EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Finn**
Respondent (1):	**The British Bung Manufacturing Company Limited**
Respondent (2):	**Mr J King**
Heard at Sheffield	**On: 22, 23, 24 and 25 February 2022**
	6 April 2022 (in chambers)

Before:	**Employment Judge Brain**
Members:	**Mr D Dorman-Smith**
	Mr K Lannaman

Representation

Claimant:	**Mr R Finn (son)**
Respondents:	**Miss G Churchhouse of Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The disclosures made by the claimant to the first respondent on 24 July 2019 and 13 April 2021 qualify for protection pursuant to Part IVA of the 1996 Act.
2. The disclosures made by the claimant to the first respondent on 26 March 2021 and 8 April 2021 do not qualify for protection pursuant to Part IVA of the 1996 Act.
3. The claimant's complaint against the first respondent succeeds that upon 25 March 2021 he left his place of work and refused to return to his place of work because of circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert and which persisted until 13 April 2021.
4. UPON the claimant's complaints of unfair dismissal brought against the first respondent pursuant to Part X of the Employment Rights Act 1996:

(a) The claim that he was unfairly dismissed upon the grounds that he made the disclosures in paragraph 1 fails and stands dismissed.

(b) The claim that the claimant was dismissed for the health and safety reason in paragraph 3 pursuant to section 100(1)(d) of the 1996 Act fails and stands dismissed.

(c) The claim that the claimant was unfairly dismissed pursuant to sections 94 to 98 of the 1996 Act succeeds.

(d) Upon remedy for the claim in paragraph 4(c):

a. The claimant's conduct before the dismissal was such that it is just and equitable to reduce the amount of any basic award made by 50%.

b. The respondent would fairly have dismissed the claimant on 15 October 2021.

c. The claimant's dismissal was caused or contributed to by his conduct such that it is just and equitable to reduce the amount of any compensatory award made by 75%.

5. The complaint of wrongful dismissal brought against the first respondent succeeds.

6. The claimant's complaints against the first respondent that he was subjected to detriment for having made the disclosures in paragraph 1 pursuant to section 47B of the 1996 Act fail and stand dismissed.

7. The claimant's complaints against the first respondent that he was subjected to detriment because of the health and safety reason referred to in paragraph 3 succeeds in part, in particular:

7.1 that the respondent ignored and ostracised the claimant after 25 March 2021 until 8 April 2021.

7.2 that the respondent failed to investigate the claimant's concerns adequately or at all until 8 April 2021.

8. The remaining complaints against the first respondent of detriment for the health and safety reason in paragraph 3 fail and stand dismissed.

9. UPON the claimant's complaints against both respondents brought under the Equality Act 2010:

a. The complaint of harassment related to sex arising out of the incident of 24 July 2019 succeeds.

b. The complaint of harassment related to age arising out of the incident of 24 July 2019 fails and stands dismissed.

c. The complaints of harassment related to age and sex arising out of the incident of March 2021 fail and stand dismissed.

10. It is just and equitable to extend time to vest the Tribunal with jurisdiction to consider the complaints of harassment arising out of the incident of 24 July 2019.

11. UPON the claimant's complaint of victimisation brought against both respondents pursuant to section 27 of the 2010 Act:

10.1. BY CONSENT, the claimant did a protected act upon 24 July 2019.

10.2. The claimant's complaint that he was victimised by the respondents for having done the protected act fails and stands dismissed.

REASONS

Introduction and preliminaries

1. Having heard the evidence from the parties and having received helpful written and oral submissions from the parties' representatives, the Tribunal reserved judgment. After having discussed the matter in chambers on the afternoon of 25 February 2022 and upon 6 April 2022 the Tribunal arrived at the judgment set out above. As judgment was reserved, the Tribunal now gives reasons.

2. This case benefited from a case management hearing which came before Employment Judge O'Neill (by telephone) on 24 September 2021. A copy of her case management summary is at pages 40 to 51 of the hearing bundle. The issues in the case were identified. She gave case management directions.

3. The Tribunal shall look at the issues in the case in detail in due course. However, it suffices at this stage to summarise the issues in the case. This may conveniently be done by reference to paragraph 46 of Employment Judge O'Neill's case management summary. She sets out the issues as follows:-

    (1) Unfair dismissal – sections 94 to 98 of the Employment Rights Act 1996.

    (2) Automatic unfair dismissal for a health and safety reason pursuant to section 100(1)(d) of the 1996 Act.

    (3) Unfair dismissal for having made protected disclosures pursuant to section 103A of the 1996 Act.

    (4) Detriment for having made protected disclosures pursuant to section 47B of the 1996 Act.

    (5) Detriment for a health and safety reason brought pursuant to sections 44(1)(d) of the 1996 Act.

    (6) Harassment related to sex and age brought pursuant to sections 26 and 40 of the Equality Act 2010.

    (7) Victimisation brought pursuant to sections 27 and 39(4) of the 2010 Act.

    (8) Wrongful dismissal (by way of summary dismissal).

4. The complaints brought under the 2010 Act are against both respondents. The unfair dismissal and wrongful dismissal complaints may of course only be brought against the first respondent as the claimant's employer. The complaints of detriment arising out of the health and safety case may only be brought against the first respondent. There is no complaint against the second respondent arising out of the public interest disclosure detriments.

5. Employment Judge O'Neill directed that merits and remedy issues should be dealt with at the hearing. She set out (at page 40) a timetable for the hearing. Upon it appearing to the Tribunal and to the parties that there was insufficient time to deal with all of the remedy issues, the Tribunal directed (subject to two exceptions) that remedy issues would be deferred to a remedy hearing if required. The two exceptions arose upon the claimant's complaints of unfair dismissal. These were:-

    (1) Whether the respondent would have fairly dismissed the claimant in any case and if so when; and

    (2) Any issue arising out of the claimant's conduct.

6. Upon the second day of the hearing, the Tribunal heard evidence from Robert Finn who is the claimant's son. (We shall, in these reasons, refer to the claimant as such and to Robert Finn as *"Mr Finn*"). Under questioning from the Employment Judge, Mr Finn disclosed that he had in his possession a recording of a conversation held on 13 April 2021 between the claimant and Mr Finn on the one hand and Michael Steer and Douglas Taylor of the first respondent on the other.

7. Michael Steer is the managing director of the first respondent. Douglas Taylor is the first respondent's company secretary. The exchanges took place on 13 April 2021 in circumstances to which we shall come in due course. (For convenience, we shall now refer to the first respondent simply as *"the respondent".* We shall refer to the second respondent as *"Mr King*").

8. The Tribunal directed there to be an adjournment during the course of the second day of the hearing in order that a copy of the transcript could be sent by Mr Finn to the respondent's and Mr King's solicitor. The matter was then adjourned to afford the opportunity of listening to the recording. After having done so, the respondent's and Mr King's counsel said that there was no objection to the Tribunal listening to the recording and receiving a transcript of it. (It appears that Mr King's position upon the question of the transcript was neutral. The events of 13 April 2021 had no direct bearing upon the case brought by the claimant against Mr King).

9. The Tribunal then adjourned matters in order to listen to the recording and to receive an agreed transcript from the parties. As a matter of record, the agreed transcript was not added to the hearing bundle but nonetheless was placed before the Tribunal.

10. The Tribunal heard evidence from the claimant and from Mr Finn. The claimant also called evidence from one of the respondent's former employees Philip Steel.

11. In addition to Mr Steer and Mr Taylor, the Tribunal heard evidence from the following on behalf of the respondents:-

    (1) Mr King. He is employed by the respondent as a shift supervisor.

    (2) Christopher Hardcastle. He is employed by the respondent as a production manager.

    (3) Edward Charles Gledhill. He is a director of the respondent.

12. The Tribunal also received into evidence a signed and dated witness statement from Adrian Hudson. He is employed by the respondent as a quality control manager. Mr Hudson did not give evidence before the Tribunal. This is because the claimant agreed the evidence contained within his witness statement.

Findings of fact

13. We now turn to our factual findings. The claimant was employed by the respondent as an electrician between 22 September 1997 and 25 May 2021. Upon the latter date, the claimant was dismissed from his employment without notice by the respondent.

14. The respondent is a small family business. It was incorporated as long ago as 1882. It employs around 30 employees. The workforce is predominantly if not exclusively male. It is not in dispute that industrial language is common place upon the shop floor.

15. The respondent did not put in issue any question about the claimant's capability to undertake his role. There was also no dispute prior that to the events of late March and April 2021, the claimant had an unblemished disciplinary record over not far off 24 years of service.

16. It is not in dispute that there was an altercation towards the end of July 2019 between the claimant and Mr King. The claimant refers to this in paragraph 5 of his witness statement. He gives the date as 31 July 2019. He says, *"I was working on a machine that I had to cover awaiting specialist repair. The covers were taken off, and it was apparent that Jamie King had done this. When I spoke to him about it, he began to call me a stupid old bald cunt and threatened to 'deck me.' Fearful for my personal safety I retreated to the nearby office of Ady Hudson, supervisor. Jamie continued his tirade of threats and abuse at the office door. This was witnessed by Ady."*

17. The claimant goes on to say, in paragraph 6 of his witness statement, that, *"Following the incident, I was spoken to by Ady, and provided a formal statement regarding the matter. Jamie was spoken to and accepted his behaviour was as described. I was told Jamie was raising a young child on his own and should I wish to take [matters] further this may have resulted in him losing his job. I decided to give him the benefit of the doubt, and so I told management we would draw a line under the matter and move on."*

18. The statement which the claimant furnished to the respondent at the time of the incident is at pages 64 and 65 of the bundle. This is consistent with the claimant's witness statement in so far as it concerns the claimant's concern about the covers of the electrical appliance having been removed after the claimant had put them back on following his diagnosis that a specialist engineer was required.

19. However, the printed witness statement prepared for these proceedings which contains the claimant's evidence in chief is inconsistent in material respects with the contemporaneous account. Firstly, the date of the incident was given as 24 July 2019 in the document commencing at page 64 whereas in the printed statement the claimant says that the incident occurred on 31 July. Secondly, the claimant says (at page 64) that Mr King called him a *"fat bald old cunt"* as opposed to a *"stupid old bald cunt" per* the printed witness statement.

20. Mr King's contemporaneous account of events is in the bundle at page 66. Mr King's contemporaneous account is consistent with that of the claimant in that there is reference to the cover of the electrical appliance having been removed. Mr King candidly accepts that he called the claimant a *"bald cunt"* and said that he said that he was going to *"knock him out."*

21. Mr Hudson also gave a contemporaneous witness statement. This is dated 31 July 2019 (as is Mr King's contemporaneous statement). Mr Hudson says that he procured Mr King's and the claimant's statements and decided to take no disciplinary action against either of them. In his printed witness statement prepared for these proceedings (and which was agreed by the claimant) Mr Hudson says that he did not witness the incident between the claimant and Mr King.

22. Mr King's account in his printed witness statement (in paragraph 4) is consistent with that in his contemporaneous statement at page 66. There is consistency both upon the date of the incident and what was said by Mr King to the claimant.

23. Accordingly, because of the inconsistencies in the claimant's account, we prefer the account given by Mr King. We therefore find as a fact that Mr King called the claimant a *"bald cunt"* and that the word *"old"* did not feature. We also find as a fact that Mr King threatened physical violence towards the claimant.

24. Mr King gave evidence to the Tribunal to the effect that between July 2019 and March 2021 no issues or problems occurred as between him and the claimant. There was no evidence from the claimant to the contrary. Indeed, in the claimant's printed witness statement he makes no reference to anything untoward happening as between him and Mr King over that 20 months' period. The Tribunal therefore finds that nothing of note happened between the claimant and Mr King from July 2019 until March 2021.

25. The claimant's evidence in chief is as follows about the incident which took place in March 2021:

"(9) On Friday 26 March 2021 I was actively in the workplace. I had been contacted by telephone by Mick Steer to ask me to work that day, hence why I was there. I arrived at work at 7.30am. At around dinner time, I needed to modify a machine to allow the connected robots to work from a spur as opposed to the current plus sockets, as they kept tripping out.

(10) I went to see Jamie King as he was the person I needed to approach to shut the machine down for safety reasons for me to complete the modification. I needed to do this as Jamie is a "setter", which means he sets the machine up for production. There is one "setter" for each shift, and Jamie was on at this time. Jamie was able to authorise the shutdown of the machine and needs no prior authorisation from management. Jamie shut down the machine and walked off.

(11) I began work, then Jamie returned with his supervisor Chris Hardcastle. Chris asked me what I was doing. I explained the work I was doing as per Mick Steer's direction; this was to be done on every machine to save the company money. Chris said, "This machine is fucking working alright, it's not tripping out." I replied, "Yes Chris that may be, but Mick has agreed rather than put RCDs in the robots we are changing them all to spur units to prevent any issues. He said something else. I replied, "I don't think you're getting me Chris, its working because I have put a fucking spur on it."

(12) At that point I became aware that Jamie King was behind me. He said, "Don't you swear at Chris." I turned round and said, "Excuse me, what's this got to do with you." He said, "You know you shouldn't swear at other staff." I replied, "Oh shut up Jamie, what's this got to do with you I'm talking to Chris." From this point onwards, Chris Hardcastle (Jamie's supervisor) just stood there, smirking, without getting involved. Jamie said, "No I won't shut up." I said, "It's got nothing to do with you." Jamie then said, "And what are you going to do about it eh?" I said nothing "I'm not having this again, go away." Jamie then shouted, "Come on then, make me, you old bald cunt. Make me!" At this point he was in front of me. It was clear he was threatening me and wanted to have a fight. His face was angry, he was tensed up. This really did scare me. His words and actions caused me harassment, alarm and distress and I feared for my personal safety due to his behaviour that was directed at me. Due to the fear of violence, I began to walk away. Jamie shouted at me as I did, "ooh, what are you gonna do. Run on to the boss and tell tales again?" He clearly was making reference to the first incident of harassment and violence which I had decided to pursue no further at the time.

Also present during the incident was Phil [Steel], a warehouse person. I didn't know his second name at the time.

(13) I walked away from the incident and back to my office/workshop area. I waited for a member of the management team to come and check on my welfare and to discuss how to formally deal with the incident, but no one came. I then went back to the area, as a professional electrician I still had to make the machine safe as wires were hanging out. I spoke to Phil, he told me he heard every word.

