but referred to the issue of the wrong building having been investigated – dealt with above. The Tribunal accepted Mr Side's evidence in respect of the concern about the panel that it had been risk assessed and the assessment indicated that it was safe for two people to move the panel and that this was the practice. The Claimant did not adduce evidence to contradict this evidence, and by virtue of his position within the Respondent, and his investigations, we considered Mr Side's evidence on this issue to be credible and reliable.
79. In relation to several matters, the Respondent submitted that it was notable that the Claimant had given evidence that he had, for instance, repeatedly gone into a store room in which he said that there was a fire risk or risk of explosion and that he had given evidence of, for example, opening an heavy panel fifteen times a day despite the weight and alleged risk to his health. The Tribunal did not consider that it would have been an appropriate response to such a risk if it were established to say that the Claimant had actually carried on his work alongside these risks. However, the Tribunal understood the Respondent to be saying that it was unlikely that the Claimant's evidence was accurate if he was saying that he went into a room in which he thought there was a risk to his health and safety. In any event, if there was a genuine, reasonably held concern about an explosion, whether the Claimant went into the room or not, it would be a valid matter to have raised and would have been in the public interest.
80. The Tribunal also noted that in Mr Leech's grievance appeal outcome letter, he confirmed Mr Side's account of certain practices and systems having been up-graded, and he recorded that the Claimant accepted that some matters of initial concern to him had now been resolved. This



applied, for example, in relation to the mops.

*Issue 13.1.1*

81. In relation to the way the grievance was dealt with, the Claimant also complained (issue 13.1.1) that the Respondent was guilty of direct race discrimination for failing to deal with his grievance appropriately. He relied on the delay as evidence of this. The Tribunal found that there were periods between the end of July 2018 through to the conclusion of the grievance appeal in April 2019 when short adjournments were granted pursuant to the Claimant's requests.
82. The primary reason for the delay relied on by the Respondent was that the grievance raised a number of matters. The Tribunal accepted that this was the case and also accepted that the Respondent acted promptly to deal with his concerns formally as a grievance after the Claimant reported the matters to Mr Side. The delay is also explicable in part by the parallel investigation into the disciplinary matter. Evidence of the detailed grievance investigation was the length of the notes of the hearing that took place on 11 January 2019 (grievance appeal). The grievance meeting before Mr Side also took a fair amount of time and as we found above, the Claimant raised a number of different matters.
83. It was also not clear exactly what the Claimant meant in the direct race discrimination complaint by alleging that his grievance was not dealt with appropriately.
84. The Claimant relied on two former managers as comparators namely Graham Woollard and Diego Palacio. However, in relation to the first matter, there was no evidence before the Tribunal that either of them had raised a grievance. Therefore, the circumstances of the comparators were materially different: section 23(1) Equality Act 2010.
85. The Claimant also relied on failing to deal with his grievance appropriately as a public interest disclosure detriment. Once again, there was no specificity about this nor was there any adequate basis evidentially for the Tribunal to believe that the delay was caused by the fact that the Claimant had made protected disclosures. The Tribunal considered that the Respondent's explanation about the need to investigate these matters in detail was more than adequate.

*Issues 12.4.3 & 13.1.2*

86. The next factual issue namely being refused a meeting with the Director was said to be a complaint of both direct race discrimination and whistle-blowing detriment (issues 12.4.2 and 13.1.2).
87. The Respondent did not accept that the Claimant had made such a

request. The Tribunal considered that the record of the requests being made were first in the Claimant's disciplinary appeal email sent on 8 February 2019 (p441D) in which he listed as one of his complaints that "none of the directors meet me in person but we have them so many"; and also in the hearing which followed before Ms Milburn, Team Leader, on 26 February 2019, when she asked him whether he would like his job back at Kidbrooke, he replied "yes, at the village but I want Directors and Liam to meet and ask me" (p452).

