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THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Jevric	**v**	**University College London**

Heard at: London Central

On: 1-3 & 6-9 November 2017, in chambers 25 January 2018

Before: Employment Judge Goodman

Members: Mr G W Bishop
Mr S Soskin

Representation:

Claimant: Ms H Platt, Counsel
Respondent: Mr E Williams, Counsel

RESERVED JUDGMENT

1. The claim of harassment related to race does not succeed because out of time.
2. The claimant was not dismissed for making protected disclosures.
3. The claimant was subjected to detriment for making protected disclosures by the respondent's failure to respond to a subject access request, but not otherwise.
4. The claimant was unfairly dismissed by the respondent when it dismissed for some other substantial reason.
5. The awards for unfair dismissal are not to be reduced for contribution.
6. The amount of compensation will be decided at a hearing on 20 February 2018.
7.

REASONS

Claims and Issues

1. The claimant was dismissed by the respondent on 2 August 2016. He claims unfair dismissal under section 98 of the Employment Rights Act 1996, unfair dismissal for making protected disclosures, detriment for making protected disclosures and race harassment. The dismissal and detriment is also to be considered as race discrimination. The protected characteristic is identified as the claimant's East European national or ethnic origin.

2. An outline list of issues was prepared for a preliminary hearing in April 2017, revised in November 2017, and some changes were made during the hearing. The protected disclosures and detriments were listed in Replies to a Request for Further Particulars, and references in these reasons to particular detriments are to this document.

3. The final list of protected disclosures, identified in closing, contained six disclosures. Two disclosures were made to Andrew Grainger, on 20 June 2014 and 3 July 2014. Two disclosures were made to Rex Knight, on 8 October 2014 and 3 November 2014. A fifth disclosure was made to KPMG on several occasions in December 2014 and January 2015. Emails to Geoffrey Prudence of 29 May 2015, and to Michael Arthur 29 February 2016 complete the total. Of the detriments identified on the list as caused by protected disclosure, those numbered 2.2.5 (a), (b) (i) and (ii), and (d) were withdrawn in closing.

4. The respondent argued that claims for many of the earlier detriments are out of time, and that they were not a series of acts. It was also argued that the race discrimination and harassment claims were out of time.

Evidence

5. The Tribunal read witness statements and heard live evidence from the following:
   Novica Jevric - the claimant

Andrew Grainger, Director UCL Estates, to whom two disclosures were made.

Martin Earlam– head of EM and I, and from August 2014 the claimant's line manager

Geoffrey Prudence – Director of Facilities and Infrastructure, and Martin Earlam's line manager. He reported to Andrew Grainger

Rex Knight, Vice-Provost, Operations, to whom two protected disclosures made, and who investigated

Wendy Appleby, Registrar and Secretary to Council, who chaired the disciplinary hearings

Simon Cove, Director UCL Information and Culture, reports to Rex Knight, heard the appeals against disciplinary action

Dr Mike Cope – Director Information Services, reports to Rex Knight

Dr Celia Caulcott – Vice Provost (Enterprise and London)

6. There were 10 lever arch files of documents running to well over 4,000 pages, with additional material provided during the hearing.

7. The case was listed for 7 days. The evidence was taken over 6 days, and on day 7 we read written submissions and heard oral submissions too. The tribunal reserved judgement, to meet a further day for discussion in January, and with a contingent remedy hearing listed for 20 February 2018.

Findings of Fact

8. The respondent (UCL) is a large university in central London. This case is concerned with the Estates Department which maintains its property, which extends to 230 buildings, with around 4000 student rooms.

9. The claimant was employed on 28 November 2011 as team leader for engineering maintenance and infrastructure. This first appraisals record that he was good technically, and had leadership prospects.

10. From 2011 claimant managed the refurbishment of the Rockefeller energy centre. The principal designer was Parsons Brinckerhoff (PB), a contractor appointed by Geoffrey Prudence, director of facilities and infrastructure.

11. Towards the end of 2013 the claimant disputed PB's invoices – they were invoicing for stage D work and beyond without having reported on stage D, contrary to contract. There were meetings to find a solution, including a session on 11 December 2013 involving Geoffrey Prudence, Martin Earlam and others. The claimant disputed that the solution was the way forward. He thought a new project manager was needed. He complained to Martin Earlam on 11 February 2014 that "somebody is pushing PB and others even though their contribution to UCL is questionable". Nevertheless, on 28 March 2014 Martin Earlam gave instructions for the disputed invoice (£22,500) to be paid, subject to conditions, and the claimant was instructed to approve payment.

12. The claimant's evidence is that from the mid to end of 2013 he was "overwhelmed with work", and there were some signs of strain. We set out examples of how relationships with colleagues and managers were in the months leading up to the first disclosure for which protection is claimed, so as to see subsequent events in context and better assess what part was played by the disclosures.

13. He became engaged in a dispute about whether a contractor was working safely. When he attended a training course on 1 April 2014, the trainer reported back on the claimant's behaviour saying he had caused "extended grief today" and had "negative attitude about safety"; he asked the trainer to say "if he oversteps the boundaries and disrupts the course to the detriment of the other attendees". A mid-year appraisal around this time recorded that his technical competence was "undermined by his outward approach to audience, especially around safety documentation to support business case and performance". In evidence, the claimant was not sure he had seen this document, but he agreed that his manager had explained he must consider the "shadow" he cast at work, and how he should take different approaches

to different people in how he presented himself within the office, and not behave the same with everyone. Rightly or wrongly, he was being viewed as a difficult colleague.

14. Earlier examples of this were described: in 17 December 2013 the claimant and Martin Earlam were asked to help the contractor David Stevens on the business case for the datacentre infrastructure review. The claimant replied that he did not have time to get involved and run a workshop on this. In January 2014 he asked Martin Earlam about a contract had been awarded to TB&A; it was valued at £170,000 and the bid had been awarded by Geoffrey Prudence, who had introduced a contractor to the project. The claimant took the view that Geoffrey Prudence had delegated the contract to David Stevens to bypass the project team, which had wanted the work to go out to tender. The contractor TB&A had not joined the framework agreement in 2011 (a collection of contractors who agreed UCL's terms, which was in effect a panel of suitable contractors for building work). The claimant wanted written confirmation that no one on the framework agreement could do the work.

15. Later, in July 2014, Martin Earlam told him that the business case have been approved by PRG, there was no need to revisit that analysis, and although it should have been treated as strategic maintenance, with a framework contractor, it was treated as a project because of the time constraints, and because the contractor was a specialist in datacentre work.