(14) I then went to the office to report Jamie King and log the incident. I took my overalls off and went into the office to report the crime. Doug Taylor and Mick Steer were there. I shouted to them, "That is it. I cannot work here whilst ever he is going to threaten and abuse me like that. It's Jamie. He's done it again, he's a nasty little bastard, it's him or me, it's time for you to choose." I was so upset I was shaking. Both Mick and Doug just stared at me. I paused for an awkward moment in disbelief, then said "ok, fine, I'm going" and with car keys in hand, I left the office.

(15) I was so upset I got in my car and drove home. I waited for a member of the management team to telephone me and check on my welfare and to discuss how to formally deal with the incident, but no one called. I waited by the phone, expecting a call from somebody."

26. Mr King's account in his evidence in chief is:

"(11) On Thursday 25 March 2021, I was working in the back room off the main factory when Tony [Finn, the claimant] came up to me and said "Jamie turn that fucking machine off" in regard to a machine that Philip Steel was working on. I didn't like the way I had been spoken to but I did not respond. I turned the machine off and went to get my line manager, Chris Hardcastle, as I had been in trouble for arguing with Tony before.

(12) Chris and I went into the back room where the machine was and Chris asked Tony why he needed the machine to be turned off. At this point I went back into the main factory. I then heard raised voices so went back into the back room. Tony was swearing and shouting at Chris and then told Chris to fuck off. I asked Tony why he was telling Chris to fuck off and told him to have a bit of respect for a manager. Tony responded telling me to "fuck off this is nothing to do with you."

(13) I replied telling Tony not to speak to me like that and said to him that he always speaks to us like shit and I called him a dickhead. Tony replied along the lines of "what are you gonna fucking do about it" which I felt like he said in order to goad me. I said to Tony that I was not going to do anything because I have been in trouble before and that if I did he would go straight into the office to report me. At that point Chris told me to walk away, which I did. I went outside of the factory for a cigarette.

(14) When I came back inside about half an hour later Tony had left site. Mick came out of the office and asked if I had threatened Tony. I said I had not. Mick then called Chris Hardcastle into the office and I went and continued with my work.

(15) The argument on 25 March 2021 was something and nothing. Tony did not appear to be frightened at any point. He was shouting and swearing at me and Chris. It was a heated discussion that would probably have been forgotten about the next day if Tony had not left. I did not threaten Tony at any point and did not give him any reason to think I was threatening him. I was stood more than two metres away from Tony and did not approach him. I did not call him an "old bald

cunt" as he has alleged. If I had, I would be honest about it as I have been in all my statements about the names and language used."

27. Mr Steel, in his evidence in chief, has the incident as taking place on Friday 26 March 2021. He says in paragraph 5 of his witness statement that, *"I … saw Chris Hardcastle come over to the back of the machine. I heard raised voices between Tony and Chris. I then saw Jamie walk past the side of me and start joining in the conversation. I heard Tony say, "Jamie just stay out of it." I heard Jamie say something [like] "it is to do with me" and "get out of there." Tony said something like "why what you gonna do?" Jamie replied "I'll kick fuck out of ya". I saw Jamie's posture was towards Tony in a threatening manner. I saw Tony appeared scared and went to walk off. Jamie then shouted something like, "you gonna go grass me to Steer again?" Tony shouted over to me, "did you get all that Phil?" and I replied "every word."*

28. Mr Hardcastle has the incident as taking place on 25 March 2021. Mr Hardcastle corroborates Mr King's account that Mr King was affronted by the way in which the claimant had made the request of Mr King to switch off his machine in order that the claimant could work upon it and that he (Mr King) had approached Mr Hardcastle to complain. He also corroborates that Mr Steel was present when the incident took place. Mr Hardcastle says that the claimant was aggressive towards him (Mr Hardcastle) and said that he needed to *"fit a fucking RCD"* several times.

29. Mr Hardcastle corroborates the claimant's account that Mr King involved himself in the matter by interceding to the effect that the claimant should not speak to Mr Hardcastle in that manner. Mr Hardcastle says that he thought that the claimant was seeking to goad Mr King. He says that Mr King did not refer to the claimant as *"an old bald cunt"* nor did Mr King threaten the claimant.

30. It is common ground between the parties that the claimant left the factory premises shortly after the incident. Mr Hardcastle says that after the claimant had left, Mr Steer charged him with the task of investigating the matter.

31. Mr Hardcastle says that Mr Steel considered it inappropriate for him (Mr Hardcastle) to take his statement because Mr Hardcastle was himself involved in the matter. Mr Steel gave evidence to this effect to the Tribunal. Mr Hardcastle reported Mr Steel's view of matters to Mr Steer who instructed Mr Hardcastle that he (Mr Steer) would investigate matters himself. In paragraph 8 of his witness statement Mr Steel says that he was asked to go and see Mr Steer. Mr Steel says in his witness statement that he said to Mr Steer that, *"you don't want me to say what I'm gonna say cos it means you'll have to sack Jamie, and he's done summat similar before."* Mr Steel said that he was prepared to give a statement to Mr Steer if requested. However, Mr Steer did not ask Mr Steel for a statement.

32. Miss Churchhouse sought to impugn Mr Steel's credibility upon the basis that he had left the respondent's employment on bad terms. She referred in particular to Mr Steel's email dated 9 April 2021 at page 72 of the bundle. This was sent at around the time that Mr Steel left the respondent's employment. He left with the parting shot, *"Thanks for treating me like a human. Have fun with trading standards and HSE."* When asked by the Employment Judge to what Mr Steel was referring, he replied that he had taken photographs of blocked fire exits and issues arising out of the manufacturing process. He said that he'd been assured by Mr Steer that he would "*get someone independent*" to look into the matter but Mr Steel heard nothing further.

33. The Tribunal accepts that Mr Steel was unhappy towards the end of his employment with the respondent. We accept that he may have had genuine concerns about blocked fire exits. However, his unhappiness principally arose out of being asked to work upon the conveyer belt and being removed from his substantive role in dispatch within the respondent's warehouse.

34. We accept Mr Steer's account that, by reason of the impact of the pandemic, there was a commercial imperative behind the respondent's decision to move Mr Steel from his substantive role. We also accept that subjectively Mr Steel was not happy about being moved.

35. We do not accept that Mr Steel's unhappiness about his change of role and concerns about certain health and safety matters lessens the weight that the Tribunal feels able to afford Mr Steel's testimony. He impressed the Tribunal as a very straightforward historian. Indeed, although called to give evidence for the claimant, his testimony was against the claimant upon a key issue as to whether Mr King had used the same colourful language in March 2021 as had been used by him in July 2019.

36. We can attach no significant weight to Mr King's version of events. Having received a warning from the respondent about the July 2019 incident it is unsurprising that he gives an account in which effectively he denies the use of threatening words or behaviour towards the claimant.

37. Just as Mr Steel's evidence does not accord with that of the claimant, so too there is an inconsistency between his account and that of Mr Hardcastle (upon the issue of Mr King issuing threats to the claimant). In such circumstances, testimony from an individual such as Mr Steel who has no vested interest in the matter one way or the other ought to attract significant weight absent substantial grounds to doubt the evidence of the witness. Those grounds are absent in this case for the reasons which we have already given.

38. Therefore, pulling this together, we find that Mr King did threaten the claimant with physical violence. We do not find that Mr King made pejorative remarks about the claimant's age or appearance.

39. Mr Steer and Mr Taylor did not witness the incident which took place upon the factory floor. That said, both of them became aware that something untoward had occurred very quickly afterwards. Mr Steer says, in paragraph 5 of his printed witness statement, that on 25 March 2021 he was in the office with Mr Taylor, *"when Tony came in shouting that he had had enough and that if we did not fire Jamie King then he would leave. Doug asked Tony to calm down and to explain what had happened. Tony said something along the lines of it being "them cunts out there," that Jamie had been at it again and if we didn't do something about it that would be it. Tony then walked out. It was not clear what had happened."* Mr Steer says in paragraph 6 of his statement that he resolved to wait for several minutes to allow the claimant to calm down. He then went to find him. He could not locate the claimant. Mr Steer went to look in the car park and found that the claimant's car was not there.

40. Mr Taylor gives a similar account to that of Mr Steer in paragraph 5 of his (Mr Taylor's) witness statement. He says that he was with Mr Steer when the claimant came in *"shouting and swearing that he had had enough and that if we did not fire Jamie King then he would leave. I asked Tony to calm down and to explain what had happened. Tony said something along the lines of it being "them cunts out*

there", that Jamie had been at it again and that if we didn't do something about it that would be it. Tony then walked out. It was not clear what had happened. Mick went to try and find Tony about five minutes later but he had left the workplace."

41. Although nothing turns upon this issue, there is a discrepancy between the witnesses at the date upon which this event took place. Some have it as occurring on 25 March and others on 26 March. We find that the incident took place on 25 March 2021. This is because Mr Taylor gives several reference points for that date. Firstly, he says that Mr Steel gave notice of resignation on 26 March 2021. Secondly, Mr Taylor says that when the claimant did not attend for work on 26 March 2021 he was unsure as to how to treat the claimant's absence. Mr Taylor's account before the Tribunal was that he would calculate the employee's wages on the Monday before the end of the month. It is therefore credible that Mr Taylor was unsure as to what to do about Friday 26 March given the claimant's non-attendance. Had the claimant attended for work that day then the claimant would have been entitled to be paid for it and Mr Taylor would not have been presented with his dilemma. Mr Taylor said that he contacted his solicitor for advice as to how to treat the claimant's absence and that he sought that advice on Friday 26 March. Mr Taylor being able to reference matters in this way renders it credible, in our judgment, that the incident between the claimant and Mr King took place on Thursday 25 March and not Friday 26 March.

42. That both Mr Steer and Mr Taylor observed the claimant's distress and demands that action be taken against Mr King corroborates the Tribunal's findings that Mr King issued threats towards the claimant. It is difficult to see why otherwise the claimant would burst into Mr Steer's office as he did and demand the removal of Mr King in circumstances where there was no unsavoury incidents between the pair after July 2019. It is not in dispute that the claimant had been prepared to let bygones be bygones in July 2019 and was accepting of the respondent's decision to issue Mr King only with a warning then on account of Mr King being responsible for a young family. The claimant's actions on 25 March 2021 had plainly been triggered by something. There was no suggestion that anything else could have precipitated the claimant's reaction than what had taken place between him and Mr King that day.

43. There was no contact between the parties after 25 March 2021 until 8 April 2021. It is common ground that the next contact was initiated by the claimant on 8 April 2021 following receipt by the claimant of his wage slip. His email is at page 75.

44. A number of workplace policies used by the respondent appear towards the end of the bundle. One of these is the sickness absence policy. As may be expected, this places the onus upon an ill or injured employee to notify the respondent no later than 30 minutes after the time work is expected to commence. The sickness policy (commencing at page 178) vests the employer with the right to contact the employee in cases of unauthorised absence. The claimant was not ill over this period. The policy was therefore inapplicable.

45. The claimant maintained that he was under no obligation to contact the respondent after 25 March 2021 because he understood that he was only required to come into work on an *ad hoc* basis as and when requested by Mr Steer. This is because the claimant (and other employees) had been placed upon furlough leave. There is a letter to this effect addressed to the claimant dated 24 June 2020 at pages 68 and 69. There is also a letter from Mr Taylor to the claimant dated 25 November 2020 confirming the continuation of the furlough arrangement.

46. In paragraph 3 of his witness statement Mr Steer says that the respondent, *"is required to have an electrical inspection every five years and a PAT test every year by an external independent electrician. An electrical inspection was undertaken in early 2021 during the Coronavirus pandemic, and whilst the majority of staff were furloughed. The external electrician prepared a report of electrical works that required correcting. I rang Tony in early March 2021 to ask him to come back to work from furlough in order to undertake the necessary works. Tony said he could not come back for the first few days due to medical appointments. When Tony came back in March 2021 he did so for a few days at a time due to medical appointments and then having a problem with his car."*

47. The Employment Judge asked the claimant about the arrangement for coming into work during March 2021. The claimant accepted that he had been taken off furlough *"to do a few jobs."* He says that there was no letter from the respondent to clarify his status. The claimant said that he was working full time in March 2021 and that his understanding was that he needed so to do until all of the work recommended by the external electrician had been undertaken.

48. It was not, of course, permissible for the claimant to undertake work for the respondent while on furlough. We therefore accept the respondent's case that the claimant's furlough leave came to an end in March 2021. However, the respondent did not help themselves by failing to write to the claimant to clarify matters as they had done earlier in the pandemic. It is therefore understandable that the claimant considered that he was only working upon an *ad hoc* basis and may have been left uncertain as to whether he needed to contact the respondent after 25 March 2021.

49. Each side's failure to contact the other may be considered surprising given the need for the electrical work which required to be undertaken. We accept the claimant to be a conscientious electrician (as demonstrated by the incident of July 2019 when he raised concerns about the removal of the cover and in March 2021 when before leaving site he ensured that the appliance upon which he had been working when the altercation took place was safe). It may therefore be considered surprising that the claimant left matters in abeyance knowing that outstanding work needed to be completed. Likewise, the pressing need for electrical work renders it surprising that the respondent did not contact the claimant to resolve matters in order to get the claimant back and finish the work. Neither side's approach is particularly impressive given the prevailing circumstances.

50. As we said in paragraph 43, the claimant was prompted to contact Mr Taylor upon receipt of his wage slip: pages 75 and 76. He discovered that he had been paid only statutory sick pay during the period of his absence. He complained to Mr Taylor that he had had no communication or correspondence from the respondent to check upon his welfare. The claimant was upset about this, particularly given his length of service.

51. Mr Steer's evidence before the Tribunal was that legal advice had been given to the respondent that there was no obligation to pay the claimant at all after 25 March 2021 as he was absent without leave. Mr Steer said that a decision had been taken to pay the claimant statutory sick pay so that at least the claimant would receive some remuneration during his absence.

52. Mr Taylor replied to the claimant's email of 8 April 2021 the next day. He said that he would revert to the claimant once he had sought legal advice: (pages 74 and 75).