88. In relation to the allegation of race discrimination, there was no evidence that either of the comparators had ever requested a meeting with the Director. The request for a meeting with the Director was, as the Claimant indicated in his annotation to paragraph 152B of Mr Fuller's submission, "the last chance" after he had dealt with all the managers. In other words, it came at the end of grievance appeal process. There was no suggestion whatsoever that a meeting with a director formed a part of the Respondent's procedures. This was therefore an adequate explanation for why the meeting was refused. The failure to comply with such a request did not raise a question in the Tribunal's mind as to why this would have been refused given that both the grievance and the disciplinary procedures were dealt with through the Respondent's procedures and in ways that were consistent with the ACAS Guidance. The Tribunal did not see any basis for thinking that the refusal of the meeting was in any way connected with the Claimant's race or was caused by the fact that he had made protected disclosures.

*Issues 12.4.3 & 13.1.3*

89. The third detriment relied upon as both direct race discrimination and a whistle blowing detriment was that the Respondent gave the Claimant additional work and responsibilities (12.4.3 and 13.1.3). On his own case the Claimant first made protected disclosures on 25 July 2018. He was suspended on 1 August 2018 and did not return to work thereafter. In his evidence the Claimant complained about having been given additional responsibilities from almost the start of his work through to the end. This was consistent with the Claimant's perception that he had been key to the development of the service at City Point as the development grew. However, he gave no detail of the additional work and responsibilities which were given to him in the time frame after having made the protected disclosures. He had thus failed to establish the primary facts alleged. Further, in any event, even if he had been given additional work and responsibilities prior to 25 July 2018, that detriment could not have been caused by the disclosures made before 25 July 2018.
90. In relation to the race discrimination complaint, there was no adequate basis for the Tribunal to find that he had been given any additional work and responsibilities for a reason relating to the fact that he was Polish. There was an absence of detail in any event about the additional work and

responsibilities that the Claimant complained about.

91. The Tribunal had in mind the effect of the case of *Madarassy v Nomura International* [2007] IRLR 246 which requires there to be something more than simply a difference of race and less favourable treatment for the Tribunal to be able to be satisfied that the initial burden of proof has shifted from the Claimant: section 136 of the 210 Act. As far as the direct race discrimination complaint in relation to additional work and responsibilities was concerned, that was lacking.
92. For those reasons therefore both the whistle-blowing detriment and direct race discrimination complaints in respect of having been given additional work and responsibilities were not well founded and were dismissed.
93. The final race discrimination complaint was in relation to the dismissal. It is appropriate to deal with that below alongside consideration of the unfair dismissal complaint.

#### *Issue 14*

94. The Claimant alleged indirect religious discrimination (issue 14) in relation to being required to attend a disciplinary hearing on Boxing Day 2018 (p324). He relied on the fact that he was Catholic, and he asserted that the calling of this meeting interfered with his observance of his faith over the Christmas period.
95. The Claimant was unable to establish as a matter of fact that he was required to attend a disciplinary hearing on Boxing Day 2018. On that basis alone, the complaint was not well founded and was dismissed. In any event, there was no evidential basis whatsoever for the Tribunal to find that the relevant members of staff of the Respondent knew that the Claimant was Catholic.
96. Further, the complaint of indirect race discrimination changed during the hearing. He did not pursue the Boxing Day meeting allegation but complained instead that he was upset and distressed by the disruption to his Christmas holiday period by having to think about the internal process. This belated alteration to the case did not assist with the credibility of the Claimant but in any event, it was not the allegation that the Respondent had come expecting to address and the claim had not been amended. That complaint also was not well founded and was dismissed.

#### *Expenses Claim – 23 August 2018*

97. The claim for reimbursement of travel expenses incurred on 23 August 2018 was part of issue 17.4 as a breach of contract claim. The Respondent had a policy in relation to employee expenses (pp436A-436F). This stated that the general policy was that the company would

reimburse employees for “reasonable expenses wholly, necessarily and exclusively incurred in connection with its business”. It then identified what were allowable travel expenses by stating that the company would “reimburse the reasonable costs of amounts necessarily expended on travelling in the performance of the duties of the employment, for example to events, external meetings, training, etc.,”.