16. Between January and March 2014, the TB2 project was pursued on a tight budget and with time limits for the new datacentre. On 21 March 2014 the claimant decided to close down the work for safety concerns, and said the contractor, EMS, should be dismissed. Mr Overbury wanted this decision escalated, on the basis that the contractor did other work for UCL. This illustrates the poor relations the claimant had with colleagues.

17. In the second half of 2014 Mr Stevens became compliance manager. The claimant volunteered to take over from him, but the project was awarded to

Mr McGrath. The claimant suspected that he was being bypassed because there were breaches of UCL policy.

18. In the spring of 2014 the claimant was asked to review the tenders for the TP 3 project of around £25 million. Mr Okorocha, on secondment from PB, reviewed the tenders and decided that PB's bid was the best. The claimant disputed this on 11 March 2014. He based this on his experience on the Rockefeller Centre, and said Mr Okorocha was conflicted. The claimant was then excluded from further evaluation meetings. In the event PB were appointed for £300,000 worth of work. Only much later, on 19 November 2014, was the claimant was told by Mr Stevens that Mr Okarocha had not scored the tenders himself.

19. There is further evidence of fractious relations between the claimant and Martin Earlham in March 2014, over the closure by contractors of the sub-basement car park to lay power cables. The claimant forwarded emails about this, commenting: "this is spiralling out of control", and was rebuked by Martin Earlham who invited him to "manage the things which are within our control", and if he was concerned that if closure had not in fact been planned in the construction programme, the claimant should find out why not. It was for him to manage round the problem.

20. On 9 April 2014 the claimant was involved with Linda Barnes-Hussain of Shared Portfolio Services, whose job it was to assist the technical staff with the preparation of business cases. Business cases were relatively new formal documents for authorising expenditure, and the claimant was being shown by her how to write his cases. She invited the claimant to sit down with her and Martin Earlam for "support and guidance on how to complete the reports". After this meeting the claimant sought to justify some of the phrases she had asked him to rewrite, such as "the finance department doesn't know about it", and his complaints about the contractor PB not responding to calls and emails. He said she said to him that "if directors see my reporting due to phrasing I will be out of UCL in no time at all". She replied that she had advised him "to make your reports less inflammatory by

changing the tone to make the more professional and objective, taking the sting out of them. We even worked up an example based on one of your project relating where I gave you guidance on how to do this". This is quoted so as to illustrate how tense and angry the claimant was becoming in relations with other people and departments.

21. In May 2014, over the early bank holiday weekend, contractors working on the new data centre left equipment running causing overheating, with the result that all plastics in the centre melted down. The claimant was held responsible as project manager for not having supervised the contractors adequately. Whatever the rights and wrongs – there seems to have been no inquiry – this episode, and the additional workload of dealing with the aftermath, caused Martin Earlam to resent the claimant, and strained relations still further.

22. On 16 June claimant asked Martin Earlam about working from home on 26 June because he had booked eye tests himself and his children. He also needed to leave early another day because of trouble with his car. The latter was granted, but Mr Earlam wanted more information about eye tests, which were not regarded as medical appointments. The claimant protested whether all this was necessary. Was his commitment being questioned? The tribunal concludes his tone was argumentative. Martin Earlam resented the claimant wanting time at home when there was still work to be done after the data centre meltdown.

The first protected disclosure

23. On 20 June 2014 claimant made the first disclosure for which protection is claimed. On 18 June he asked Andrew Grainger for a meeting because he believed "there are things going on within the EM&I which are not fully compliant with UCL's procurement procedures. It is about Mr Prudence so I cannot go and talk to him". Andrew Grainger replied that how this should be handled depended on the nature of his concern. The claimant was directed to UCL's public interest disclosure policy, and he could follow that, or instead could raise it with Geoffrey Prudence, "as he may well have a good cause

and explanation for the actions that are causing concern". The claimant replied on 20 June that he did not feel comfortable talking to Mr Prudence about it, and would like to speak to Andrew Grainger. He could go through the public disclosure procedure but did not want to waste "anyone valuable time before trying every avenue within our department". He wanted to focus on datacentre infrastructure improvements, including why this had been awarded to TB &A who were not on the framework agreement, he asked whether it had gone to competitive tender, whether it was good value for money, and why "Mr Prudence took such close interest in this business case and then excused himself from PRG", why invoices for TB&A had been processed despite questions, who had brought TB&A to UCL, and "why we are pushed to use" them. He would talk about other cases if he thought there was a smoking gun here.

Second protected disclosure

24. The claimant then had a meeting with Andrew Grainger on 3 July 2014 and explained his allegations in more detail – this is his second disclosure. Andrew Grainger conceded that what he described "could be fraud".

25. Andrew Grainger then asked Geoffrey Prudence to provide the business cases leading to the appointment of TB&A, so that he could review the procurement decisions, but, he says, did not tell him about the claimant having raised concerns. Mr Grainger then seems to have lost touch with the project. He took no further action.

26. On 3 October the claimant followed up his concern, saying it was 3 months since that meeting and he had not heard anything. He wanted some closure, and to be reassured that his concerns were "some kind of misunderstanding". Mr Grainger replied that he had had some discussions with Geoff (Prudence), but needed to draw final conclusions. The claimant said he was under a lot of pressure, as the issue was much more complex, and asked if he could go to Rex Knight about another case "which is completely unrelated to anything I told you before".

Third Protected disclosure

27. Without waiting for a reply, on 8 October 2014 the claimant emailed Rex Knight about "concerns of procurement practice within estate division". He asked him to review the TB&A project, in particular the TP3 datacentre. He complained that Mr Okorocha had influenced the decision to employ PB, although himself a PB secondee.

28. He also asked if Andrew Grainger had discussed this with him. Mr Knight confirmed that he had. The claimant asked if he could have a reply sooner than another 3 months. The Tribunal view is that any conversation between Andrew Grainger and Rex Knight must have taken place in the last few days; we are not clear that Andrew Grainger had even spoken to Geoffrey Prudence, other than asking for business case documents.

29. Rex Knight told the Tribunal he had been told by Andrew Grainger that procurement practice was "an area of focus in estates", and that "in the past there may not have been full adherence where there was a need to get things done quickly to deliver the outcomes needed". Tightening up would be beneficial.

30. On 10 October Rex Knight told the claimant that he was going to arrange for someone in the finance division to investigate, and he hoped to reply in 3 weeks. Emma Smith was then appointed to investigate, and discussed her findings with him on 17 October. She identified that a competitive tender process should have been undertaken, as it was more than £50,000 for a single piece of work. David Stevens and Richard Lakos had told her that this was because TB&A were already engaged to carry out an infrastructure review across campus, that the appointment of TB&A had been approved by Geoffrey Prudence, and this was because of their previous experience in Data Centre work. Initially TB&A had advised on infrastructure strategy, but the contract had been extended to include design work, and then project management.