53. Upon the same day as the claimant's email was received, Mr Hardcastle gave a contemporaneous statement about the events of 25 March 2021. That document may be seen at page 71. It is consistent with Mr Hardcastle's printed witness statement. Mr King's contemporaneous witness statement following the 25 March 2021 incident is at page 90. It is dated 20 April 2021. Again, it is consistent with Mr King's printed witness statement. There was no satisfactory explanation as to why Mr King's statement was not taken until almost a month after the incident or why Mr Hardcastle's account was only given two weeks after the event.

54. There is no evidence that the respondent undertook any investigation on or after 25 March 2021 until the claimant got in touch on 8 April 2021. It can, in our judgment, be no coincidence that Mr Hardcastle's witness statement was created upon the same day as the claimant's email. We have already seen that Mr Steel was not asked for a witness statement. The respondent's enquiries of him just seemed to fizzle out: see paragraph 32. The claimant could not know what, if anything, was happening with an investigation as he was not in work. However, he did of course know that no contact had been made with him by the respondent to enquire about the incident.

55. On 9 April 2021 (at 13:11) Mr Finn emailed Mr Taylor: (pages 78 and 79). He did so upon behalf of his father (the claimant). Mr Finn expressed concern that the respondent had not been in touch with the claimant. He said that the claimant had remained at home believing that he was on the furlough scheme. (We have found as a fact that the claimant was taken off furlough by this point). Mr Finn expressed concern on his father's behalf when receiving his wage slip and discovering that he had been paid statutory sick pay only. Mr Finn said that the claimant *"wants to work. He needs to work. He just wants a bit of support like he needed on 26 March".* Mr Finn asked Mr Taylor to confirm that the claimant was required to attend work the following Monday (12 April). Alternatively, Mr Finn asked for confirmation that if the claimant was not required to work from Monday 12 April that he would at least receive furlough payments.

56. On 9 April 2021, Mr Taylor emailed the claimant (page 77). He invited the claimant to attend an investigation meeting at the respondent's offices on 13 April 2021. The claimant agreed to do this provided that he would be paid his furlough payment and not SSP.

57. The claimant's account (in paragraph 26 of his witness statement) is that he was concerned about the prospect of attending the investigation meeting unaccompanied. The claimant and Mr Finn resolved to attend the investigation meeting together in the hope that Mr Finn may be permitted to attend. The evidence from the claimant and Mr Finn is that they apprehended that Mr Finn may not be permitted to attend the meeting as he was not a trade union representative nor an employee of the respondent. Accordingly, they decided to prepare a written statement of events to assist the claimant were he to find himself in the meeting alone. The claimant says in paragraph 25 of his witness statement that he turned to his son to assist as "*he has taken lots of witness accounts as he is a police officer".*

58. The claimant's statement was prepared on 11 April 2013. The claimant went to Mr Finn's house. Mr Finn typed the statement on his laptop. It is in the bundle at pages 80 to 83.

59. In paragraph 9 of his witness statement, Mr Finn says that, *"The most obvious and structured way of [the claimant] providing a 'witness statement' was to write it up*

on a blank 'witness statement' template. I have a blank statement template saved on the desktop on my laptop." He goes on to say in the same paragraph that, "*The sole purpose of the document was that dad could assist the appointed investigators by giving them a true and accurate recollection of events. We both knew if he was in the meeting alone, he may miss parts of the conversation, get confused and be of minimal help to whoever spoke to him and the workplace investigators."*

60. In paragraph 10 Mr Finn says that, "*The statement was made using a blank generic template. I was not on duty. It has not been attached to any crime reports. I have not countersigned it in any capacity. A rear was not completed [sic], there was no need as the document was never to be used by anyone within the police. The content of the account makes no reference to the matter being reported to or investigated by West Yorkshire Police in any way whatsoever. It was simply a structured and legible document intended to help them investigate my dad's complaints and allow him to get back to work and for them to deal with the matter internally."* In paragraph 11 of his witness statement Mr Finn says, *"I defaulted to the only way of providing a witness account that I had used over numerous years."*

61. As we say, the witness statement is at pages 80 to 83. We can see that it is headed '*West Yorkshire Police.'* As Mr Finn said, it is in a template form. The top of the form says, *'WITNESS STATEMENT' (Criminal Justice Act 1967, s9; Magistrates' Courts Act 1980 s5B; Criminal Procedure Rules, Rule 16.2).'* It is signed by the claimant within a box provided for that purpose at the top of the statement which contains the following wording: *"This statement (consisting of four pages) (each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated in it anything which I know to be false or do not believe to be true."* It is then dated 11 April 2021.

62. The body of the statement gives an account of the incident of July 2019 and the incident of March 2021 and then the aftermath from the latter incident. The claimant's evidence in chief for these proceedings (in his printed witness statement) is in very similar terms to that of the statement at pages 80 to 83 of the bundle. Indeed, the claimant's evidence in chief in paragraphs 9 to 15 cited above is in the statement at pages 80 to 82.

63. The claimant and Mr Finn duly attended the respondent's premises at the appointed time. In evidence given under cross-examination, the claimant said that he introduced Mr Finn as a police officer when Mr Steer and Mr Taylor came down to the reception area to meet with the claimant ahead of the meeting. In his evidence in chief in the printed witness statement the claimant omits this detail. Mr Finn also does not say that at that point he informed Mr Taylor and Mr Steer that he is a police officer in his witness statement (in paragraph 12). We therefore find that Mr Finn's profession was no referred to before the investigation meeting commenced.

64. There is no dispute that Mr Finn was introduced to Mr Taylor and Mr Steer. They say so in paragraphs 13 and 10 of their witness statements respectively. There is also no dispute that Mr Finn was declined permission to accompany the claimant. Accordingly, Mr Finn remained in the reception area and waited while the other three went to the meeting room from reception.

65. There are no contemporaneous notes of the investigation meeting. The claimant's account is in paragraph 30 of his witness statement. He says that Mr Taylor accused the claimant *"of leaving the building without informing a supervisor on the*

last day I have been in work." The claimant says that he was somewhat discomfited by this remark as he understood that the purpose of the meeting was to investigate the claimant's complaint. The claimant says that Mr Steer remarked, "*we had no idea why you left."* The claimant says that as far as he was concerned he was "*here to sort out the matter I'd reported to them regarding Jamie King."* He then said that he had *"written everything down in a statement to help them with their investigation"* and handed over the document at pages 80 to 83. There were challenges by Ms Churchhouse to parts of paragraph 30 of the claimant's witness statement but not to his contentions that Mr Taylor asked him in accusatory fashion as to why he had left site on 25 March 2021 or of Mr Steer's observation that they had no idea why he had left site.

66. In paragraph 31 of his witness statement, the claimant says that, *"Mick [Steer] took the statement from me and began to read it. Within moments he then looked at me and said something to the effect of "right, this meeting's over. I want you to leave the building." I was shocked and asked him why. Mick said I had given him a statement that said Police on it. He told me if the police are involved it's another matter and he was going to speak to his solicitor. He hadn't read the statement in full at this point. I was confused and pointed out that my son, Rob had helped me with the statement, and he was in reception. I told both men Rob is a police officer but I hadn't reported anything to the police. Mick Steer he didn't care he wanted us both to leave and stood up and asked me to leave the room. We all left the meeting room and began to walk towards the reception area/main exit."*

67. Mr Steer and Mr Taylor give not dissimilar accounts. Mr Steer in paragraph 14 of his witness statement that the claimant introduced the statement by throwing the document on the table. He says in paragraph 15 of his witness statement that he told the claimant that the claimant had *"presented a police witness statement implying that the company or its employees were involved in a crime. Tony responded saying that there had been a crime. Tony asked me to give him the witness statement back and I said no as we needed to provide it to our solicitors. At no point in the meeting did Tony say that the witness statement had been prepared by his son or that his son was a police officer. Doug and I then walked Tony back to reception."* Mr Taylor gives an account corroborative of Mr Steer's version in paragraphs 11 and 12 of his (Mr Taylor's) witness statement.

68. In paragraph 13 of his witness statement, Mr Finn says that about 10 minutes after the others had gone into the meeting room, *"the door into the reception area flew open and Mr Steer asked me and my dad to leave the premises immediately. I asked why, what had happened. I was bemused. Mr Steer told me it was because he had just been provided with a statement that said 'West Yorkshire Police' on it. At that point I realised that the new blank forms, unlike the old pre-printed paper MG11 statement forms that I had used for 18 years, may automatically populate the form somewhere."* ('MG11' is the name of the template witness statement form).

69. Mr Finn says that in reception after the meeting was closed he "*explained to Mr Steer that this was simply a misunderstanding on his part. I told him that I was a police officer but attempted to clarify that there was no mystery or misleading intent and without hesitation explained the circumstances as to why the statement had been typed up for their benefit. I categorically and vehemently stressed that in no way whatsoever was that as a result of my dad reporting the incident to West Yorkshire Police. I told him I'd simply used a blank canvas to write a structured and coherent statement to assist them with their internal enquiries. I calmly*

explained that the matter was not under police investigation, there was no incident log, no crime number. Mr Steer kept repeating "I don't care it says Police on it."

70. Mr Steer says that upon re-entering reception and seeing Mr Finn again, he explained to Mr Finn that he and Mr Taylor were ending the meeting in order to seek legal advice. Mr Steer accepts that Mr Finn said that he is a police officer and had prepared the statement on his work computer. Mr Steer's account is that Mr Finn then opened a notebook and said he wanted his and Mr Taylor's names. Mr Steer comments that he *"found it intimidating and threatening that a police officer had confirmed they had prepared the witness statement and was then asking to take our details."*

71. In paragraph 17 of his witness statement, Mr Steer says that he asked the claimant and Mr Finn to leave the premises *"what felt about 20 times but they refused."* He says that they were prevailed upon to leave when Mr Steer told them that if they did not, he would ring the police.

72. Again, Mr Taylor's statement is corroborative of Mr Steer's version of events. Mr Taylor confirms that when they ended the meeting and went back into the reception area, Mr Finn explained that he is a police officer and had prepared the witness statement on a work computer. He says that Mr Finn opened a notebook and asked for their names. Mr Taylor says that Mr Finn asked Mr Steer several times to hand the statement back to him. He also observes that Mr Steer asked the claimant and Mr Finn to leave the respondent's premises *"about a dozen times"* but they refused and only left upon being threatened with police action.

73. As we said earlier, the Tribunal had the benefit of listening to the recording of the exchanges which took place in the reception area after the meeting was closed down by the respondent. Although initially Mr Steer sounds agitated, it is to the credit of all that the exchange were conducted in a civilised manner given the stressful circumstances in which the parties found themselves. We accept that the respondent's officers were disconcerted at having been presented with such a statement. We can also accept that from the claimant's perspective, matters had taken a very wrong turn and his wish for the respondent to investigate the actions of Mr King have been derailed by his decision to present a statement to the respondents in that form and the respondent's reaction to it We can also accept that the situation was stressful for Mr Finn given that he may have felt a degree of responsibility for the predicament in which the parties found themselves as it was at his instigation that a statement in that form had been prepared. Given these circumstances, as we say, it is to the credit of all how the post meeting discussions proceeded.

74. Much of what is said by Mr Taylor and Mr Steer about Mr Finn's demeanour is belied by the recording. There is no record (upon the recording or the agreed transcript of it) of Mr Steer having to threaten Mr Finn and the claimant with the police in order to compel them to leave. Mr Finn made only one request for the witness statements to be handed back in contrast to Mr Steer's account that this was asked for several times. The recording shows that Mr Steer and Mr Taylor did not make repeated requests for Mr Finn and the claimant to leave. They were asked to leave only on two or three occasions. Upon page 3 of the transcript, we can see that Mr Finn did ask for their names. These were provided willingly.

75. The respondent sought to argue that the transcript captured only part of the conversation in the reception area post-meeting. This was proffered as an explanation for the omission from the transcript of exchanges corroborative of

Mr Steer's and Mr Taylor's version of events. The Tribunal does not accept this explanation. The opening comment upon the transcript is that of Mr Steer who says, "*can you please sorry."* As we say, this was said in an agitated fashion. Mr Steer was asking Mr Finn and the claimant to leave. Mr Finn then very quickly assured Mr Steer that the statement was not *"a police statement"* but had simply been prepared upon a template. As it is common ground between the four individuals involved that the Finns were asked to leave straightaway upon the meeting being closed down and that Robert Finn proffered the explanation that he did about the provenance of the statement we are satisfied that the transcript captures most if not all of the post-meeting exchanges.

76. That being the case, therefore, we prefer the claimant's account to that of the respondent where there are factual disputes about what happened that day. Firstly, we accept that the claimant did not throw the witness statement down on the board meeting table as was suggested by Mr Steer and Mr Taylor. Secondly, we accept that Mr Finn sought to explain about half a dozen times the provenance of the witness statement and assured the respondent immediately after the meeting that the matter had not been reported to West Yorkshire Police and that it was not a police matter. Thirdly, we find that Mr Taylor approached matters in a confrontational manner by accusing the claimant of leaving site without informing anyone and that Mr Steer was disingenuous when he said that they had no idea why the claimant had left. Plainly, even on their own accounts, they were aware of an incident having occurred between the claimant and Mr King.

77. We accept that Mr Finn did ask for the names of Mr Steer and Mr Taylor but not in an aggressive or intimidating fashion. We accept Mr Finn's account that he did not brandish a police notebook but simply an ordinary A4 notebook. Mr Finn did not attend wearing uniform.

78. Neither party made notes of the meeting between Mr Steer and Mr Taylor on the one hand and the claimant on the other. This is perhaps unsurprising on the part of the claimant but perhaps less so upon the part of the respondent as the employer. This omission has certainly not helped the respondent. Given that Mr Steer's and Mr Taylor's credibility has been tainted by the contrast between the recording on the one hand and their version of events in their printed statements on the other, we do not accept that the claimant said, *"so what if I have?"* (in reply to a question from Mr Steer during the meeting asking whether he had gone to the police). It follows therefore that the sole basis upon which the respondent could have formed a belief that it was a police matter is from the form of the document presented by the claimant that morning.

79. At 14:23 on 13 April 2021 Mr Taylor emailed the claimant (page 84). The claimant was informed that following the meeting that morning, he was suspended on full pay.