98. On 23 August 2018 the Claimant travelled by taxi to the meeting which covered both the investigation into the grievance and the potential disciplinary issues.
99. The policy in relation to allowable travel expenses provided (p436C) that: “Employees are expected to use taxis only when strictly necessary and where it is cost effective to do so. Please note that the company’s appointed car company should be used where possible and if not, employees should always obtain a dated receipt.”
100. The Claimant incurred a cost of £15.73 by Uber to attend the Royal Arsenal premises for the meeting. It was not suggested that Uber was the appointed car company.
101. In subsequent correspondence between the Claimant and the Respondent (Ms Migwi in January and February 2019) and indeed with Mr O’Loughlin, there was a reference to the Claimant needing advance approval. The Tribunal could not find an indication in the procedure that the incurring of the expense had to be approved in advance by a Manager. This may have been an implication from the provision about the use of the appointed car company where possible.
102. The Tribunal also noted that in respect of this trip, Ms Migwi indicated on 30 January 2019 (p434) in her email to the Claimant, that the Respondent was happy to approve the cost of a daily cap according to TFL between his home (zone 4) and Royal Arsenal (zone 4) of £10.10. The return journey would therefore total £20.20. That suggested very strongly to the Tribunal that the Respondent was prepared to pay the public transport cost of the Claimant and his witness, Mr Ipacs, attending on 23 August 2018. That appeared to the Tribunal to be a reasonable approach taken by the Respondent who clearly had a discretion to reimburse that amount to the Claimant. The employer appeared to the Tribunal to have exercised its discretion reasonably.
103. In summary, it did not appear to the Tribunal that the Claimant was contractually entitled to reimbursement for his Uber travel expenses in respect of the expenses incurred for attending on 23 August 2018.

*Expenses Claims – 11 January 2019*

104. The Claimant claimed as damages for breach of contract, reimbursement

of the cost of three Uber rides on 11 January 2019 (p436) as follows: -

£8.68 to Blackheath, phase 4;  
£11.15 from Blackheath, phase 4 to Woolwich; and  
£14.28 from Woolwich to Catford.

105. Having reviewed the correspondence by email between the Claimant and Ms Migwi, in particular (pp431 - 436), it appeared that the Claimant was claiming travel expenses for himself only in respect of two dates at that stage, 23 August 2018 and 11 January 2019. He made it clear that his companion who had attended with him had not claimed any expenses for himself. The Respondent indicated that they would arrange for the payment of £20.20 to be made to him through the Respondent's payroll team (p431). This means therefore that on each occasion the Claimant could have attended the meetings by public transport which would have been at a cost of £10.10 each time and instead he used taxis which cost more than double that. He did not provide adequate justification for using a taxi rather than public transport.
106. In relation to the excess that the Claimant claims, however, we did not consider that the circumstances met the requirements of the policy in terms of the use of an Uber taxi or several Uber taxis being either strictly necessary or cost effective. For those reasons also we did not consider that the Claimant had established that he was entitled to the balance of the money claimed.

*Wrongful and/or Unfair Dismissal and Direct Race Discrimination in respect of the Dismissal*

107. The Tribunal was satisfied that there were no breaches of the ACAS code in the application of the disciplinary procedure. None was alleged.
108. The first question for the unfair dismissal complaint under section 98 was what was the principal reason for the dismissal? However, it was also necessary to make this determination in relation to the other claims as well. In assessing this the Tribunal had to consider whether the Respondent genuinely believed that the reason for the dismissal was the Claimant's conduct in writing the comments posted on Life Works, or whether it was for the other reasons relied on by the Claimant.
109. The Tribunal was satisfied that neither the incident between the Claimant and his Managers on 25 July 2018, nor the fact that the Claimant reported it to Mr Side in his email sent that evening contributed to the decision to dismiss - Issue 12.5. The clearest evidence of this was that although the criticism of the Claimant's conduct at the team meeting was one of the reasons for suspending the Claimant on 1 August 2018, the Respondent did not proceed with disciplinary action in relation to this matter in December 2018. Rather, the two disciplinary charges considered by the

disciplining manager were in relation to the comments on the Life Works platform. It was very unlikely therefore on the balance of probabilities that the facts relating to the wall planner dispute had contributed to the decision to dismiss.