31. On 29 October Rex Knight sent the claimant her files, and said that there did appear to have been lapses in adherence to good procurement practice. He was forwarding the reports to UCL's internal audit service to include in their programme.

Relevant Law – Protected Disclosures

32. At this stage we pause the narrative the consider whether these disclosures qualify for statutory protection.

33. By virtue of section 43B of the Employment Rights Act 1996, a qualifying disclosure means any disclosure of information, which, in the reasonable belief of the person making the disclosure, is made in the public interest and tends to show…(a) as a criminal offence has been committed …or is likely to be committed (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which is subject…(d) that the health or safety of any individual… Is likely to be endangered".

34. It must be disclosure of information and not a bare allegation- **Cavendish Munro v Geduld**. The worker does not need to identify a specific legal obligation, provided it is appreciated by all that the information plainly showed that it could give rise to a potential legal liability, but a mere sense that actions might be wrong because they are immoral, undesirable or in breach of guidance is not enough – **Bolton School v Evans (2006) IRLR 500, Elgar Securities LLP v Kornishova (2017) ICR 561.** The test is subjective, judged by what a person in the worker's position and with his knowledge would reasonably believe. The belief does not have to have been correct provided it is reasonable.

35. We asked ourselves whether the disclosures to Andrew Grainger and Rex Knight, which concerned giving work to a contractor without going through due process, and authorising the appointment of another by one of their own employees on secondment, qualify for protection. We concluded that they do. First, they disclosed information. Next, Emma Smith's brief investigation

showed that there was some cause for concern, as standard procedure had not been followed. In our view, although some of the claimant's head of steam might be due to resentment at being forced to authorise invoices he had challenged as irregular, his concern that behind any breach of standard procedures there might be something more sinister was real and genuine. Very substantial sums of money are sunk in construction projects. Money can be wasted in cost overruns and poorly supervised contracts. We were not told what legal obligation might have been breached by this. But sometimes, and historically in the construction industry, there is corruption in the awarding of contracts. These risks will have been behind UCL's relatively recent decision to tighten up its procedures for approving expenditure in construction and maintenance. A belief that corruption *could* be involved was not unreasonable, and was clearly in the claimant's mind, though he was careful not to make a specific allegation. That this was a possibility is shown by Andrew Grainger's recognition that this could be fraud. Grounds for his belief were that he had been about to deal with the Parsons Brinckerhoff appointment, but was taken off the project and a Parsons Brinckerhoff employee left to approve the tenders; in addition there was the irregular appointment of TB&A. He had been told to approve invoices which were not in line with the contract. This was sufficient to give rise to a reasonable belief that something might be going on (the Tribunal adds that the Claimant's perceived hostility to Parsons Brinckerhoff at that stage may have been another feature, but that did not make his belief unreasonable). The disclosure was made in the public interest – to eliminate corruption, a goal, especially in public institutions, which is important. The Claimant had not been told at that time that "Chinese walls" had been put in place or that Mr Okorocha would not be marking the PB bid. There were real grounds why he should hold a reasonable belief.

The Fourth Protected Disclosure

36. Reading Emma Smith's report, the Claimant did not consider that this "addresses the main points raised in my email", as he put it in his next

disclosure, to Rex Knight by email on 3 November 2014. He asked for an independent external audit, and this time he focused more precisely on why he considered that Mr Prudence was to be investigated. This central review had been given to David Stevens, without knowledge of the Claimant's team, by-passing the project teams. Mr Prudence was not a University Project Officer but he had made the TB&A appointment, and Mr Stevens who did not know about UCL procurement procedures. The contractor's charge was about 30% of the total work, while a framework contractor's fee would be 3.85%. Mr Grainger "and some external people's" first reaction was "that is fraud. He was not satisfied that TB&A had the expertise they claimed; their application for the framework agreement did not get through. On PB, he had concern with PB's efficiency and Emeka Okorocha's involvement was "when finally clicked for me that PB have proper backing from the top". He had asked Mr Prudence about this on a number of times but got no answers. He raised another matter pointing to Mr Prudence: knowing Mr Lawrence from outside contacts, and the contractors Steve Hunter and Andy Green being paid, with the implication that Mr Prudence approved them. "There is feeling for all in that department while they are ring fenced by Mr Prudence". He made points about projects without competitive tender, or vetting of the business case and health and safety procedures. It needed an external review.

37. He added that he had taken away the "private and confidential: in his email subject line "as I think everybody within EM&I know this by now and we may as well go public if required". It is apparent from this and other comments made by the claimant that he did not limit expression of his concern to the disclosures in this claim. He discussed his concerns within and without the department at the time. Martin Earlam heard gossip that the claimant was saying he "took backhanders".

38. Was this is a protected disclosure? It is a disclosure of information, though it includes, by implication, allegations against Mr Prudence. It is in the public interest, as if there was fraud it should be investigated. The Claimant's belief was genuine (and we take into account the background of events at this time

which we will discuss shortly). We considered whether it was reasonable, having regard to the Respondent's argument that having seen the Emma Smith report he had an explanation for the appointment of TB&A. She had included in her account of why they had been appointed, that they had been confirmed by Geoffrey Prudence (without adding more), which may be what prompted the Claimant's more direct focus on Geoffrey Prudence when writing the 3 November email. He had reasons for concern that this explanation was not adequate. We concluded that this disclosure was protected.

39. We now need to return to the narrative of what occurred after the Claimant's disclosures to Andrew Grainger on 20 June.

The First Detriment

40. The first detriment alleged is that when the Claimant emailed Mr Earlam on 21 July asking for permission to work from home on the Friday he did not reply in time, effectively refusing the request. Mr Earlam did not reply until Thursday evening, when he asked a series of questions about what he proposed to do at home. Mr Earlam agrees now this would have come across as aggressive. The Claimant came into work that Friday saying that he had forgotten to come into the office on Thursday to collect his laptop, so could not work from home. Whether because of delay, or because the Claimant just forgot his laptop, he did not get the day off.

Relevant Law- detriment

41. By virtue of section 47B of the Employment Rights Act, a worker has the right not to be subjected to any detriment… by his employer done on the ground that the worker has made a protected disclosure. As an employer's reasons are within his own knowledge, it is for the employer to show that the reason for detrimental action and the test as expressed in **Fecitt v NHS Manchester (2012) IRLR 64**, is whether the protected act did have a material influence (in

the sense of being more than a trivial influence) on the employer's treatment of the whistleblower.