80. The same day the respondent's solicitor wrote to the Chief Constable of West Yorkshire Police (page 85). The letter enclosed a copy of the witness statement at pages 80 to 83 of the hearing bundle. The respondent's solicitors say that*, "On its face, this [witness statement] appears as if it were prepared by West Yorkshire Police and intended to induce our client to believe that the matters to which it refers have been reported to and is being dealt with by West Yorkshire Police. We have informed our client that it is unlikely that the police would involve themselves in an internal employment issue of our client, nor would there appear to be grounds to do so. We are however concerned to learn (from what [the claimant] has told our*

client) that Mr Robert Finn is the son of [the claimant], and employed by your Force. We should be grateful for your acknowledgement of receipt of this letter, and confirmation that the matters which it raises are being investigated, as we think they ought to be."

81. Also on 13 April 2021, the respondent's solicitor emailed the claimant. The email and the attached letter is to be found at pages 86 and 87 of the bundle. The claimant was informed that the respondent's solicitor had taken matters up with the police. The respondent, through their solicitors, requested "*a written explanation from [the claimant] as to how this statement came to be made and provided to our client. In particular, we need to know how it came to be presented as if the matter were being dealt with by West Yorkshire Police, with whom, we understand, your son is understood to have a connection. This matter is, and its implications is very serious, which is why we are writing to you. For the same reason, you should obtain immediate independent legal advice before you respond."* A response was requested by 4pm on 20 April 2021.

82. The claimant replied on 19 April 2021 (pages 88 and 89). The claimant explained that the statement was prepared in order to assist the respondent's investigations. He said that it was prepared by the claimant with the assistance of Mr Finn. The claimant said that neither Mr Finn nor he had suggested at any point that the matter had been reported to the police. He says, *"I acknowledge now that the statement was regrettably provided via a blank template that did have three words 'West Yorkshire Police' on top of the first page. This was an oversight on my son's behalf. This was not done with the intention to mislead anyone, a fact that was emphasised to Mr Steer once he had noticed it."* The claimant goes on to complain that the issue of the threats of violence and harassment against him had still not been dealt with.

83. On 12 May 2021, Mr Taylor emailed the claimant to invite him to attend the disciplinary hearing which was to be held on 21 May 2021. The email is at page 91. The letter to which Mr Taylor refers in his email is at page 92.

84. The disciplinary meeting was convened in order to consider the following allegations:-

"(1)That on 11 April 2021 in the course of an investigation of the conduct of [the claimant] and others, [the claimant] provided a witness statement which falsely suggested on its face, and by its content, that it had been made to, and taken by West Yorkshire Police in connection with the investigation of an alleged crime. It is alleged that [the claimant's] intention was thereby to give the impression that there was a police investigation.

(2)It was only when you were challenged on the provenance of the statement that you admitted that it had been prepared by your son, who is understood to be a Police officer.

(3)By reason thereof you have irreparably destroyed the trust and confidence which is required to exist between employer and employee."

85. Mr Taylor directed the claimant that at the meeting it was intended to refer to:

(1) The statement of 11 April 2021 *[pages 80 to 83 of the bundle].*

(2) The respondent's solicitor's letter to the claimant of 13 April 2021 *[page 87]*; and

(3) The claimant's reply of 19 April 2021 *[pages 88 and 89].*

86. The claimant was warned that the meeting *"could result in your dismissal without notice for gross misconduct."* The claimant was informed of his entitlement to be accompanied at the meeting by a work colleague or union representative.

87. The claimant attended at the respondent's premises for the disciplinary hearing as scheduled. He was accompanied by Mr Finn's wife. As she is not a trade union representative or an employee of the respondent permission was declined for her to be accompany the claimant.

88. There is a transcript of the disciplinary meeting which is at pages 101 to 110. The transcript records that Mr Steer and Mr Taylor were present on behalf of the respondent.

89. It appears from the document at page 95 that Mr Taylor had prepared a script with which to open the disciplinary proceedings. It appears from the transcript that Mr Taylor read the words on the script. The salient part is at pages 101 and 102 of the bundle. This records Mr Taylor saying as follows: *"Ok. This is the company's grievance with [the statement at pages 80 to 83]. The company considers that the statement was presented in this way as a form of threat and intimidation towards the management investigating an employment issue. The company also considers it was also meant to purposely mislead the company that this employment issue had been reported to the police as a crime. The company does not believe that this was an honest mistake, that was premeditated. We don't find it credible that a serving police officer would make such a serious oversight as you have mentioned in your letter to our solicitors on 19 April of presenting such a statement involving a member of his family in an employment issue. When you were challenged about the official police witness statement and how inappropriate it was, realising your error of judgment you requested to take back the statement which the company refused. All that was required from yourself was a simple statement of facts from you about the incident on a blank piece of paper and signed by yourself. On the advice of our solicitor, a formal complaint has been made to West Yorkshire Police about this matter. The complaint has been acknowledged and logged, and we are awaiting a response".* The claimant was then invited to reply.

90. The claimant had prepared his own script at pages 96 to 100. It appears from the transcript that the claimant read out the script. The salient part of the transcript is at pages 102 to 106.

91. The claimant said that he prepared the written statement in good faith and with no intention of misleading the respondent. He explained how it was that the witness statement came to be prepared on West Yorkshire Police notepaper. He says that he and Mr Finn both overlooked the fact that the template used was headed *'West Yorkshire Police'* and the reference to the criminal statutes. The claimant said that he had not reported matters to West Yorkshire Police. It was not a criminal matter. He then prayed in aid his 24 years of exemplary service and submitted that dismissal would be a grossly disproportionate reaction on the part of the respondent. The claimant maintained that he had been the victim of criminal offences against him from other employees of the respondent.

92. Mr Taylor expressed scepticism about the claims of the claimant and Mr Finn that producing the statement in that form was an oversight. Mr Taylor said to the claimant that he could not understand why he (the claimant) had not simply prepared his statement upon a blank piece of paper.

93. Mr Taylor then said to the claimant that the matter had been reported to West Yorkshire Police (by the respondent). He then said (at page 109) that the respondent *"will have to see what they come back with."* Mr Steer reinforced what Mr Taylor was saying. He chimed in, *"wait for their outcome, yeh."* The claimant replied, *"fair enough."* Mr Taylor then reinforced the point by saying, *"you know, and if they agree, then, you know, err, we'll probably have to wait for their response on that."* The claimant replied *"ok"* to which Mr Taylor said, *"we're not going to pre-empt any sort of decision at this meeting today."*

94. On 25 May 2021 Mr Taylor sent an email to the claimant (pages 111 to 113). The email included a letter giving the claimant notice that he had been dismissed.

95. The letter reads that, "*We are satisfied that you deliberately provided a witness statement which falsely suggested on its face and by its content, that it had been made to, and taken by, West Yorkshire Police in connection with the investigation of an alleged crime. We are also satisfied that it was only when you were challenged on the provenance of the statement that you admitted that it had been prepared by your son, who is a police officer. We are also satisfied that you and your son then asked for the statement back. We do not accept your explanation, or that you acted in good faith, or that there was merely an oversight. You did not apologise. On the contrary, you said that you did not think that you had done anything wrong."* The letter goes on to say that*, "We are satisfied that your actions amount to gross misconduct justifying your immediate dismissal. In light of your failure to apologise, and insistence that you have done nothing wrong, we are satisfied that it would be impossible to have trust and confidence in you as our employee."* The claimant was dismissed with immediate effect. He was afforded a right of appeal.

96. On 26 May 2021, the claimant emailed Mr Taylor (page 114). The email set out the claimant's appeal. He reiterated (in paragraph 4) that the statement was "*an honest way of providing you with my chronology of events that happened in the workplace, that I made only to assist you and others conduct your investigations as is your duty as an employer."* He went on to say in paragraph 5 that, *"You have failed to listen to any of the clear and irrefutable points I raised in the meeting that would clearly allow a reasonable person to conclude the statement did not seek or intend to give you or anyone who was to read it, the belief it had been written as part of an official police investigation."*

97. In paragraph 8 of his grounds of his appeal the claimant says, upon the issue of apology, that *"I maintain my innocence meaning there is nothing I can apologise for, though if I had done would this have changed your decision making?"* In paragraph 9, the claimant refers to him being informed that the matter was ongoing and that the respondent was waiting for the police to get back to them regarding their complaint. The claimant asks, "*Can you please share with me what information was received that assisted you in arriving at your decision in such a short period of time. Or can you confirm that you had not yet heard from anyone if that were the case. I feel this is relevant to my appeal as I believe you had already decided what outcome to take and misled me during the meeting."*

98. The appeal was heard by Mr Gledhill. As with the disciplinary hearing, it appears that each side prepared a script or *aide memoire*. That prepared by Mr Gledhill is at page 118. The one prepared by the claimant is at pages 119 to 123.

99. The Tribunal also has the benefit of a transcript of the appeal hearing. This is at pages 124 to 130.

100. The claimant went through his nine grounds of appeal. He again maintained that he had nothing to apologise for. Upon the issue of the ongoing police investigation, Mr Gledhill asked whether the police report would have any bearing upon the claimant's employment and dismissal? The claimant replied that, "*Mr Steer and Mr Taylor stressed several times that they would be waiting for an outcome of the complaint before deciding how to deal with me. Then I was dismissed two working days later."* Mr Gledhill confirmed that the respondent had heard nothing from the police between 21 and 25 May 2021.

101. On 18 June 2021 Mr Gledhill wrote to the claimant with the appeal outcome (page 131). The claimant's appeal was dismissed.

102. Mr Gledhill expressed himself *"satisfied that you deliberately prepared and provided the company with a statement which was intended to suggest that it had been taken by West Yorkshire Police. I do not accept that this was a mere oversight, as you said, and find your explanation to be incredible. I agreed that you did not persist in deceit once you were challenged, but you did wait to be challenged before confirming that the statement had been prepared by your son and you."* Mr Gledhill said that he had taken into account the claimant's mitigation on account of his length of service and unblemished record. Mr Gledhill noted that the claimant was insistent that he had done nothing wrong. In the circumstances therefore Mr Gledhill's decision was to uphold Mr Steer's and Mr Taylor's sanction of summary dismissal.

103. On 30 September 2021 West Yorkshire Police wrote to the respondent's solicitor (pages 136 to 140). West Yorkshire Police concluded that the *"service level"* provided by Mr Finn was acceptable under the circumstances. However, there was a finding that Mr Finn should not have used the template form to create the statement and should just have used a blank piece of paper. The recommended outcome was for Mr Finn to "*learn from reflection."* The report, prepared by PC Khan of the Service Review Team, directed that Mr Finn's line manager was to be made aware of matters so that consideration could be given to arranging for Mr Finn to receive words of advice about his conduct and how matters were perceived by the respondent. The respondent was given a right of review.

104. The respondent availed themselves of this opportunity. The relevant form requesting a review is at pages 141 to 147.

105. On 18 November 2021 West Yorkshire Police notified the respondent of the outcome of the review (pages 148 to 151). From this, it appears that PC Khan had emailed the respondent on 24 August 2021 with his understanding of the respondent's complaint and asking for confirmation that his understanding was correct. PC Khan received no reply to his email and therefore proceeded upon the assumption that he had understood matters correctly. The review caseworker therefore upheld PC Khan's conclusions and declined to make any further recommendations for further action to West Yorkshire Police.

106. In his evidence given under cross-examination, Mr Steer said that had the claimant offered an apology during the course of the disciplinary hearing then that "*would change the way we were thinking."* Mr Steer said, *"we were waiting for [the claimant] to apologise and admit he's wrong, that's all it needed.* Mr Taylor gave similar evidence when he was cross-examined. He said that, *"It would have helped [the claimant] to hold his hands up and acknowledge that it was wrong and intimidating. If he'd said that we could possibly look at matters differently."*

107. In his cross-examination of Mr Gledhill, Mr Finn asked whether had the claimant been apologetic there may have been a different outcome. Mr Gledhill replied in the affirmative.

108. In his letter dismissing the appeal at page 131, Mr Gledhill had said (by reference to the issue of awaiting West Yorkshire Police's report) that he was satisfied, *"that it was reasonable to conclude that there was no reason to wait, as that is a separate issue, which would not have a direct bearing on your employment."*

109. This concludes our findings of fact.

The relevant law

110. We now turn to a consideration of the relevant law. As was said earlier in these reasons, the claimant pursues complaints (brought under the Employment Rights Act 1996) of unfair dismissal and detriment. He also brings complaints of harassment and victimisation under the Equality Act 2010. In addition, he has a common law complaint of wrongful dismissal.

111. Upon the complaints brought under the 1996 Act, the claimant says that he was unfairly dismissed and subjected to detriment because firstly he made protected disclosures and secondly he left his place of work in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert or, while the danger persisted, he refused to return to his place of work.

112. Where the reason for the dismissal (or where there is more than one reason, then the principal reason for it) is for either of the reasons in paragraph 111 then a complainant may claim that they have been unfairly dismissed. Such dismissals are sometimes referred to as "*automatic unfair dismissals"*

113. Where, as here, an employee who alleges that they were dismissed for an automatically unfair reason has sufficient qualifying service to claim unfair dismissal in the normal way, then the burden of proving the reason for dismissal is on the employer (as it is in an ordinary unfair dismissal claim brought under sections 94 to 98 of the 1996 Act). Where such an employee argues that the real reason for dismissal was an automatically unfair reason, then the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that they are advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons must be the principles reasons for the dismissal.

114. It is also open, as the claimant does in this case, to advance a complaint that the employee was subjected to detriment during employment for making a protected disclosure and/or for the relevant health and safety reason. A detriment means simply something which puts the employee or worker to a disadvantage and exists where a reasonable worker would or might take the view that the employer's actions were to their detriment or disadvantage.

115. It is for the claimant to show that he made a protected disclosure and/or that there was the relevant health and safety reason pertaining at the material time. We shall therefore start with a consideration of what is meant by a protected disclosure.

116. The Tribunal has been greatly assisted by Miss Churchhouses' analysis of the law upon this (and other) issues which arise in this case. As she says, section 43B of

the 1996 Act defines a protected disclosure as *"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 six relevant failures set out in section 43B(1)(a) to (f).

117. She then refers us to the ruling of Auerbach J in **Williams v Michelle Brown AM** [UK EAT/0044/19]. Guidance was given to Employment Tribunals upon the issues to be considered when determining whether a disclosure amounts to a qualifying disclosure. Firstly, the content of the disclosure must be considered in order to determine whether it includes information of sufficient factual content and specificity capable of showing any of the matters listed in section 43B(1)(a) to (f). Secondly, the Tribunal must consider why the claimant considered the matter to be in the public interest. Thirdly, the Tribunal must consider why it was reasonable for the claimant to have that belief. Fourthly, there must be considered whether the disclosure tended to show any of the six relevant failures in section 43B(1) and finally whether that belief was reasonable.