110. The other 'disclosures' all related to matters dealt with in his grievance. Once again, these did not form part of the disciplinary case against him before Mr Leech.
111. The race discrimination case in respect of dismissal – Issue 13.1.4 – was not really advanced in the hearing. In closing, the Claimant referred to the payslip not having been clear enough (p45 of Joint Submission). No evidence had been put forward as to why the Tribunal could conclude that the reason for dismissal was related to race: *Madarassy* above.
112. The remaining aspects of the complaints about dismissal were the ordinary unfair dismissal complaint and the wrongful dismissal complaint.
113. In respect of the ordinary unfair dismissal complaint, the Tribunal then needed to assess whether the Respondent had conducted reasonable enquiries into the making of the posts, and the closely related issue of whether the Respondent had a reasonable basis for its belief that the Claimant was guilty of the misconduct alleged. Case law has long established that the extent of enquiries required to establish reasonableness is relative to the degree of uncertainty as to whether the Claimant has committed the alleged misconduct.
114. In his annotation to Mr Fuller's submission, the Claimant argued that he was not himself at the time of making the posts, that he was on medication, and did not get help from the Respondent. He believed that he had been made a scapegoat because of his nationality or national origins.
115. At the time, i.e., during the internal process, the Claimant did not put forward a case that he was "not himself" when he wrote the posts. The Tribunal reviewed the references to the Claimant's health in the internal process.
116. During the hearing with Mr Leech (p417), the Claimant said that the things which had happened before he made the posts "dragged me to that mental stage". However, the Tribunal did not consider that that meant that the Respondent should conclude that he was suffering from such mental health issues that he was not responsible for his actions. That was inconsistent with his general position both internally and to the Tribunal that he made the comments to "get a reaction". The Tribunal accepted Mr Fuller's submissions at paragraphs 81 and 82 of the consolidated submission.

117. In correspondence with Ms Migwi from 19 to 21 February 2019, not all of which was available to the Tribunal (pp446-447), the Claimant asked about various matters which she answered in an email sent on 21 February 2019 at 14:58 (p446). She explained that apart from the issue he had raised about whether Mr Ipacs needed to attend work before the meeting, all other matters he had raised, including in his email of 19 February (which was not available to the Tribunal) could be addressed at the appeal hearing, with two exceptions. These were: (i) the issue of his travel expense claim as that fell outside the scope of the appeal; and (ii) his request to see the company doctor or for the company doctor to be present so that he could discuss his health. Ms Migwi explained to him that the Respondent could not grant either request, but that the Claimant was welcome to raise any issues about his health if he considered this a ground of appeal against his dismissal. He was advised by Ms Migwi that he would need to explain any such ground clearly at the appeal.
118. The Claimant again asked for a doctor to attend the disciplinary appeal meeting, in further correspondence with Ms Migwi of Human Resources (p448) on 21 February 2019 at 15:16. He said that he wanted this because he was on anti-depressants caused by the stress which the Respondent had placed him under. He did not rely on it as evidence of his mental state at the time of the incidents.
119. The first email response from Ms Migwi referred to above (page 446) was copied by her to Ms Milburn who was due to deal with the appeal meeting. At the hearing she was questioned appropriately in the Tribunal's view as to what steps she took to enquire into the health issue. It was not in dispute that towards the end of the meeting, the Claimant requested time to take his medication, a pill (p452). However, the Claimant did not indicate during the meeting that the medication that he was taking was in any way related to the appeal or to the actions that he was accused of doing in the previous July 2018. Further, Ms Milburn also asked him in an open question towards the end of the meeting whether there was anything he wished to add (p453). He failed to make any reference to his mental health as being a relevant matter and indeed, he referred to another person having been "under depression" but drew no comparison with his own case or any suggestion that this had been the reason for his actions.
120. Part of the picture was also that the Claimant did not express any remorse or regret about the statements/comments that he had made. He continued to suggest that there had been fake comments of praise about his colleagues and also that there were lies posted on the Life Works comments. This happened even at the appeal.
121. Therefore, looking at the picture as it was presented to the Respondent at the time and as a result of the Respondent's reasonable enquiries, the Tribunal did not consider that there was any reason for them not to have been satisfied that the posts were put up by the Claimant.