42. Detriment is not defined in statute. In **Ministry of Defence v Jeremiah (1980) ICR 13**, it was defined as "putting at a disadvantage", and should be assessed from the viewpoint of the reasonable worker – **Shamoon v Chief Constable of** the **Royal Ulster Constabulary (2003) ICR 337**. However, an unjustified sense of grievance is not a detriment.

43. This episode can be viewed as part of the continuing friction between the Claimant and Mr Earlam about time off and holidays which already existed – see for example the episode on 18 June, before the first disclosure was made. It took place against the background of the data centre meltdown; Mr Earlam thought that the Claimant's responsibility and they were all working hard to deal with the consequences; it is interesting that the data centre meltdown does not feature in the claimant's very long witness statement. We could not see how Martin Earlam's delayed handling of the claimant's request to work home on this occasion was related in any way to the Claimant having made a protected disclosure to Mr Grainger on 20 June or their meeting on 3 July. It is not evident that Martin Earlam knew about the disclosures - even if Mr Grainger mentioned it to Mr Prudence, and Mr Prudence 'joined the dots', as the claimant suggests, there is no evidence that Martin Earlam was aware of it, or would have been concerned about it. Mr Earlam did not delay or refuse the request to work from home on ground that the Claimant had made a protected disclosure.

Events from July 2014

Steam Meters

44. This episode is important because it led to disciplinary proceedings preceding the claimant's dismissal.

45. There was an ongoing maintenance replacement programme. As part of this, Nigel Oglesby, who indirectly reported to the Claimant, was involved with a project to replace energy meters across UCL's estate, using consultants, who recommended a certain type of steam meter. According to Nigel Oglesby, the suitable meters were supplied by ABB Meters, and at some point in the first half of 2014, he placed an order for them with a contractor, All Pipe and Valve. He did not prepare any business case documents; there is no purchase order or even a quote for this work.

46. In or around July 2014, the meters arrived on site. The Claimant "fell off his chair" to discover that around £250,000 worth of meters had been supplied without his knowledge, or a business case, or even an invoice. Faced with the fait accompli, he prepared documents called PID's (Project initiation documents) for each meter separately. This would reduce the order values to a level where there was less scrutiny.

47. Asked to authorise these PID's, Geoffrey Prudence was suspicious about three small value works being placed with the same contractors for the same items, and he put them on hold. Getting no reply, the claimant pushed on 6 August, saying that he wanted a decision by the end of the day, before he went on holiday. Mr Prudence said: "OK, hold it then let's look at metering as the scheme … also please can you send me the latest version of metering strategy documents/implementation programme"- in other words, he wanted to look into it. The Claimant emailed back: "PUT THE PROJECTS ON HOLD is not an option at this stage. I'll cancel the whole thing and we can start from the beginning sometime in the future". Mr Prudence said to a group of colleagues, including the Claimant and Mr Earlam, that they needed a scheme approach to metering combined with infrastructure/BMS and overarching energy plans moving forward. The Claimant replied on 7 August: "as agreed I will cancel all the work scheduled, return all kit and proceed according to the email below from Sept/Oct". However, the "kit" was not returned.

48. Geoffrey Prudence's evidence is that he did not appreciate that the meters had already arrived – he thought he was being asked to approve the placing of an order

49. There is a dispute about when Mr Earlam became aware of the full value of the meters that had been delivered, and which remained on UCL premises for many months thereafter, the supplier unpaid. The Claimant's evidence was that he found out about the meters on 17 July, asked the supplier for quotes to complete the installation so as to seek a budget from which to pay them, and acted on his return from a training course in the week beginning 28 July. He says he asked Nigel Oglesby's supervisor to return the kit. He went on annual leave on 8 August and had nothing more to do with it.

50. Mr Earlam, it was said, had told the Claimant to return the material in July; Mr Earlam's evidence is that he did not discover the meters had even arrived on site until 22 August.

51. The understanding of the disciplinary panel that much later adjudicated on this, was that the Claimant was not responsible for Nigel Oglesby's initial order, and had not encouraged or facilitated it; it was of his own initiative, even though Mr Oglesby had previously ordered an item of far lower value (£30,000) without paperwork or business case, and had been rebuked for that, according to by his line manager, Rob Durnos. Nevertheless, as of the late summer and autumn of 2014 there was considerable suspicion among the Claimant's senior managers of whether he was responsible in the first place, or was covering up something that should have been reported, or disobeying an instruction to return them.

52. According to a briefing note prepared by a Martin Earlam on 20 November 2014, the meters had not gone back to the supplier in August, and in September the supplier was still unpaid - as they were bespoke items the supplier would require payment of a £100,000 restocking charge if they took them back. In October, it seems, Mr Oglesby tried to use £43,315 worth of these meters as substitutes for some already authorised for another

replacement project, but this was not permitted. In other words, by the 20 November, the problem had not been resolved, involved serious difficulty for UCL, which was unable to return the meters, and staff did not know how to account for them either, as that they had been ordered in breach of procurement processes. The conclusion of Martin Earlam's report was that there was: "serious disregard for procurement regulations, poor or no project governance, poor or no management control, attempts to cover up/use the meters by stealth and of poor value to UCL, a supplier is exposed, reputation or risk should the supply go into liquidation". Martin Earlam's report concerned the Claimant's activity, not that of Mr Oglesby.

53. This took place against continued friction with Martin Earlam. On 30 September the Claimant had made a request for flexible working, asking to work at home one day a week to assist with childcare. He did not get a reply. On 1 October, Lynda Burns-Hussein met the team for a fortnightly briefing meeting, where she was to explain recent changes in the PSO (business case) documentation process. As reported by Mr Earlam, in this session the claimant was "very confrontational, persistently questioning and challenging what she was saying in front of the whole team … referring to specific projects he had and how Lynda and the team had dealt with it, being very critical, and as such was not an appropriate forum. It dominated the meeting and took the focus away from its purpose. I had to stop the exchange. In the end Lynda was reduced to tears and left the session". The Claimant denies that Ms Burns-Hussein was reduced to tears, but does not dispute the rest. Lynda Burns-Hussein's manager then emailed Martin Earlam and the Claimant. Her first point was that the claimant was already having one to one training on PSO documentation, and was still not meeting compliance standards, and she asked: "is he competent to run projects or is he wilfully disregarding PSO processes?" Also, "NJ (the claimant) is disruptive and he has bullied and upset a member of my team"; they had discussed how the Claimant should change his behaviour when dealing with the PSO; he should be instructed to comply with their processes. Noone suggests PSO was involved in protected disclosures.