118. She then referred us to **Chesterton Global Limited v Nurmohamed** [2018] ICR 731 in which the Court of Appeal provided some guidance on the public interest requirement. It was held that even where the disclosure relates to a breach of the worker's own contract of employment (or some other matter where the issue in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker. The factors that may be relevant are: the number within the group whose interests the disclosures served; the nature of the interests affected and the extent to which they are affected by the wrong doing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer.

119. Moving on to the health and safety case, the 1996 Act affords protection to employees who leave or propose to leave, or refuse to return to their place of work in circumstances of danger which the employee reasonably believes to be serious and imminent and which they could not reasonably have been expected to avert. Health and safety detriment or unfair dismissal claim brought upon this ground will fail if the employee concerned is unable to show that they acted in circumstances of danger which they reasonably believed to be serious and imminent. What amounts to a serious and imminent danger is a question of fact and will vary from case to case.

120. Miss Churchhouse drew the Tribunal's attention to the case of **Harvest Press Limited v McCaffrey** [1999] IRLR 778 EAT. Here, the complainant complained about the behaviour of a colleague with whom he shared the nightshift. The colleague became very abusive. The complainant, concerned for his safety, went home, telephoned his manager and refused to return to work unless the colleague was removed or dismissed. The Tribunal held that the complainant had been dismissed in circumstances that fell within section 100(1)(d) of the 1996 Act, being satisfied that the complainant had a reasonable belief that there were circumstances of danger reasonably believed to be serious and imminent and which the employee could not reasonably have been expected to have averted. The Employment Appeal Tribunal held that the reach of section 100(1)(d) was intended to be wide, the word *"danger"* being used without limitation. There was no reason to restrict circumstances of danger to those generated by the workplace itself. The statute was wide enough to encompass a danger presented by work colleagues. The EAT observed that a sensible employer would have spoken to

the complainant to form a view as to whether the concerns were genuine and acted accordingly.

121. We have already commented upon the issue of the burden of proof where automatically unfair reasons for dismissal are advanced by a complainant who has sufficient qualifying service to pursue a complaint of ordinary unfair dismissal. We shall now say something about the burden of proof which arises upon the claimant's detriment claims.

122. Ordinarily, a complainant will bear the burden of proving their claim on the balance of probabilities. Indeed, this is the position upon the health and safety detriment claim. It will be for the claimant to show that he was subjected to detriment because he left his workplace in circumstances of danger which he reasonably believed to be serious and imminent. The claimant need only show that him doing so was a material reason for the detrimental treatment. It need not be the only or principal reason for it.

123. The burden of proof provisions work differently upon a complaint of public interest disclosure detriment. It is for the claimant to show that he made protected disclosures. He must show there was a detriment and that he was subjected to the detriment by the respondent. If he does so, then the burden will shift to the respondent to prove that the claimant was not subjected to the detriment on the grounds that he made the protected disclosure.

124. A defence frequently put forward by employers in protected disclosure claims is that the worker was not subjected to detriment because they made a disclosure but rather because of the way in which the disclosure was carried out. Where the employee commits an act of misconduct in the course of making the disclosure, it will be open to the employer to argue that the reason for the dismissal was not the disclosure but rather the manner of it or the way in which it was done.

125. We now turn to the unfair dismissal complaint brought under sections 94 to 98 of the 1996 Act. This is sometimes known as *"ordinary"* unfair dismissal.

126. There is no dispute in this case that the claimant was dismissed by the respondent. Accordingly, the burden is upon the respondent to show a permitted reason for dismissal. The reason for the dismissal will be the set of facts known to the employer or the beliefs held by them and which caused them to dismiss the employee.

127. The relevant permitted reason relied upon by the respondent in this case relates to the claimant's conduct. The claimant will appreciate that in conduct unfair dismissal cases, the employer does not have to prove the misconduct. What matters is that the employer genuinely believed on reasonable grounds that the employee was guilty of the misconduct in question.

128. Miss Churchhouse referred the Tribunal to the well-known case of **British Home Stores Limited v Burchell** [1980] ICR 3030, EAT. There, it was held that a three-fold test applies. The employer must show that they believed the employee to be guilty of misconduct. The Tribunal must then be satisfied that the employer had in mind reasonable grounds upon which to sustain that belief and at the stage at which the belief was formed on those grounds, the employer had carried out as much investigation into the matter as was reasonable in the circumstances. This means that the employer need not have conclusive direct proof of the employee's misconduct. A genuine and reasonable belief, reasonably tested, will suffice. While there is a burden upon the employer to show a genuine belief of misconduct

there is no burden of proof upon the issue of reasonableness. It is for the Tribunal to satisfy itself that there were reasonable grounds upon which to sustain the employer's belief after carrying out reasonable enquiry.

129. If the Tribunal is so satisfied, then the Tribunal must decide whether the dismissal of the claimant was one which fell within the range of reasonable responses of the reasonable employer. The range of reasonable responses test applies in a conduct case both to the decision to dismiss and the procedure by which that decision was reached. The Tribunal must not substitute its own view for that of the employer. Provided the employer's actions fell within the range of reasonable managerial prerogative such will suffice as a defence to the unfair dismissal complaint. When considering the reasonableness of the employer's conduct, the size and administrative resources of the employer must be considered.

130. Where the Tribunal is satisfied that the dismissal of the employee was outside the band of reasonable responses and unfair the Tribunal will go on to consider issues of remedy. By consent, the Tribunal will not consider any remedy issues other than those that arise from the application of the principles in **Polkey v A E Dayton Services Limited** [1988] ICR 142 and issues arising out of the claimant's conduct.

131. The **Polkey** principle, broadly stated, is concerned with the issue of what it is just and equitable to award to the complainant in all the circumstances having regard to the losses sustained in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal can therefore consider the likely longevity of the employment regardless of any unfairness. Of particular relevance in this case is the issue of whether any procedural irregularity made any difference to the decision to dismiss. If the Tribunal finds there to be procedural irregularity then the question that will arise is whether this particular employer acting within the range of reasonable responses may fairly have dismissed the employee in any case at some future date.

132. An issue may also arise upon the question of the conduct of the complainant. This may arise for consideration whether the Tribunal is contemplating making a re-employment order upon a successful unfair dismissal complaint or (far more commonly) considering only a monetary award.

133. The monetary awards take the form of a basic award (which is broadly the equivalent of a redundancy payment) and a compensatory award. The latter, as we have said, will be in such amount as the Tribunal considers it to be just and equitable to award for any losses attributable to the employer's conduct in unfairly dismissing the employee. The issue of the employee's conduct may arise upon the consideration both of the basic award and the compensatory award.

134. Where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the basic award then the Tribunal shall reduce it accordingly. In the case of the compensatory award, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the employee then the compensatory award may be reduced by such amount as the Tribunal considers to be just and equitable.

135. Upon a consideration of conduct, the Tribunal must make primary findings of fact upon the question of the complainant's conduct and then determine whether it is just and equitable to reduce the monetary awards accordingly.

136. The Tribunal must determine whether there has been culpable or blameworthy conduct upon the part of the employee. The culpable or blameworthy conduct may

be acts in breach of a legal obligation or acts which may be considered to be foolish, perverse or bloody minded. Secondly, upon the compensatory award there must be a consideration as to whether such conduct caused or contributed to the dismissal. Thirdly, the Tribunal must be satisfied that it is just and equitable to reduce the awards accordingly.

137. We now turn to a consideration of wrongful dismissal. As Miss Churchhouse says in paragraph 31 of her written submissions, summary dismissal will amount to wrongful dismissal unless the employer can show that the dismissal was justified by a repudiatory breach of contract by the claimant.

138. Again, whether the employee was guilty of repudiatory conduct is a question of fact. It is for the Tribunal to make its own determination as to whether objectively the employee was in repudiatory breach entitling the employer to bring the contract to an end summarily. Upon wrongful dismissal complaint, therefore, it follows that the Tribunal may substitute its view for that of the employer.

139. What is meant by a repudiatory breach? There has been extensive case law upon this issue and the test has been expressed in a number of different ways. The essence of matters however is that there must be conduct inimical to trust and confidence or a deliberate flouting of the essential contractual conditions or which is sufficiently serious and injurious to the relationship such as to lead to a conclusion that the defaulting party no longer intends to be bound by the contract.

140. During the course of her closing submissions, the Tribunal asked Miss Churchhouses' observations upon the issue of the intention of the putative contract breaker. In other words, is it legitimate for the Tribunal to take into account the claimant's intentions? The Tribunal referred the parties to the case of **Tullett Prebon Plc v BGC Brokers** [2011] EWCA Civ 131. In this case, the employees claimed that the employer was in repudiatory breach of contract by the way in which the employer sought to enforce contractual obligations against the employees. Kay LJ said that the question of whether the employer's conduct was sufficiently serious to be repudiatory is highly context specific. An objective assessment of the true intention of the employer's management was warranted.

141. The issue of repudiation (by showing an intention no longer to be bound by the contract) has to be judged objectively in all the circumstances as known to a reasonable observer. The Court of Appeal in **Tullett Prebon** therefore held that in these circumstances the court was entitled to look at the employer's intentions in judging what was the employer's objectively assessed intention. The motive of the contract breaker may be relevant if it reflects something of which the innocent party was aware (or of which a reasonable person in their position should have been aware) and which throws light on how the alleged repudiatory conduct would have been viewed by such a reasonable person. The test is whether looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and all together refuse to perform a contract. It was therefore held that the employer's intention objectively assessed was to preserve the relationship rather than to repudiate it. All of the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker as to whether or not they were abandoning and refusing to perform the contract and acting in repudiatory breach of it.

142. We now turn to consideration of the relevant law under the 2010 Act. It is for the claimant to provide sufficient evidence to persuade the Tribunal that harassment

or victimisation has taken place. It is for him to show, on the balance of probabilities, facts from which in the absence of any other explanation, the Tribunal could infer that an unlawful act of harassment or victimisation has occurred. If the claimant succeeds in establishing a *prima facie* case, then the burden of proof moves to the respondent to prove that they did not commit the act in question. These burden of proof provisions are enacted within the 2010 Act in section 136.

143. By section 26 of the 2010 Act, a person harasses another if they engage in unwanted conduct related to a relevant characteristic and that conduct has the purpose or effect of violating the other's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. In deciding whether the conduct has that effect, the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must all be taken into account. Harassment of an employee by an employer is made unlawful within the workplace by section 40 of the 2010 Act.

144. It is not necessary for the worker to show that another person was, or would have been, treated more favourably. Instead, they have to establish a link between the harassment and the relevant protected characteristic. The Equality and Human Rights Commission's *Code of Practice on Employment* notes that unwanted conduct can include a wide range of behaviour. We refer to paragraph 7.7 of the Code.

145. The Code provides in paragraph 7.8 that the word *"unwanted"* is essentially the same as *"unwelcome"* or *"uninvited".* Whether the conduct is "*unwanted"* should largely be assessed subjectively from the employee's point of view.

146. Conduct that is by any standards offensive or which obviously violates a complainant's dignity will automatically be regarded as unwanted. The Code gives an example of what it terms *"self-evidently unwanted conduct"* of sexist remarks made to a female electrician that she should go home to cook and clean for her husband.

147. A serious one off incident can amount to harassment. We refer to paragraph 7.8.

148. The unwanted conduct in question must have the purpose or effect of violating the claimant's dignity or creating an intimidating *etc* environment for him. Conduct that is intended to have that effect will be unlawful even if it does not in fact have this effect. Conduct that in fact does have that effect will be unlawful even if that was not the intention. In an assessment of whether the conduct has the proscribed effect, the Tribunal will take account of the complainant's perception, whether it is reasonable for the conduct to have that effect and all the circumstances of the case. The adverse purpose or effect can be brought about by a single act or by a combination of events.

149. The conduct in question must relate to a relevant protected characteristic. Where a direct reference is made to an employee's protected characteristic the necessary link will usually be clearly established. Where the link between the conduct and the protected characteristic is less obvious then Tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any negative association between the two.

150. By section 27 of the 2010 Act, a person victimises another if they subject them to a detriment because they have done a protected act, or they believe that the other has done or may do a protected act. A protected act includes the making of an allegation of a contravention of the 2010 Act. It is not necessary that the 2010 Act

must actually be mentioned in the allegation. However, the asserted facts must, if verified, be capable of amounting to a breach of the 2010 Act.

151. The EHRC Code says (in paragraphs 9.8 and 9.9) that *"generally a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."*

152. Crucially, there must be a causal link between the protected act on the one hand and a detriment suffered on the other. To succeed in a claim of victimisation the claimant must show that they were subjected to the detriment because they did a protected act, or the employer believed that the complainant had done or might do a protected act. The essential question is what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment.

153. Victimisation of an employee is made unlawful in the workplace pursuant to section 39(4). An employer must not victimise an employee by subjecting the employee to detriment.

154. By section 123 of the 2010 Act, proceedings must be brought before the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. Section 140B of the 2010 Act provides for an extension to the section 123 time limit to take account of the time spent in ACAS early conciliation. The days between notifying ACAS and the issue of the ACAS early conciliation certificate do not count to the calculation of the three months period.

155. Time limits are exercised strictly in employment cases. It is for the complainant to convince the Tribunal that it is just and equitable to extend time. The exercise of the discretion is the exception rather than the rule. In considering whether to exercise discretion under section 123 to extend time, all factors must be considered including in particular the length and reason for the delay.

156. The Tribunal's discretion is a wide one. The factors which are almost always relevant are the length and reasons for the delay and whether the respondent suffers prejudice. There not need be a good reason for the delay. It is not the case that time cannot be extended in the absence of an explanation for the delay from the claimant. The most that can be said is whether there is any explanation or apparent reason for the delay and the nature of any reason are relevant matters to which the Tribunal ought to have regard. However, there needs to be something to convince the Tribunal that it is just and equitable to extend time. Authority for these propositions may be found in the case of **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640.

Discussion and conclusions

157. We shall now turn to our conclusions. We shall apply the relevant law as just outlined to the factual findings of fact in order to reach our conclusions upon the issues in the case identified by Employment Judge O'Neill.