122. The next question was whether they were entitled to conclude that the comments the Claimant made about other employees were inappropriate, derogatory and offensive (p438) and whether the comments about the company were derogatory.
123. In answer to Mr Leech's question during the disciplinary hearing (pp417-418) the Claimant accepted that his comments on the postings had not met the Respondent's Dignity at Work standards.
124. The Claimant also contended during the hearing that he was not aware that the Life Works forum was only for positive comments and praise. He referred to the fact that there had no training on the forum. The Tribunal did not consider that this was a credible argument. All the other comments on the platform were positive and he did not draw the Tribunal's attention to any other negative comments. It was set up to receive "recognition of various members of staff". The Tribunal considered that the Respondent was entitled to reject that as a valid point, and we rejected this argument in the context of the wrongful dismissal claim as well.
125. In summary, the Tribunal specifically accepted the submissions made in paragraphs 83, 84 and 86 of Mr Fuller's written submissions (para numbers from the consolidated submission):
83. As to the level of investigation carried out to obtain the aforementioned grounds for R's belief, generally these were established by way of two investigation meetings on 1<sup>st</sup> August 2018 and 23<sup>rd</sup> August 2018 [245-249 and 280-296], a disciplinary hearing on 11<sup>th</sup> January 2019 [405-420] and a disciplinary appeal hearing held on 26<sup>th</sup> February 2019 [439-443]. The R's investigation was exploratory and sought to establish the reasons why C did what he did.
84. C did query in the disciplinary appeal hearing whether R had investigated the IP address of the computer used to make the posts to ensure it was C, a point C maintained in evidence should have been carried out [439-444]. However, C did not blame someone else for the posts and he still accepted he made them. The R already had reasonable grounds on which to base its belief, and further investigating the IP address was therefore not necessary to establish further grounds on which to base its belief.
86. C's evidence during hearing as to why he made the comments not only contradicted itself, but it contradicts what he said at the time of events.
126. The Tribunal was thus satisfied that the Respondent's belief in the Claimant's misconduct was reasonably held, the grounds on which it based its belief were reasonable, and those grounds were obtained following a reasonable level of investigation.



127. The next main point in assessing fairness was whether the Respondent reasonably concluded that dismissal was an appropriate sanction having regard to the considerations set out above in section 98(4)(a) and (b) of the 1996 Act.
128. The Tribunal also considered that Ms Milburn's view that the fact that the Claimant had directed his negative comments towards both a very senior member of the Respondent and his direct line-manager, and other people in between in terms of the hierarchy indicated that it was more difficult for the Respondent to treat this conduct as less than serious misconduct.
129. The Tribunal also noted from the Claimant's evidence and his closing submissions that he clearly felt extremely hurt by the fact that Mr Side had not engaged with him on 31 July 2018 when Mr Side attended the Claimant's site. The Tribunal considered that this was, however, perfectly understandable given that Mr Side is a Senior Manager and was attending the premises for a pre-arranged official meeting relating to completely unrelated issues. Finally, Mr Side knew that he had informed the Claimant about the process that the Respondent was about to engage in in order to address the Claimant's concerns. Indeed, it would have been inappropriate for Mr Side to initiate discussions with the Claimant informally having given him that indication.
130. The other difficulties at this point about the Claimant raising the question of whether the Respondent had interrogated the IP address of the computer used was another indication of a degree of ambivalence on the Claimant's part. On the one hand, he admitted earlier that he had written the posts but on the other hand at a late stage in the disciplinary process he asked the Respondent to investigate whether he had indeed done so, despite the fact that this was patently something that would have been within the Claimant's own knowledge.
131. The Tribunal further accepted Mr Fuller's submissions at paragraph 87 of the consolidated submission in relation to the question whether dismissal was a reasonable sanction under section 98(4).

87. In evidence C claimed that, at the time, he was in a 'bad state of mind' and he 'wasn't thinking straight', and so when he went onto LifeWorks, whilst he saw the posts, he did not see others' comments. However, within the formal investigation on 23<sup>rd</sup> August 2018 C accepted he saw posts that commented and praised each other [283], and he accepted the same in the disciplinary hearing [419]. It can also be seen from some of the posts [233, 238, 239, 244] that C's comments came after others had posted their own comments on recognitions.