54. This was the context in which the Claimant and Martin Earlam met for a one to one meeting on 3 October. Martin Earlam's summary of bullet points in an email on 7 October following the meeting included: "you would act professionally and in a measured way at all times, in particular when dealing with the PSO Team" and "you would follow the PSO processes". In addition he would be more open and transparent about information which he sometimes stated he had but did not indicate what it was. He expected "measurable improvement" in one to two months, and later referred to it as a performance improvement plan. This is not alleged as a detriment, but we note it as part of the picture that friction between the Claimant and Martin Earlam. Mr Earlam was concerned about the Claimant's disruptive behaviour with PSO, and also critical of the Claimant (rightly or wrongly) over the meltdown, and steam meters, which were of course a real problem at this time, with the supplier still awaiting payment.

55. It is however alleged as detriment (f.ii) that Martin Earlam treated the claimant differently in ways set up by the claimant in an email of 7th of October (see below, race harassment). This allegation is not otherwise particularised. Without exploring the detail, it seemed to us that as of 7 October there were, as already stated, many reasons why Mr Earlam was dissatisfied with the claimant's conduct and performance – the datacentre meltdown, the complaints from PSO, and so on. Nor did Martin know about the claimant's protected disclosures. In our finding, disclosures had no material influence on Mr Earlam's treatment of the claimant in this period.

Race Harassment – Factual findings

56. The claimant's response to the 7 October request for performance improvement was first to write back expressing disappointment, and then a few minutes later: "Martin, I asked you before but I never get an answer so I may ask you in writing. What do you find funny in calling me Mr Kalashnikov or Mr Borat? Is it because I come from Eastern Europe?".

57. Martin Earlam replied: “I only recall on one occasion, a good few months ago, an ISD employee referring to you in my and your earshot by the name Borat and I like others in the office you heard unfortunately laughed. In my case this had nothing to do with your nationality. When you ask about the incident I immediately apologised as it was clear you have been offended and said that it was inappropriate and would (and did) take this up with the ISD employee. Because you have not mentioned this again in numerous meetings I assumed that this was closed to your satisfaction”.

58. The claimant responded: “you laughed your head off. You clearly enjoyed so much!”, and said that he had raised it on numerous occasions since, but like many things had not had a reply. Martin Earlam replied that he would treat it as a formal grievance.

59. Mr Earlam saw the Claimant’s raising his use of discriminatory language after an interval of several months, when he thought he had apologised and moved on, as “a backlash to the performance/capability issues that I am trying to tackle at the moment” (8 October 2014, email to Geoffrey Prudence asking for support).

60. On 7 November the claimant said that if this was being treated as a formal grievance, he had not had any response, as he should have done, and he was bringing in HR. Martin Earlam replied that HR had advised that because he had not sent it to the HR director, it was to be dealt with informally, but did not say what informal action was being taken.

61. The claimant then sent a formal grievance to Nigel Waugh of HR on 18 November. He said he had been bullied from January 2014 when he started questioning decisions particularly about TB&A. His particular complaint was that “sometime during the summer Mr McGoldrick (ISD) came to our office and he start joking with Mr Earlam that I look like Mr Borat in my grey suit. He also called me Mr Kalashnikov which Mr Earlam found very amusing. Although Mr Earlam acknowledged straightaway that is not probably politically correct he didn’t stop conversation. While they were having a great time at front of whole office I was sitting at my desk

feeling smaller and smaller. A few days later just before start of our informal GM&I meeting Mr Earlam mentioned Mr Kalashnikov name again. I wasn't impressed with that however I didn't want to argue at front of everyone so I just play it down. At the first our 121 meeting following the informal GM&I meeting our I raised Mr Kalashnikov issue. I explained to Mr Earlam that calling me like that is just not right. It is racist indeed. He apologised for it and we decided to move on from that point. Recently I've been told he called me Mr Kalashnikov during meeting which I was late. I've decided to confront him in writing more than a month ago and that is why we have this email chain below". He wanted to be treated like everybody else, but did not want to talk to Mr Earlam again "as he knows exactly what he was/is doing. He is very smart man".

62. On 19 November the claimant confirmed to Nigel Waugh of HR that he did want to pursue this as a formal grievance.

63. To follow through the progress of the grievance, HR decided to handle it informally and a meeting was arranged for the claimant to meet Mr Earlam and Geoffrey Prudence on 16 January 2015. A transcript is in the bundle. It is clear there was little dispute on the facts, that Sean McGoldrick had referred to the claimant as "Borat", Martin Eralam had laughed, then put a stop to it, and, as the claimant agreed, subsequently apologised to the claimant in a one-to-one meeting. Months later the claimant had raised it again. He agreed he had had an apology, but he was not prepared to accept it, because the laughing was intentional. It also seems clear that the claimant had been nicknamed "Mr Kalashnikov" in the Department, where a lot of people use nicknames, and the claimant explained how he objected to this reference to his Eastern European origin. Martin Earlam again apologised, explaining he had no intention to cause offence. Geoffrey Prudence tried to close down the discussion, saying that as Martin Earlam was apologising there was an end to it, and that to continue was "unnecessary noise", but he became heated and pointed his finger at the claimant. The claimant widened this into discussions about Martin Earlam

treating the claimant unfairly with regard to requests to work from home. The meeting concluded with an exhortation from Geoffrey Prudence: "you guys have to get this relationship working". As grievance meetings go, it was not successful. Nor, with the tone taken by Mr Prudence, is it likely to have succeeded.

64. Geoffrey Prudence wrote on 22 January 2015 to Martin Earlam and the claimant. He recognised there was tension, and said of the name-calling in May and June 2014 that Martin Earlam had apologised then, and again in the meeting 16 January, and had offered to put it in writing. He did not believe there would be a recurrence. He urged them to act together more proactively. He trusted this resolved the matter.

65. The claimant was not satisfied, and wanted a full investigation of his grievance. There was a further meeting with Eileen Hardy and Geoffrey Prudence, but the matter did not progress.

66. On 16 April 2015 the claimant complained to HR that a colleague, Mark Lawrence, had made a racist comment about Asians at a meeting on 11 March, and had also referred to female colleagues as "girls". Nigel Waugh of HR invited him to make a formal grievance. The claimant said he was not going to because: "last time I tried to do something about Mr Kalashnikov and I ended up receiving end and I'm still being targeted".

Harassment - Relevant law and Discussion

67. Harassment is defined in section 26 of the Equality Act 2010 as unwanted conduct related to the relevant protected characteristic which has the purpose or effect of violating dignity, or creating an intimidating hostile, degrading, humiliating or offensive environment. Deciding whether it has that effect must take account of the claimant's perception, the circumstances of the case, and whether it is reasonable for the conduct have that effect. **Land Registry v Grant (2001) ICR 1390** indicates that matters which are trivial or

transitory do not necessarily violate dignity and tribunals should not encourage a culture of hypersensitivity.