158. It is convenient, we think, to start with a consideration of whether the claimant made protected disclosures.

159. The claimant says that the following were disclosures which qualify for protection under section 43B of the 1996 Act:

    (1) The statement of 24 July 2019 at pages 64 and 65.

(2) The verbal report made by the claimant to Mr Steer and Mr Taylor regarding the incident which (on our factual findings) took place on 25 March 20221.

(3) The email of 8 April 2021 addressed by the claimant to Mr Taylor (at pages 75 and 76).

(4) The statement of 11 April 2021 handed to Mr Steer and Mr Taylor on 13 April 2021 (at pages 80 to 83 of the bundle).

160. We find that the statement of 24 July 2019 at pages 64 and 65 is a disclosure which qualifies for protection. By application of the factors in **Williams,** the claimant conveyed information of sufficient factual content and specificity about the threat of violence issued to him by Mr King and that Mr King had called him a *"fat bald cunt.*" We have found as a fact that Mr King did issue threats of violence to the claimant at the end of July 2019 and that Mr King called the claimant a *"bald cunt."* We found as a fact that Mr King did not use the word *"old".* However, that is not fatal to the claimant's case that he made a protected disclosure about this matter. In our judgment, the claimant had a reasonable belief that Mr King did make such a remark as it is consistent with the pejorative epitaphs used by him. Plainly, the claimant had a reasonable belief about the threats of violence and the use of the expression *"bald cunt"* given that Mr King admitted these.

161. The expression *"bald cunt"* tends to show one of the matters in section 43B(1), namely that Mr King (and vicariously, the respondent) failed to comply with a legal obligation to which he was subjected, in particular the prohibition against harassment in the workplace pursuant to sections 26 and 40 of the 2010 Act. The claimant had a reasonable belief that Mr King had failed to comply with the legal obligation under section 40 of the 2010 Act. We shall consider below the difficult issue as to whether the expression *"bald cunt"* is harassment related to sex. However, the claimant only needs to have a reasonable belief that it did. He did have such a belief (in light of Mr King's admission). He also held a reasonable belief that Mr King was in beach of a legal obligation not to threaten him with assault and that his health and safety was likely to be endangered as a result. Again Mr King admitted the threat.

162. We are satisfied that the claimant considered this to be in the public interest. We accept that the claimant's complaint was in his personal interest as well as that of the public interest. However, the nature of the wrong doing disclosed is serious. There is plainly a public interest in preventing acts of violence amongst members of the public. Parliament has proscribed acts of harassment within the workplace from one employee towards related to characteristics protected by the 2010 Act.

163. We find that the second disclosure does not qualify for protection. When the claimant went to see Mr Steer and Mr Taylor on 25 March 2021, he did not (even on his own case) give an account of what Mr King was alleged to have done. We accept that the claimant conveyed to Mr Steer and Mr Taylor that he could no longer work with Mr King. However, doubtless because the claimant was in an emotional state, he did not convey to them the events which had taken place not long before. Therefore, by application of the **Williams** factors, this disclosure lacks sufficient factual content and specificity to attract the status of a protected disclosure.

164. For similar reasons, we find that the email of 8 April 2021 from the claimant to Mr Taylor (at pages 75 and 76) is not a protected disclosure. This simply refers to

the claimant having received abuse from Mr King. Again, there was no specificity about the information being conveyed by the claimant to the respondent.

165. We find that the statement dated 11 April 2021 and handed by the claimant to Mr Steer and Mr Taylor on 13 April 2021 is a protected disclosure. This repeats what happened in July 2019. It must follow therefore that, as with the statement at pages 64 and 65, the disclosure at pages 80 to 83 has protected status for the same reasons. In addition, the claimant provides a lot of detail about what he says transpired on 25 March 2021. For the same reasoning as with the 24 July 2019 statement, we find that to be a protected disclosure, the information tending to show in the reasonable belief of the claimant that the act had taken place, that disclosure was in the public interest and that the information tended to show a breach of Mr King's and the respondent's legal obligations under the criminal law and under the 2010 Act. In addition, in relation to both of the disclosures with which we find qualify for protection, the claimant had a reasonable belief that his own safety was likely to be endangered by Mr King's conduct. That we have found as a fact that Mr King did not use an abusive epithet that day does not mean that the claimant did no reasonably believe that he had. After all, Mr King had done so in July 2019 in similar circumstances.

166. We find that the claimant reasonably believed that Mr King's threats towards him uttered on 25 March 2021 presented a serious and imminent danger to him. We do not accept that the claimant rendering the appliance safe before leaving work detracts from the reasonableness of his belief that Mr King presented a serious imminent danger to him. The claimant is a conscientious electrician. There was no issue raised by the respondent about his capabilities. It would have been remiss indeed for the claimant simply to leave site without ensuring that the electrical appliance was safe. He was the only qualified electrician on site. The claimant was placed in an invidious position. He was confronted with the dilemma of either leaving there and then without rendering the appliance safe or putting his personal safety at risk by going on to the factory floor and possibly being confronted by Mr King. That he chose the latter course ought not to deprive him of the protection of the 1996 Act.

167. The claimant was in no position to avert or prevent the imminent danger presented to him by Mr King. Only the respondent could do so. Accordingly, the claimant reasonably apprehended the danger to persist while ever the claimant's employment was likely to bring him into contact with Mr King. Being threatened with violence by a man 30 years younger (and for a second time) is sufficient, in our judgment, for the claimant to make out his case that he reasonably considered there to be such a danger so as to bring himself within the protection of the 1996 Act.

168. We are satisfied that the claimant has demonstrated that the making of the two protected disclosures and the health and safety issue are matters which warrant investigation and which are capable of establishing the automatically unfair reasons advanced. Firstly, the claimant made protected disclosures on 13 April 2021 (at which the July 2019 and March 2021 incidents were raised). These were made at the investigation meeting that day, the purpose of which was to look into the circumstances of the claimant leaving work without leave. The health and safety reason and the protected disclosures were therefore squarely before the respondent when they were making decisions upon the claimant's future employment with them.

169. It follows therefore that it is for the respondent to show on balance of probabilities which of the competing reasons was the principal reason (or the only reason) for the dismissal. It is to that matter which we shall now turn.

170. The Tribunal finds that the reason for the dismissal was the claimant's conduct in presenting the respondent with a witness statement on West Yorkshire Police headed notepaper and which gave the appearance of matters having become a police matter. We are satisfied that the health and safety reason and the protected disclosures were not the reasons for the claimant's dismissal.

171. Firstly, the claimant had made a similar protected disclosure in July 2019. The respondent had taken no adverse action against the claimant to his detriment at that time. There is no reason to suppose that but for the production of the statement at pages 80 to 83, the respondent would have taken adverse action against the claimant. Secondly, Mr Taylor and Mr Steer had attended the meeting on 13 April 2021 with the intention of investigating matters as between the claimant and Mr King. There is some legitimate criticism of the dilatory action which Mr Steer and Mr Taylor took in dealing with the issue. However, once prompted by the claimant they were at least prepared to entertain it. Such a willingness is inconsistent with an employer set upon dismissing the employee for leaving the workplace in circumstances of danger or for having made protected disclosures.

172. We therefore accept that the reason for the dismissal was the claimant's conduct in presenting a witness statement in such a format. We are satisfied that it was the manner of the disclosure which caused the issue for the respondent and not the disclosure in and of itself. As we say, a similar disclosure had been made 20 months prior without the claimant suffering any detriment from which we draw a favourable inference in the respondent's favour. There is no basis to suggest that had the claimant presented his statement on a blank sheet of paper that the respondent would not have taken it seriously.

173. It follows from this therefore that the automatic unfair dismissal complaints stand dismissed. We are satisfied that the only reason for the dismissal of the claimant was the manner in which the West Yorkshire Police statement was presented to the respondent.

174. There can be no question that the respondent had reasonable grounds upon which to sustain a belief that the claimant had committed the misconduct in question. There is no dispute that the witness statement in that format was prepared by the claimant and was presented by him to Mr Taylor and Mr Steer.

175. The issue therefore is whether the respondent could reasonably believe that the statement falsely suggested on its face and by its content that it had been made to and taken by West Yorkshire Police in connection with the investigation of an alleged crime. It is difficult to see how the Tribunal conclude anything other than that it fell within the range of reasonable responses for the respondent to so conclude. As has been said several times now, the statement is headed *'West Yorkshire Police.'* It makes reference to criminal statutes and rules of procedure. It is endorsed by a statement of truth signed by the claimant. The claimant has signed the statement on each page in accordance with that statement of truth. Mr Steer and Mr Taylor are not criminal lawyers. They are not police officers. In our judgment, to the educated but untrained eye, the statement has all the hallmarks of having been made to West Yorkshire Police in connection with the investigation of an alleged crime.

176. We are also satisfied that Mr Steer and Mr Taylor could reasonably conclude that it was only when challenged upon the provenance of the statement that the claimant volunteered that the statement had been prepared by or with the assistance of Mr Finn. We found as a fact that Mr Finn was not introduced as a police officer when he and the claimant arrived at the respondent's premises and met with Mr Taylor and Mr Steer. The claimant does not say in his evidence in chief contained in his printed witness statement that he introduced the statement with any kind of pre-amble to explain its provenance. Had he done so, doubtless it would have been less of a shock and surprise to the respondent.

177. We are satisfied therefore that the respondent had reasonable grounds to believe that the claimant was guilty of the conduct alleged in the first and second paragraphs of the letter of 12 May 2021 (at page 92) which convened the disciplinary hearing. There are in reality only two allegations. Paragraph 3 of the letter of 12 May 2021 (that by reason of his conduct the claimant had irreparably destroyed trust and confidence) is not an allegation in and of itself but rather, it seems to us, a consequence of the allegations in the first two numbered paragraphs.

178. The next issue therefore is whether the respondent formed such a reasonable belief after having carried out as much investigation into the matter as was reasonable. This encompasses the carrying out of a fair procedure.

179. There was in reality little for the respondent to investigate. The claimant's conduct was plain for all to see.

180. However, there is merit in the claimant's criticism of some of the procedure carried out by the respondent. It is well established (upon the authority of **Khanum v Mid Glamorgan Area Health Authority** [UK EAT 1979] that a disciplinary hearing must fulfil three basic requirements of natural justice. These are firstly that the person should know the nature of the accusation against them, secondly, that they should be given an opportunity to state their case and thirdly that the 'domestic tribunal' (*ie* the employer) should act in good faith.

181. Upon this latter requirement, we find the respondent to be wanting. There is little doubt, in our judgment, that the claimant was led to believe that no decision would be made by the respondent pending hearing from West Yorkshire Police with the outcome of their enquiries. We refer to paragraph 93. There may be some merit in Miss Churchhouse's point that whatever view the police took of matters, this did not detract from the claimant's culpability. That may be the case. The respondent will doubtless have been better not to have raised this as an issue. However, having said that they would await the outcome of the West Yorkshire Police investigations, it is in our judgment an act of bad faith to then dismiss the claimant only two working days later. Mr Gledhill accepted, in the appeal, that nothing had been heard from the police between 21 May and 25 May 2021.

182. Such an act of bad faith does, in our judgment, take the procedure followed by the respondent outside the range of reasonable management responses. The respondent ought to have waited for the outcome of the police investigation. Failing that, at the very least, they ought to have informed the claimant of their change of mind and invited any representations from him. The respondent did neither.

183. The claimant is also, in our judgment, correct in his submission that the appeal conducted by Mr Gledhill did not cure the unfairness caused by Mr Steer and

Mr Taylor proceeding to dismiss him before the police's enquiries had been concluded. Mr Gledhill, in our judgment, compounded the error by saying that he could not see that the outcome of the police enquiry would have made any difference. That may be a valid point. However, Mr Gledhill did not engage with the central issue squarely raised by the claimant in his grounds of appeal (in paragraph 9) that the respondent had agreed to defer a decision pending the outcome of the West Yorkshire Police investigations. The respondent's approach was in breach of the requirement of natural justice *per* **Khanum.**

184. We also consider there to be merit in the claimant's criticism of Mr Taylor and Mr Steer in reaching a pre-determined view. The script read out by Mr Taylor was plainly couched in terms that the respondent had reached a concluded view of matters: see paragraph 89. We cannot accept Miss Churchhouse's submission that Mr Taylor was simply inviting the claimant to make representations. On any view, Mr Taylor was presenting the claimant with the concluded view which had already been reached. This is consistent with the respondent's peremptory decision to dismiss the claimant just two working days later and dilatory approach to the investigation. Again, this defect was not cured on appeal. Mr Gledhill did not engage with the issue when reaching his conclusions.

185. We do not consider there to be merit in the claimant's objection to Mr Steer and Mr Taylor conducting the disciplinary hearing. We accept that they were involved in the matters which arose on 25 March 2021 and on 13 April 2021. However, the Tribunal has to be mindful of the size and administrative resources of the respondent's undertaking. The claimant's safeguard was that Mr Gledhill (who had no involvement in any of these matters) was kept in reserve to conduct an appeal. While the Tribunal can understand the claimant's reservation about Mr Steer and Mr Taylor conducting the disciplinary hearing, we do not consider that in the circumstances such fell outside the range of reasonable responses in the circumstances.

186. We do not consider there to be merit in the claimant's complaint that the respondent was at fault in failing to instruct the claimant how to present a statement. The respondent in fact had not requested the claimant to prepare a written statement at all. The claimant took it upon himself so to do. We accept that he did so with good intentions. It is not reasonable for the claimant to suggest that the respondent was somehow at fault in failing to instruct the claimant not to present a statement in the form of the document at pages 80 to 83. It should not have needed spelling out to the claimant that to present a document in that form was foolhardy and inviting problems.

187. We do not consider it credible that the claimant and Mr Finn did not know that the document was upon the West Yorkshire Police witness statement template. The name *'West Yorkshire Police'*, the criminal statutes and the statement of truth are clearly visible and prominent at the top of the first page of the document. They really cannot be missed and it is not credible to suggest otherwise.

188. For the reasons given in paragraphs 180-184, it follows that the claimant's complaint of unfair dismissal brought under sections 94 to 98 of the 1998 Act succeeds. As we say, the complaints of automatic unfair dismissal fail and stand dismissed.

189. We now turn to the issue which arises in this case by application of the principles in the **Polkey** case. In our judgment, this employer acting within the range of reasonable responses would have dismissed the claimant on 15 October 2021.