88. On balance, R submits that C did see other people's comments before making his own, and he will have seen it was a forum where only positive comments were being made about others.

89. Even if he did not see such comments, C took issue with there being no policy on how to use LifeWorks, but it did not require a written policy on how to use LifeWorks for C to have reasonably known that making the comments he did were potentially offensive and derogatory. C was unreasonably ignorant of why his comments could be offensive, evidenced by his continued denial of such.

132. The Tribunal also considered in this context whether the Respondent acted reasonably by way of taking into account any appropriate mitigation. The Tribunal reminded itself that it is appropriate to consider the process up to and including the disciplinary appeal. The Tribunal was less certain that Mr Leech had approached the issue of the level of sanction in the knowledge that he was free even in a case of serious misconduct to consider a sanction less than dismissal. However, to the extent that this might have been a breach of the procedure, the Tribunal was satisfied that Ms Milburn was fully aware of this and indeed, applied her mind separately to this issue. Her reasonable consideration of the issue of the appropriate level of sanction cured any error made by Mr Leech before that on that point.

133. The Tribunal considered various aspects of the circumstances of the Claimant's misconduct. Regarding the Claimant's comments being to "get a reaction", as a result of Mr Side not having taken appropriate action, the Tribunal also found Mr Fuller's submission below persuasive:

93. C claimed that he was unable to address his concerns with management and found Liam Side unapproachable, yet within his email on 25<sup>th</sup> July 2018 C explicitly states, "*I prefer to contact you because what happening*" [222], and again raised concerns with Liam Side on 31<sup>st</sup> July 2018 [225]. The R submits C did find Liam Side approachable having felt comfortable enough to address these matters with him twice, and C could have addressed his concerns by other means instead of using LifeWorks. He did not, and instead chose to air his concerns openly of R's forum.

The Tribunal reminded itself also that despite the long interval between the original offences and the disciplinary hearing in January 2019 and then the appeal hearing at the end of February 2019, the Claimant did not put forward a more remorseful case acknowledging the hurt and assuring the Respondent that he would not repeat such acts.

134. In relation to the question of whether the Claimant had received the Dignity at Work Standard before the commencement of the disciplinary process, the Tribunal accepts that the Dignity at Work Standard was sent to the Claimant at the time of the invitation to the disciplinary meeting at the beginning of January 2019 (pp330-331). The Tribunal considers that that was sufficient to satisfy the test of fairness. The Tribunal also accepted Mr Leech's evidence that the Dignity at Work Standard was

available along with other of the Respondent's policies on the Respondent's intranet. The Tribunal did not accept the proposition that the Claimant needed to have seen the Dignity at Work policy in order to understand that the making of these comments was, at the very least, inappropriate.

135. In addition, Mr Fuller's submissions at paras 97(a) – (d) of the consolidated document were adopted as set out below:

- a. R's Dignity at Work Standard acknowledges R's condemnation of all types of bullying, harassment and discrimination at work [60-70];
- b. It is acknowledged within R's disciplinary policy that a breach of the Dignity at Work Standard is considered a potential gross misconduct offence given the seriousness placed on observing the Standard [74];
- c. R's disciplinary policy also confirmed using threatening or offensive language towards other employees and bringing the company into disrepute were potential gross misconduct offences [74];
- d. The comments themselves, viewed objectively, are not confined to just general moans or complaints about C's work or R's organisation, and instead go further to personally attack certain individuals within R's organisation, which could reasonably be interpreted as bullying or harassment under the Dignity at Work Standard – e.g. C's suggestion the team at Kidbrooke Village following Jason Grieve's departure are 'a joke' [236], calling Catherine Riva, one of R's most senior figureheads, 'fake of the fake' [238], suggesting that things would be better if Diego left [243] and suggesting Jamie showed no management skills [241];

136. The Tribunal also considered that it was extremely relevant that the Claimant had only just been assured by Mr Side that Mr Side had looked into the background because Mr Side referred in his email of 26 July to the fact that he had looked at the minutes of an earlier team meeting in early July and that he was referring the matter to be dealt with and taken seriously by the Respondent by way of a formal grievance investigation. The picture therefore that the Claimant sought to portray of a Respondent who simply did not care about his concerns which left him with no option but to lash out was therefore not substantiated. It was also fair to say that the method by which the Claimant chose to raise the profile of his disquiet was unlikely to have been fruitful.