68. Besides the documentary evidence which has been summarised, we heard the evidence of the claimant and Martin Earlam on this. We concluded that there had been an episode when Shaun McGoldrick called the claimant Borat, Martin Earlam had laughed but recognised it was likely to be offensive, and closed it down, and later apologised. It was suggested by the respondent that this was not hostile or intimidating.

69. The film, Borat, caricatures a generic stereotype of Eastern European culture, and is both very funny and highly offensive. That Martin Earlam laughed has to be seen in the context of then immediately stopping the use of the term, and subsequently apologising. Taken together, in the absence of any other race hostility, it is not harassment unless persisted in. As for the nickname Kalashnikov, it seems Martin Earlam had referred to the claimant in this way when he was late for a meeting. We took into account other evidence (including the claimant's) that generally the claimant and Martin Earlam were good colleagues and got on well, the claimant did not (then) perceive Martin Earlam as hostile to him. This tends to suggest that using the term Kalashnikov was a bantering nickname; the claimant had not indicated it was unwelcome, indeed the tribunal checked whether the nickname was regarded by the claimant as offensive (it was), given that Kalashnikov was a hero among engineers, whatever the fatal results of his successful weapon design. Nevertheless, banter related to protected characteristics is a difficult area. Those who are the object of it may prefer to keep silent for the sake of an ongoing working relationship, but object nonetheless, and wise managers are aware of this. Further, the term had been used again at some time in the summer after Martin Earlam had apologised. We concluded that there had been harassment related to a protected characteristic, national origin, which was minor, but not trivial, in the claimant's perception, and evidently still rankled in October, even though there had been an apology, which Mr Earlam was prepared to put it in writing.

70. This brings us to the respondent's defence that the claim is out of time and the tribunal has no jurisdiction. The time limit is 3 months from the act complained of. An act may extend over a period. A tribunal may extend time if it considers it just and equitable to do so. In considering whether to extend iit must take account of the factors set out in **British Coal Corporation v Keeble**: the length of the delay, the reasons for the delay, the effect of delay on the cogency of the evidence, and must balance the prejudice to either party in making a decision.

71. The claimant argues that because his grievance was never formally investigated, and was shelved pending disciplinary investigations, it continued until dismissal and is in time. The respondent argues that we are being asked to decide matters which happened in May 2014, the claim form having been presented 9 January 2017, two and a half years after the event, and nearly 2 years after the last meeting about the grievance.

72. The Tribunal considers that the grievance procedure ended in January 2015, and that the claimant recognised this, and considered it closed when he wrote his email in April 2015 about Mark Lawrence. We do not consider it just or equitable to allow it to proceed out of time: the claimant knew it was at an end as far as his employer was concerned, but took no steps to pursue it by protest or appeal, though he was able to start another which he decided not to pursue. Time limits are there for a purpose. The harassment was real but not major, so has less weight when weighing the balance of prejudice. Employers are prejudiced by having matters raised very late, when it is no longer possible to interview others, which is what the claimant wanted. The claim is dismissed because out of time.

Events of Autumn 2014

73. We return to the narrative of events from 7 October 2014, at the point where the claimant raised the racial name-calling. There is no evidence, as of 7 October (the request for improved performance) that Mr Earlam was then

aware of the Claimant's disclosures to Mr Grainger in June and July, or of course to Mr Knight on 8 October, which occurred a day later.

74. Relations continued to be difficult. On 9 October the claimant disrupted a meeting chaired by Geoffrey Prudence by insisting on raising issues not on the agenda, such as the datacentre budget, PB's performance and the appointment of TB&A, as well as being critical of the PSO team. Geoffrey Prudence and Martin Earlam asked him to stay behind at the end of the meeting to discuss his behaviour.

75. On 13 October, Mr Earlam asked two colleagues to investigate the origin of the steam meters. On 15 October he rejected Nigel Oglesby's purchase requisition to substitute them into another project. On 3 November, Mr Earlam told the Claimant he would not be approving the flexible working request.

The Second Detriment

76. The second detriment is listed as the claimant being refused a training opportunity. The Claimant had over the past few years attended a large trade exhibition for which people purchased tickets, although free tickets would be supplied to higher education institutions. The Claimant had obtained six tickets, and on 30 October asked to attend, saying it was a training opportunity to attend a data centre training session.

77. Geoffrey Prudence was made aware of this by Sean McGoldrick. He approved another employee, Brett, attending but refused others, commenting: "we are not having a multi-jolly attendance". Martin Earlam told the claimant on 18 November, and reported back to Geoffrey Prudence "that the Claimant had just asked if he could go to the exhibition and been told that Brett was attending." He attached emails from the Claimant, commented that "he has arranged multi-jolly attendance in September", and said this was "one for the log …" This last comment suggests that Mr Earlam and Mr Prudence were building a case against the Claimant, and should be seen in the context of

their reports and discussions about the claimant at the end of November (see below – management action November 2014).

78. This next day, 19 November, the claimant attended a drop-in session for the whole group run by Geoffrey Prudence. Martin Earlam says: "while (his) behaviour had been getting increasingly confrontational and erratic, nonetheless it shocked me. He subjected Geoff to intense questioning and challenged him in an aggressive and negative way, steering the conversation to points Novica (the claimant) wanted to talk about which were not appropriate for the forum and detracted from the purpose of the session". It was mainly about PB. Geoffrey Prudence emailed the claimant expressing his disappointment at his behaviour, and that he expected a more professional approach.

79. Was the claimant subjected to detriment by being refused the opportunity to attend the exhibition and seminar? Many employees welcome the opportunity of a day away from their normal duties, and many employers recognise this, using attendance at outside events as a small reward. The claimant regularly attended. He may well have perceived the refusal, especially without much notice, as a deliberate blow. We concluded that in the sense of disadvantage, it was a detriment, and his sense of grievance was not unjustified. However, we did not conclude that the decision was materially influenced by having made a protected disclosure. The decision was made against a background of other matters - the claimant being perceived as less than competent, given the datacentre meltdown, the ongoing difficulties with the steam meters, and his rudeness to PSO staff, which by the beginning of October meant that he was being asked to improve performance in this area. Relations were already bad, and thereafter deteriorated with the raising of the grievance, and the probable awareness by 18 November of Geoffrey Prudence that the claimant was making the protected disclosures. The anger of the managers seems to have focused on there being 6 tickets – the "multi-jolly" – which would lead to several people being out for a day, and it is not suggested by the claimant that any other staff were allocated the five remaining tickets. While it is hard to extract the

precise influence of the disclosures, and the ongoing questions about PB and TB&A, we concluded that there was already enough material for the managers to refuse him this "favour" of a day out quite apart from the disclosures.