The West Yorkshire Police report was issued to the respondent on 30 September 2021. Acting consistently with what had been said by the respondent to the claimant at the disciplinary hearing, the respondent would then have been able to take action. Nothing in the report would have caused the respondent to alter their view as to the culpability of the claimant. The respondent could not have acted in good faith other than by awaiting the outcome of the police report or informing the claimant that their position had changed. There is no evidence that the respondent sought to expedite matters by chasing West Yorkshire Police for an outcome. Indeed, the evidence is to the contrary as PC Khan observed that the respondent had not replied to his email of 28 August 2021. Upon the evidence, therefore, we take the view that the respondent was content to allow matters to take their course and await the outcome of the police investigation without chasing the police for it and would have done so had they acted fairly.

190. The Tribunal has allowed a period of two weeks to enable the convening of the disciplinary hearing in order to give the claimant fair notice of it and consider the contents of the West Yorkshire Police report. We are satisfied that the respondent had reasonable grounds to conclude that the claimant was guilty of the misconduct alleged for the reasons given in paragraphs 174-177. For these reasons, we conclude that the respondent would fairly have dismissed the claimant on 15 October 2021. His length of service and good disciplinary record does not put it outside the band of reasonableness to dismiss. Some employers may have been persuaded to hold back from the ultimate sanction on account of these factors, but it cannot be said that others would not take the respondent's approach. The claimant would have been suspended on full pay in the meantime between the date of the unfair dismissal and the date upon which a fair dismissal may have taken place.

191. The Tribunal considers that the claimant's conduct in presenting a statement in that form was culpable and blameworthy. It is difficult to see, frankly, how the claimant could have anticipated anything other than an adverse reaction from the respondent. It was foolish to present it in that form, particularly without any kind of warning or pre-amble before it was presented. The claimant's conduct caused his dismissal. He also acted in a bloody-minded way be refusing to countenance an apology. The respondent made it clear in the letter of dismissal at page 112 that contrition may have found favour but still the claimant persisted with his steadfast view that he had done nothing untoward. Mr Gledhill said that an apology may have saved the claimant.

192. In our judgment, it is just and equitable to reduce any basic award made in the claimants favour by 50% to reflect his culpable and blameworthy conduct. We rule that the respondent acted in bad faith in moving to dismiss the claimant only two working days after the disciplinary hearing in circumstances where the claimant could reasonably have formed the view that he had an assurance that no final decision would be taken pending the West Yorkshire Police investigation. We also find the respondent culpable in pre-determining matters and not affording the claimant a fair hearing against principles of natural justice. The respondent could have fairly dismissed the claimant had they acted in good faith towards him and in accordance with principles of natural justice. For these reasons, we consider it just and equitable that the respondent shall pay 50% of any basic award entitlement to reflect the very serious procedural failures.

193. We take a slightly different view upon the question of the compensatory award. Undoubtedly, the claimant's conduct led to his dismissal. He must take the lion's

share of the blame for the predicament in which he found himself attributable to his conduct and lack of insight into his behaviour. We therefore rule that any compensatory award shall be reduced by 75% to take account of that factor.

194. We now turn to the wrongful dismissal complaint. In our judgment, the claimant did not show an intention to abandon and altogether refused to perform the contract. The respondent was reassured no fewer than seven times by Mr Finn immediately following the meeting of 13 April 2021 that no report had been filed with West Yorkshire Police and that the matter was not within their purview. The claimant's intention in presenting the statement to the respondent was to be helpful and to preserve the relationship. The claimant was anxious to get back to work and for the respondent to investigate Jamie King's conduct. By application of the principles in **Tullett Prebon** we have determined that objectively considered the claimant's conduct was not intended to undermine the relationship between him and the respondent but rather to preserve it. The claimant was not therefore in repudiatory breach of contract.

195. This is, of course, a different consideration to that under investigation upon the unfair dismissal complaint. There, the question is whether the respondent could, acting within the range of reasonable response, could reasonably have considered that the claimant was guilty of the misconduct alleged in presenting a document which upon its face suggested that the matter was with the police. The consideration upon the wrongful dismissal complaint is whether objectively the claimant was in repudiatory breach upon that day. This is a highly context specific question. Taking into account what happened both in the meeting and immediately afterwards we have concluded that the claimant was not in repudiatory breach. The complaint of wrongful dismissal therefore succeeds.

196. We shall now consider the claimant's complaints of detriment arising from the public interest disclosures. By way of reminder, the claimant has established that he made two disclosures which qualify for protection. The first of these was on 24 July 2019. The second was in the form of the statement presented on 13 April 2021. The issue then is to decide whether the claimant was subjected to detriment by the respondent. If so, then it is for the respondent to explain the treatment of the claimant.

197. The first alleged detriment is that the respondent subjected the claimant to harassment, victimisation, threats of violence and verbal abuse. This is a somewhat vague allegation. Presumably, the threats are those levelled at the claimant by Mr King (no other instances of harassment or threats of violence having been raised by the claimant). We accept this took place and is a detriment as they are matters which the claimant can reasonably consider to his disadvantage. They were committed by Mr King for whose acts the respondent is vicariously liable.

198. However, these detriments can have no causal connection with the first protected disclosure of 24 July 2019. That disclosure was about the threats of violence that had taken place before the disclosure was made. The threats were not a consequence of the disclosure.

199. It is difficult to see how Mr King's actions on 25 March 2021 are causally linked to the first protected disclosure of 24 July 2019. We accept that the claimant made a protected disclosure upon the earlier day. We accept that he was subjected to a detriment by Mr King in March 2021 (or being threatened with violence). We accept that the respondent was responsible for Mr King's conduct (the respondent

not having raised the statutory defence open to them pursuant to section 47B(1D) of the 1996 Act that they took reasonable steps to prevent Mr King from acting as he did).

200. However, we are satisfied that the respondent has demonstrated there to be no causal connection between the first protected disclosure of July 2019 on the one hand and Mr King's conduct in March 2021 on the other. There is no evidence of any problems between the claimant and Mr King between July 2019 and March 2021. We are satisfied that Mr King acted as he did on 25 March 2021 because of his perception that the claimant was being disrespectful to Mr Hardcastle. The July 2019 disclosure made by the claimant to the respondent was therefore not a material reason for Mr King to act as he did in March 2021.

201. The second alleged detriment is that the respondent ignored and ostracised the claimant. We accept as a fact that the respondent did not contact the claimant after the claimant left his place of work on 25 March 2021. We accept that to be a detriment to the claimant on the part of the respondent as the claimant could reasonably consider that to be to his disadvantage. However, we are satisfied that there is no causal connection between the first disclosure of July 2019 on the one hand and the ostracism on the other. The disclosure of July 2019 did not materially influence Mr Steer and Mr Taylor in any way. Their motivation to act as they did by not contacting the claimant was because they considered that the onus was upon him to contact them given that he had walked out of the workplace. The disclosure made by the claimant on 24 July 2019 played no part in their thinking. For the reasons we gave in paragraph 49, this may have been a surprising stance to take but a misguided reason for acting may still be such as to satisfy the Tribunal that the reason for the detriment was not the making of a protected disclosure. The second protected disclosure of 13 April 2021 as a matter of logic was not causative of the ostracism as by then the claimant had been invited to an investigation meeting and the respondent was intending to get to the bottom of matters. The ostracism had ceased by 8 April 2021.

202. The third alleged detriment is that the respondent recorded his absence from 25 March 2021 as unauthorised. We are satisfied that this is a detriment. The claimant was reasonably entitled to consider that the onus was upon the respondent to contact him and that simply ignoring him and treating his absence as unauthorised was to his disadvantage. However, the respondent's evidence is that they were acting upon legal advice in so recording matters. That was the material reason for the claimant's treatment. It was nothing to do with the fact that the claimant had made a disclosure in July 2019. That was irrelevant to the respondent's decision making in treating the claimant's absence between 25 March and 11 April 2021 as unauthorised. It wasn't even in Mr Steer's and Mr Taylor's contemplation. The disclosure of 13 April 2021 is irrelevant to this allegation. It post-dates the detriment as the claimant was suspended on full pay and not marked as on unauthorised absence after 13 April 2021.

203. The fourth alleged detriment is the respondent's decision to pay the claimant at statutory sick pay rate during his absence. This can only relate to the period between 25 March 2021 and 11 April 2021 as the claimant was put on to full pay from the latter date. The Tribunal does not consider that paying the claimant statutory sick pay rates was in fact a detriment. We consider the respondent to be correct that the claimant had not demonstrated that he was ready, willing and able to work from 25 March to 8 April 2021 when the claimant wrote to the respondent upon receipt of his wage slip. The respondent had heard nothing from the claimant

to indicate that he was ready, willing and able to work and therefore entitled to remuneration. He had left site on 25 March 2021. He had not returned to the work place nor had he informed the respondent of his willingness to work. He just left matters in abeyance. Therefore, being paid SSP was in fact to pay him more than his entitlement and cannot be considered to be detrimental treatment.

204. Even if we are wrong on that, it is difficult to see any causal connection between the respondent's decision to pay him SSP only on the one hand and the protected disclosure of July 2019 on the other. At the risk of repetition, that the claimant had made a protected disclosure 20 months prior was not something which entered the respondent's thinking as to how to deal with the situation which had arisen between the claimant and Mr King. Again, the disclosure of 13 April 2021 cannot be causative of this detrimental treatment (if such it be) occurring prior to that date. Payment of the SSP had ceased by then. The claimant was being paid in full from 11 April 2021.

205. The fifth alleged detriment is the respondent's decision to remove the claimant from the furlough scheme. Again, it is difficult to see how this is in fact a detriment at all. By way of reminder, a detriment is something which a reasonable employee would consider to be their disadvantage. We ask rhetorically how it can be disadvantageous for an employee to be asked to work and fulfil their contractual obligations. That is the purpose of the work-wage bargain. Further, the claimant would then be paid his full remuneration as opposed to only 80% of it while on furlough. In any case, the respondent's decision to take the claimant off the furlough scheme was nothing to do with the disclosure of July 2019. It was because of the respondent's business needs following the electrical audit referred to by Mr Steer in his witness statement. It would be illegal for the claimant to do work for the respondent of any kind while on furlough. Again, as matter of logic, the second protected disclosure of 13 April 2021 cannot have been causative of the decision prior to that date to take the claimant off the furlough scheme.

206. The sixth alleged detriment is the failure to investigate the claimant's concerns adequately or at all. We do not accept as a fact there was a wholesale failure by the respondent to investigate the claimant's concerns. That was the whole purpose of the meeting arranged for 13 April 2021.

207. However, we do accept the claimant's case that there was a failure to investigate the claimant's concerns adequately. Nothing at all was done by the respondent after 25 March 2021 until the claimant resurrected matters when he sent his email to Mr Taylor on 8 April 2021.The claimant was left in limbo. As we have said, it is no coincidence that Mr Hardcastle's contemporaneous statement bears that date. Mr King's contemporaneous statement was then not procured for a further 12 days. The respondent acted contrary to the suggestion of the Employment Appeal Tribunal in **Harvest Press** that a sensible employer would speak to the employee and form a view about their concerns and act accordingly. It is surprising that the respondent simply left matters in abeyance and took the view that the onus was upon the claimant to contact them in circumstances where they knew that something untoward had happened between Mr King and the claimant (not for the first time). The claimant has therefore established a detriment as these failures by the respondent were to his disadvantage.

208. Again, as a matter of logic the second protected disclosure of 13 April 2021 cannot have been causative of the respondent's failures between 25 March and 8 April 2021. The claimant has established detrimental treatment towards him by the

respondent in failing to investigate matters and to contact the claimant after 25 March. He has established there to be a protected disclosure on 24 July 2019. However, the Tribunal is satisfied that the protected disclosure of July 2019 was unconnected causally with the respondent's decision making in March and April 2021. The respondent was acting upon advice that it was for the claimant to contact them and not the other way round. Whatever the merits of this advice, the respondent acted upon it. That was the approach which the respondent adopted. Again, the fact that the claimant had made a protected disclosure in July 2019 was immaterial to the approach which the respondent took in March 2021. The July 2019 disclosure was not even upon Mr Steer's or Mr Taylor's radar.

209. The seventh alleged detriment is the respondent's decision to suspend the claimant from work. We are satisfied that the claimant has established that at the time of the suspension he had made two disclosures upon 24 July 2019 and 13 April 2021. We are also satisfied that suspension was a detriment and that the claimant could reasonably consider that to be to his disadvantage. The claimant had made it clear that he wanted to return to work. The respondent was responsible for the suspension. It therefore falls to the respondent to explain the reason for the claimant's treatment.

210. The Tribunal is satisfied that the reason for the suspension was the manner in which the claimant made the disclosure on 13 April 2021. It was not the disclosure of Mr King's conduct in and of itself. The second disclosure repeated (in part) the contents of the first disclosure. The claimant had suffered no detrimental treatment following up on the first disclosure. There is therefore no reason to suppose that the respondent would have subjected him to any kind of detriment for repeating it. The second disclosure was in much the same vein. The respondent's real concern was about the manner of the presentation of the disclosure upon West Yorkshire Police letterhead paper. We are also satisfied that Mr Taylor and Mr Steer would have had no objection to the claimant presenting a statement containing the disclosures upon a blank sheet of paper. We are therefore satisfied that it was not the fact of the disclosure which was the material reason for the claimant's detrimental treatment in being suspended but rather the manner in which the disclosure was made.

211. The eighth alleged detriment is that the claimant was subjected to a disciplinary process which resulted in dismissal. This in fact is inadmissible as a complaint of detriment against the first respondent as a matter of law because pursuant to section 47B(2) of the 1996 Act a complaint of detriment cannot be brought where the detriment in question is a dismissal. Such a complaint must be brought against the employer as a complaint of unfair dismissal with which the Tribunal has already dealt.

212. A complaint of detriment amounting to dismissal may be brought against a co-worker pursuant to section 47B(1A) of the 1996 Act. However, no complaint of detriment having made a public interest disclosure has been brought against Mr King. In any case, Mr King was not a decision maker who had anything to do with the claimant's dismissal. For that reason, a section 47B(1A) claim against him would therefore have been doomed to failure in any case.