137. The Claimant also raised some other issues in relation to the procedure. The Tribunal has already indicated that in its view there were no breaches of the ACAS procedure which provides a minimum requirement. The

procedure followed by the Respondent (as outlined in para 118 of the consolidated submission) met the test of reasonableness.

138. In all the circumstances, the Tribunal concluded that the reason for the dismissal was that the Respondent believed that the Claimant was guilty of the misconduct set out in the invitation to the disciplinary hearing and in the dismissal outcome letter. The Tribunal rejected the contention that the dismissal was caused by reason of the Claimant having made the disclosures referred to above. The Tribunal noted that the Respondent had proposed to deal with the Claimant's disclosures as set out in the two emails on 25 July by way of the formal grievance. The Tribunal did not consider that the additional matters raised in the email of 31 July explained the change and the resort to possible disciplinary action. The Tribunal considered that the posts that the Claimant put up more than adequately explained the taking of disciplinary action and the subsequent dismissal of the Claimant.
139. The Tribunal also rejected the contention that the Claimant was dismissed on grounds of race. The Claimant relied on the fact that he was Polish. There was no evidence about this being a relevant consideration to the Respondent or of any background of a pattern of adverse treatment of Polish members of staff. The Tribunal noted that the racial profile of the members of staff referred to was fairly diverse. In all the circumstances, there was nothing that would satisfy the *Madarassy* test in terms of the allegation of the race dismissal. That allegation was therefore not well founded and was dismissed.
140. In the light of the findings and conclusions above, the Tribunal was also satisfied that the dismissal did not come about because of the protected disclosures having been made: Issue 12.5. That complaint was also not well founded and was dismissed.
141. Finally, in relation to the dismissal, the Claimant alleged that he had been wrongfully dismissed (issues 17.1 and 17.2). The fact that the Claimant was dismissed without notice was agreed. The Tribunal therefore had to consider whether the Respondent had proven on the balance of probabilities that the Claimant had committed acts of gross misconduct. The Tribunal was satisfied that the Claimant had posted the comments itemised in the disciplinary invitation letter. This was based on the Claimant's own admissions and the likelihood of this having happened on the balance of probabilities in all the circumstances.
142. The Tribunal considered whether this conduct constituted an act of gross misconduct. Once again, the Tribunal refers to some of the points relied on in the assessment of the fairness of the dismissal namely: -
  - i. That the derogatory comments were made against a range of managers from the Claimant's immediate line-manager through to a

very senior Director of the company;

- ii. That the Claimant failed to apologise subsequently;
  - iii. That the Claimant failed to acknowledge that the comments were inappropriate, derogatory or offensive towards other employees and/or that they were derogatory about the company.
143. The Tribunal separately considered whether it was appropriate to describe derogatory comments made about the company on the company's intranet as comments which could bring the company into disrepute given that the public did not have access to that information. However, the Tribunal considered that they were capable of having that effect given that they were made on a very widely accessed platform, albeit on the intranet of the Respondent, and this was a large employer. Further there was no guarantee that the comments would remain confidential within the large and periodically changing workforce. Moreover, the Tribunal did not consider that this allegation was limited to bringing the Respondent into disrepute in the eyes of third parties.
144. In all the circumstances therefore, the Tribunal considered that the wrongful dismissal complaint/failure to pay notice pay was not well founded and was dismissed.

*Expenses Claim in respect of Attending Meeting on 26 February 2019*

145. The Tribunal found that the Claimant accepted in evidence there were no documents showing such a claim being made for this expense. Even if he had made such a claim, he did not say what mode of travel he used to get to the appeal hearing, which was also held at Royal Arsenal, nor did he give evidence of what expenses he had incurred.
146. In those circumstances, that claim was not well founded and was dismissed.

*Summary*

147. None of the complaints having succeeded, the claim was not well founded and was dismissed.

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Employment Judge Hyde  
Dated: 21 January 2021