80. We also discount the claimant's grievance about Martin Earlam, because the decision seems to have been made by Geoffrey Prudence, who was not the object of the grievance, and the grievance meeting had not yet taken place, though he was probably aware of it. In reaching this conclusion we are aware of the cases which concern whistleblowers who are said by their employers to have been disciplined (and so forth) not because they made disclosures, but because of the way they made them – **Panayioutou v Hampshire Police (2014) IRLR 500; Bolton School v Evans (2007) IRLR 140.** In this case, we recognise that the claimant's behaviour was already fractious even before any disclosures had been made, and there were episodes unrelated to the disclosures, such as the datacentre meltdown, the steam meters, and his treatment of PSO staff. Most managers would have viewed this request for a day out with colleagues with disfavour. We understand that his difficult behaviour generally could have been because he had concluded there was corrupt practice in high places, but we did not think that any difficult behaviour at this stage was because of frustration that his disclosures were not being investigated, as despite the 3 months inaction on the part of Andrew Grainger, he should have been reassured at his point by Rex Knight taking it seriously enough to investigate.

Management Action November 2014

81. At this point the claimant's managers met to consider the claimant's position.

82. The position with regard to the disclosure is that on 20 November, Rex Knight told the Claimant that KMPG would be looking into the allegations he had made. There is no documentation instructing KMPG as to scope of their work. They were already reviewing procurement process, and were apparently told by Mr Knight about the Claimant's concerns, and that they

should be covered. The eventual report from KPMG refers to having surveyed ten projects, without identifying whether these included the two that caused the Claimant concern. There might be doubt whether the Claimant's concerns were in fact conveyed to KPMG, but for the Claimant having a meeting with their investigator, Mona Munning, in January 2015, which he followed up with an email, so they had the detail from him, if not Rex Knight.

83. Also on 20 November, Mr Earlam was preparing his briefing about management concerns over the steam meter orders, and by now there was the grievance about the use of racist language.

84. The next day, 21 November 2014, Mr Prudence, Mr Grainger and Mr Earlam met Eileen Harvey of HR about "an emerging HR issue", by which they meant the Claimant's behaviour. It was agreed that Mr Earlam and Mr Prudence would prepare a summary of their concerns, but Eileen Harvey advised against taking formal disciplinary action, on the basis that there was now the formal grievance against Mr Earlam about racist language and refusing a request to work from home, and in addition that the Claimant had made public interest disclosures which were currently subject being investigated. This the first formal acknowledgment by the Respondent that Mr Prudence and Mr Earlam were aware of public interest disclosures made to Andrew Grainger and Rex Knight; Mr Grainger says that neither was told what they were about. Ms Harvey's advice was to "tread softly" for now, but to keep a record of examples of poor behaviour and to bring these to his attention, as they would in the ordinary course of management. Formal disciplinary action was not to be taken without consultation with Eileen Harvey and Andrew Grainger. Eileen Harvey then briefed Rex Knight about what was going on.

85. In sum, the claimant's managers understood that disciplinary action must await the KPMG report and resolution of the grievance. The outcome of this meeting was two reports dated 24 November, one from Martin Earlam, another from Geoffrey Prudence.

86. Martin Earlam reported that since presenting him with a capability improvement plan at the beginning of October 2014, the claimant had done the bare minimum to achieve these, and straightaway had reacted by taking a grievance against him "for an indirect incident several months previously" (the Borat episode). He was said to have been disruptive at meetings in spring 2013, December 2013, and throughout 2014 with regard to PSO. In April 2014, he had been disruptive on an external safety services training course. He had displayed poor capability in the preparation of project management documents, in particular business cases. On the computer meltdown, he had been trying to negotiate with the contractor separately, not in the best interests of UCL. He had "promoted a heat metering project" resulting in £256,000 of steam meters being delivered in July 2014 without an order or a budget and then retrospectively tried to use them for another project. He had behaved badly at the meeting on 9 October, and subsequently, and "on 14 November I was made aware from the member of the PSO Team that they had heard indirectly that the Claimant had made accusations to individuals that I was "taking backhanders". This slander has been mentioned to AG and GP (Grainger and Prudence) and is potentially damaging to my professional reputation."

87. The Tribunal notes that this particular allegation (backhanders) does not seem to have been followed up in later investigation of the Claimant's conduct. It is also a term the claimant firmly denies having used at any time. Nevertheless, it is relevant to the disclosures the Claimant was making, insofar as the Claimant suspected that Mr Earlam was involved in any underhand appointment of PB, having instructed the Claimant to pay an invoice to them. However, the thrust of the claimant's suspicion was directed at Geoffrey Prudence, and in our finding, it is more likely than not that Martin Earlam did not hear about this from his managers (to whom the protected disclosures were made) but from departmental gossip based on the claimant's own very widespread voicing of his unhappiness about the appointment of PB and TP&R, with pointed questions about something going on, in which those listening put two and two together to reach a conclusion that he was suggesting Martin Earlam was taking bribes.

88. Mr Prudence's report of 25 November about the Claimant said that the target development areas identified on the mid-year appraisal were to be completed by the end of year, but since that appraisal, and the change of line management to Martin Earlam, his "performance and disruptive behaviour and overall attitude has greatly deteriorated". He said that in 2014 Andrew Grainger had asked him about the appointment of TB&A, (we assume a reference to the first and second disclosures), and "I now believe that this was prompted by points being raised by Novica. I did not hear any more of the matter". Clearly Geoffrey Prudence was now aware that the Claimant had been making disclosures about the appointment of TB&A.

89. Geoffrey Prudence then explained that only after discussing the disclosures and the grievance could his managers pick up the performance management issues. He listed episodes of unsatisfactory performance: his behaviour towards the PSO, his poor behaviour at the drop-in session on 19 November and "his continuing behaviour to act negatively as the senior manager to disrespect the team, our direction, and whether our valid questions about his work, in potentially interfering influence colleagues with that process". He concluded :

"we have a case for gross misconduct in the following areas:-

- Intention of serious breach of UCL policy or regulations or improper conduct in relation to job responsibilities (the panel understands this is a reference to the steam meters)
- Potentially bringing UCl into serious disrepute (we understand this relates to failure to pay the meter suppliers)
- Theft, fraud or deliberate falsification of records or UCL documents (steam meters)
- Deliberate refusal to comply with reasonable instructions or requests made by a Line Manager within the workplace. (It was not clear to the panel what this referred to but it could have been about sending the meters back).

- "additionally there is NJ's claim to discredit Martin Earlam's professional integrity by spreading unsubstantiated gossip about him". (We understand this as an allusion to the backhanders remark, and might indicate concern that the Claimant was making disclosures in order to undermine Martin Earlam).