213. For the avoidance of doubt, the Tribunal is satisfied, as has been said, that the reason for the dismissal was the manner in which the claimant presented the information to the respondent on 13 April 2021. The claimant was not dismissed for having made a protected disclosure that day.

214. The claimant raises the same eight complaints of detriment which he says were consequent upon him leaving the workplace reasonably believing there to be serious and imminent circumstances of danger. We have already determined that the claimant has established there have been such a state of affairs. The question therefore is whether he was subjected to detriment for so doing.

215. We therefore need to go through all eight of the alleged acts of detriment and consider whether the claimant leaving his place of work in such circumstances resulted in detrimental treatment. It is for the claimant to establish this to be the case.

216. It is, we think, convenient to start with the final complaint of detriment which is that he was subjected to a disciplinary process which resulted in dismissal. This is not a permissible complaint as a matter of law pursuant to section 44(4) of the 1996 Act. This subsection states that a complaint of detriment for a health and safety case cannot be brought where the detriment in question amounts to dismissal. We have determined in any case there to be no causal connection between the claimant's decision to leave his place of work on 25 March 2021 on the one hand and his dismissal on the other when dismissing the automatically unfair dismissal complaint.

217. The first alleged act of detriment is that subjecting the claimant to harassment, victimisation, threats of violence and verbal abuse. Again, this must, we think, relate to the incidents of July 2019 and March 2021. As a matter of logic therefore this complaint of detriment fails. The claimant left the workplace following Mr King's threats of violence on 25 March 2021. He was not subjected to those threats <u>because</u> he had left his place of work and after he had done so.

218. The second act of detriment is that the respondent ignored and ostracised the claimant for having left his place of work. The Tribunal has determined already that the respondent's actions were indeed a detriment. We find that the claimant has established a causal connection between his decision to leave his place of work on the one hand and the respondent's decision not to do anything in response on the other. In reality, we find that the respondent was annoyed with the claimant for having left his place of work on 25 March 2021 and not turning in for work the following day. This was the reason why the respondent took no action to contact the claimant and adopted the accusatory and disingenuous approach on 13 April 2021 (*per* paragraph 65 of these reasons). An inference is drawn against the respondent upon this basis. There is much, we think, on the claimant's point that the purpose of the meeting that day was to discuss his complaints against Mr King, yet he found himself under the spotlight from the outset about his own conduct. We accept that the respondent was legally advised that they may proceed in this way in not contacting the claimant. However, the claimant need only show that him leaving his place of work was a material reason for the detriment. This complaint of detriment therefore succeeds.

219. The third act of alleged detriment is the respondent's decision to record the claimant's absence as unauthorised. In our judgment, the claimant's absence was unauthorised for the reasons which have already been given in paragraph 202. He did not indicate a willingness to work. The respondent acted upon the basis of legal advice to treat the absence as unauthorised. Therefore, although the claimant was subjected to a detriment it was not as a consequence of leaving his place of work but rather because of the legal advice received by the respondent to mark the claimant's absence as unauthorised and the claimant's a failure to make

contact and express a willingness to work. The respondent was unsure how to record the claimant's absence. They sought advice. Their willingness to seek advice and act upon it tells against them being motivated by feelings of annoyance with the claimant upon this issue.

220. The fourth act of detriment is the respondent's decision to pay the claimant at the lower SSP rates during his absence. We hold this not to be a detriment for the reasons already given in paragraph 203.

221. Similarly, the contention that the claimant was removed from the furlough scheme because of the incident of 25 March 2021 must fail for the reasons already given. Furthermore, the claimant was removed from the furlough scheme before the episode of 25 March 2021 took place in any case. Therefore, no causal link can be shown between the health and safety concern on the one hand and the removal from the scheme on the other.

222. The sixth alleged detriment is the respondent's failure to investigate the claimant's concerns adequately or at all. This in fact in reality a different way of putting the second alleged act of detriment. Upon this basis, this complaint succeeds. The respondent took no steps to investigate the claimant's concerns until the claimant instigated contact on 8 April 2021. The respondent displayed a marked reluctance to do anything until then. This was a mark of disapproval materially influenced by an annoyance with the claimant in leaving as he had done and failing to return. We repeat the reasoning in paragraph 218.

223. The seventh alleged detriment is the respondent's decision to suspend the claimant from work. Again, we find that reason for the decision to suspend the claimant from work was the manner in which the second public interest disclosure was made. It was nothing to do with the claimant leaving his place of work on 25 March 2021. The respondent had at least been prepared to meet with the claimant on 13 April 2021 to seek the claimant's return to work. Matters unfortunately took a downward turn because of the way in which the claimant conducted himself at the meeting.

224. We now turn to the complaints brought under the 2010 Act. We shall start with the complaints of victimisation. This claim is brought against both respondents. The respondent and Mr King admit (in paragraph 60 of Miss Churchhouse's submission) that the disclosure of 24 July 2019 is a protected act. The Tribunal considers this to be a correct concession. On any view, the claimant is raising a complaint of harassment related to characteristics protected by the 2010 Act.

225. We find as a fact that on 25 March 2021 Mr King did report the claimant to Mr Hardcastle and subject the claimant to threats. However, we find that the claimant has not discharged the burden of proof upon him to show at least a *prima facie* case that there was any connection between the protected act of 24 July 2019 on the one hand and Mr King's conduct in reporting the claimant on 25 March 2021 and threatening him on the other.

226. The claimant and Mr King had got on tolerably well between July 2019 and March 2021. The operative cause of Mr King interceding and reporting the claimant to Mr Hardcastle is the way in which the claimant spoke to the latter. On the claimant's own account, industrial language was used by the claimant to explain to Mr Hardcastle the task which he had been asked to undertake on 25 March 2021 by Mr Steer. We therefore find that the cause of the threats issued to the claimant by Mr King was the manner in which the claimant dealt with Mr Hardcastle and was

nothing to do with the protected act of 24 July 2019. Mr King had received his warning arising out of the latter incident. As has been said, the pair got on tolerably well in the interceding 20 months' period. As far as Mr King was concerned, the incident of July 2019 was water under the bridge. There is no evidence presented to the Tribunal that anything else had happened as between the claimant and Mr King. The operative cause of the detrimental treatment of the claimant by Mr King (by being threatened by him and reporting him to Mr Hardcastle) was the claimant's manner that day and not the protected act. The victimisation claim therefore fails.

227. We now turn to the complaint of harassment. As with the victimisation complaint, this is a matter which the claimant raises against both respondents.

228. The harassment complaint centres on the incidence of 24 July 2019 and 25 March 2021. The claimant contends that upon both occasions the second respondent Mr King subjected to him to harassment related to age and sex by referring to him as "*an old bald cunt."*

229. The complaints of age discrimination fail upon the facts. We have determined that on 24 July 2019 the word *"old"* was not used. We have determined that on 25 March 2021 the claimant was not called an *"old bald cunt"* or even a *"bald cunt."* (The word '*old'* plainly is inherently related to the protected characteristic of age).

230. The harassment complaint related to age upon the incident of 24 July 2019 and of age and sex arising out of the incident of 25 March 2021 therefore fail on the facts.

231. This simply leaves the incident of 24 July 2019 and the reference, on our factual findings, to the claimant as a *"bald cunt."* We have little doubt that being referred to in this pejorative manner was unwanted conduct as far as the claimant was concerned. This is strong language. Although, as we find, industrial language was commonplace on this West Yorkshire factory floor, in our judgment Mr King crossed the line by making remarks personal to the claimant about his appearance. The conduct was therefore unwanted. There is no evidence that the claimant complained about the use of industrial language towards him other than about the epithets *'old'* and *'bald'* and therefore we find that the claimant was particularly affronted by them.

232. We are satisfied that Mr King's conduct towards the claimant on 24 July 2019 was unwelcome and uninvited and therefore was unwanted. It is difficult to conclude other than that Mr King uttered those words with the purpose of violating the claimant's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal recognises that the statutory language of violation, intimidation and hostility contains strong words. Of his own admission (upon the basis of what he said in paragraph 4 of his printed witness statement and his contemporaneous witness statement at page 66 of the bundle) Mr King's intention was to threaten the claimant and to insult him. Therefore, as Mr King said the words *"bald cunt"* with the purpose of violating the claimant's dignity and creating an intimidating, hostile *etc* environment for him the Tribunal need not go on to consider whether it was reasonable of the claimant to consider it to have that effect. That the claimant often expressed himself in Anglo-Saxon terms on the shopfloor matters not where the words by Mr King used had the proscribed purpose. Having said that, for the avoidance of doubt, we consider also that the claimant reasonably considered them to also have that effect for the reasons in paragraph 231.

233. It is for the claimant to show there to be a link between the unwanted harassing words on the one hand and in protected characteristic of sex on the other. (We are not of course concerned with the protected characteristic of age given that we have found that Mr King did not use the word *"old"* on the day in question).

234. Plainly, some words or phrases would clearly be related to a protected characteristic. Where the link is less obvious then Tribunals may need to analyse the precise words used, together with the context, in order to establish whether there is any negative association between the two.

235. In our judgment, there is a connection between the word *"bald"* on the one hand and the protected characteristic of sex on the other. Miss Churchhouse was right to submit that women as well as men may be bald. However, as all three members of the Tribunal will vouchsafe, baldness is much more prevalent in men than women. We find it to be inherently related to sex. (In contrast, we accept that baldness affects (predominantly) adult males of all ages so is inherently not a characteristic of age).

236. In **Insitu Cleaning Co Limited v Heads** [1995] IRLR, 4, EAT, it was held that a woman had been sexually discriminated against when a manager made a single comment to her about the size of her breasts. (The case arose before the enactment of the law of harassment and therefore had to be brought as one of sex discrimination). The remark made was *"hiya, big tits."*

237. It may be thought that such a remark is inherently related to sex. However, a similar comment may be made to men with the condition of gynaecomastia. Upon Miss Churchhouse's analysis, therefore, were a complaint of harassment related to sex to be brought today by an individual in the position of the claimant in the **Insitu** case, it would fail upon the basis that it is possible for men with that medical condition to be subjected to the same remark (just as bald women may be subject to comments such as those made by Mr King) albeit that far more women than men will be liable to such harassing treatment.

238. In our judgment, this is not the correct analysis and that the proper analysis is to approach matters purposively. The object of the 2010 Act after all is to proscribe harassment within the workplace. It is much more likely that a person on the receiving end of a comment such as that which was made in the **Insitu** case would be female. So too, it is much more likely that a person on the receiving end of a remark such as that made by Mr King would be male. Mr King made the remark with a view to hurting the claimant by commenting on his appearance which is often found amongst men. The Tribunal therefore determines that by referring to the claimant as a *"bald cunt"* on 24 July 2019 Mr King's conduct was unwanted, it was a violation of the claimant's dignity, it created an intimidating *etc* environment for him, it was done for that purpose, and it related to the claimant's sex.

239. Employment Judge O'Neill's case management order records that jurisdiction issues arise upon the complaints brought under the 2010 Act. There was no reference to the issue of jurisdiction in Miss Churchhouse's written or oral submissions. However, the Tribunal must determine jurisdictional issues even where they are not raised by the parties.

240. The victimisation claims were brought in time as they arise out of detriments said to have arisen on 26 March 2021. Having said that, those complaints fail on their merits.

241. Similarly, the complaints of harassment related to age and sex arising out of the 25 March 2021 incident were brought in time but fail upon the merits. That simply leaves the allegations of harassment related to age and sex arising out of the 24 July 2019 incident.

242. The complaint of harassment related to age fails upon the merits in any case. The complaint of harassment related to sex is meritorious. The claimant is entitled to remedy provided the Tribunal is vested with jurisdiction to consider it.

243. The complaint is a stand-alone act of harassment. It occurred on one day. It was not part of a course of conduct. The claimant did not commence the early conciliation process until 26 May 2021. He needed to have done so upon the 24 July 2019 issue no later than 23 October 2019. The claim is therefore over 18 months out of time.

244. In the Tribunal's judgment, it is just and equitable to extend time for the following reasons. Firstly, the harassment related to sex complaint is meritorious. Secondly, Parliament has legislated to outlaw harassment in the workplace. It is in the public interest that such complaints are considered and adjudicated upon and that wrongdoers are held to account. Thirdly, there is no forensic prejudice to the respondent by extending time. Contemporaneous witness statements were taken from the claimant and Mr King. Mr King was able to attend the Employment Tribunal to give evidence. He had a clear recollection of the events of July 2019. Only the claimant and Mr King were present when the incident took place that day. This is not a case where the respondent (who is vicariously liable for Mr King's actions) has been prejudiced by the delay which has led to a key witness disappearing or being unavailable. There was no evidence from the respondent to this effect. Indeed, the witness evidence exonerated the respondent and Mr King upon the complaints of harassment related to age (upon both dates) and sex (upon 25 March 2021).

245. Upon the incident of 24 July 2019, the claimant was prepared to let bygones be bygones. He urged the respondent to exercise leniency to keep Mr King in a job. Such an approach would have been derailed had the claimant instituted proceedings at some point in 2019 or early 2020. It is unjust for the claimant to be penalised for such leniency by barring him from pursuing a meritorious harassment claim where the respondent an Mr King have not been prejudiced in their right to a fair trial upon it.

246. The matter only arose in these proceedings because of Mr King's conduct towards the claimant on 25 March 2021. This of course was not conduct contrary to the 2010 Act. Nonetheless, Mr King can have few complaints that the claimant wished to resurrect the matter once Mr King had threatened him a second time around 20 months later.

247. There is therefore a reasonable explanation for the claimant not having brought proceedings in time and why the claimant brought them when he did. He was prepared to let matters rest in July 2019 but Mr King's subsequent actions led him to resurrect the matter as he did. In the circumstances the balance of prejudice favours the claimant.

248. This concludes the Tribunal's judgments upon the merits of the claim and the remedy issues arising out of **Polkey** and the claimant's conduct. The Tribunal shall now list the case for a determination of the remaining remedy issues upon the

claimant's successful complaints of unfair dismissal, wrongful dismissal and health and safety detriment.

249. Should the parties consider that a case management hearing before the Employment Judge would be of benefit to assist the remedy hearing preparations, the parties should write to the Tribunal accordingly. The parties shall also write with their dates to avoid for the listing of a case management hearing and remedy hearing. The parties must write within 21 days of the date of the promulgation of this judgment with dates to avoid over the next five months.

Employment Judge Brain

Date: 3 May 2022