90. We can see that the Claimant's managers, Martin Earlam and Geoffrey Prudence, had determined that his behaviour was out of control, that he needed to be subject to discipline, and that the charge should be gross misconduct, which if proved often results in dismissal.

91. Meanwhile, Mr Prudence and Ms Harvey continued to deal with the grievance about racist language which concluded, as we have seen, in January 2015 with what the Claimant saw as an unsatisfactory result.

The Fifth Protected Disclosure

92. Early in January 2015 the Claimant was contacted by Mona Munning of KPMG, specifically about infrastructure review, data centre review and Rockerfeller energy refurbishment. He asked to see their terms of reference, which she attached. He said it would not fully address his allegations, and in the event he did not see how Mr Grainger could sponsor it because "he already dismissed all my allegations so it is in his interest to prove me wrong". Her answer was: "Rex is the ultimate sponsor of the work, but the review incorporates not just the projects you have highlighted but other projects too which are capital in nature – this was the most effective way to get a broader range of projects included. We would not incorporate your email into our terms of reference as it can be shared very widely and we did not write your email, the objective around reviewing compliance with procurement procedures will take into account the concerns you have raised as we will be ensuring procurement procedures have been followed. The individuals who have been listed will of course be interviewed too".

93. At their meeting on 29 January, the Claimant added allegations about a company called Encred Limited, another consultant used who were not part of the framework agreement, so in apparent breach of UCL process.

94. We have to consider whether this disclosure was of information, we conclude that it was: it repeated what had put to Mr Grainger, and added information about Encred. The Claimant believed that there was breach of process, and possibly also fraud. His belief was reasonable, meaning that he had evidence that there were facts and events that suggested a process was not being followed, and of course when not followed there can be fraud. It was in the public interest, for reasons already stated.

Steam Meter Investigation

95. While KMPG continued their investigation, an investigation was going on into the steam meters. Before Christmas, Geoffrey Prudence had discussed with Eileen Harvey of HR his ongoing concern about the steam meters and on 8 January wrote: "following our discussion … I emailed Andrew Grainger with my request re concern around the meter problem and specifically NJ (the Claimant)'s responsibility for the works". As for an investigation now, "as after such an extended period, due to the advised stand off since our first concern" he wanted to close out issues to prevent further reputational damage to UCL. (He had in mind the supplier). His email to Andrew Grainger of the same date, re the steam meters stated: "I now believe there has been intentional disregard for due process and deliberate avoidance of requirements including PSO reporting, and to do work under the radar. Additionally, I believe there has been a verbal order for £100,000 - £150,000 of meters which is not on system". He asked for resources to investigate.

96. On 9 February 2015 (shortly after the Claimant's race grievance had been concluded by Mr Prudence in his meetings on 29 January and 2 February) Phil Harding, Director of Finance and Business Affairs, asked Paul Di Paola do "a short piece of fairly urgent investigatory work". Phil Harding had been instructed by Eileen Harvey; an email sent to Phil Harding shows Mr

Prudence was told on 16 December by Richard Lakos of procurement that he had spoken to the supplier of the steam meters, who denied that he had ever met the Claimant; he thought that the verbal order from Nigel Oglesby came on instruction from the Claimant. By the end of January, Richard Lakos identified that the total amount was in fact £266,000. Richard Lakos also thought it odd that the supplier had not raised an invoice for the meters nor appeared to be chasing payment. This suggests Richard Lakos may have suspected some fraud.

97. Paul Di Paola had prepared a short summary of his investigation on 16 February. The meters were still on site. They had not been paid for, they had been ordered without proper application of the financial regulations. He wanted to investigate further, got the go ahead, and interviewed the Claimant on 3 March. After the meeting the Claimant emailed Paul Di Paola: "as you can understand, this interview for fraud had a huge impact on me and I would like to make a public statement along the lines that I NEVER EVER spoke, face to face or over the phone, or exchanging emails with anyone from All Pipe and Valves". He denied any interest in the company; all he knew was that they had been supplying UCL for the last 20-25 years. He concluded: "also my line manager have been informed about all of this in August 2014 so there is an obvious question why now?"

98. Paul Di Paola's further summary, after interviewing Martin Earlam, Richard Lakos, the supplier, Ivor Martin of the consultants and Nigel Oglesby, his line manager Rob Durnos, and the claimant, is dated 10 March. He concluded that the Claimant was not to blame for Nigel Oglesby's initial order, nor could the Claimant have foreseen that Mr Oglesby would do this. It is recorded that the Claimant on discovering the meters had submitted the project initiation documents "contrary to believing this was inappropriate". There had been a number of breaches of the financial regulations, and it was "worrying no one individual took responsibility for their actions. There is a risk that this is seen as a necessary step to get work performed on time, and an administrative burden rather than an anti-fraud and VFM mechanism", presumably referring to the bypassing of procedures. He recommended:

"the operations of the estates team are growing significantly and it is important the training and support for managers is in place. The Estates Leadership Team should be tasked with providing this to all Estates budget holders and senior staff, and reiterating the importance of the following procedures".

99. There was no suggestion of fraud, or misuse of UCL resources.

100. The April complaint about Mark Lawrence making racist remarks about Asians has been mentioned in the context of the harassment claim– the claimant now chased it up, and sent his emails on to Andrew Grainger on 6 May, but got no reply, so he referred it back to Nigel Waugh in HR on 27th May. He was asked to fill in a form, and he sent it to him on 3rd June: he said the Asian stereotype remark was at a meeting at which Martin Earlam present, but no one commented on the remark, that on 19 March the Claimant had raised with Martin Earlam that it was racist, and Mr Earlam said he would speak to them about it. On 25th Mark Lawrence made the 'girls' remark. He said: "this comes at the back of the previous incident when I was called Mr Kalashnikov and Mr Borat on three separate occasions". He referred to it having been "resolved" by Mr Prudence saying that he had no reason to believe there would be a recurrence, which "make this latest incident even more serious". He wanted a disciplinary investigation and disciplinary proceedings. It was implied that Martin Earlam was implicated.

101. As far as we know, this grievance was never pursued because of other events going on involving the Claimant. It is not alleged as detriment.

Further Detriment

102. It is alleged as detriment that on 1 April Martin Earlam accused the claimant of inventing a meeting and not being truthful to the leadership team about it (e.i). The claimant then sent evidence that there had been such a meeting scheduled for 25 March and he asked for an apology. In cross-examination Martin Earlam explained it was about whether the claimant had a pre-start

meeting with a contractor when the business case had not yet been approved. He understood the claimant to tell him the meeting had not taken place, but it was in his calendar. We conclude, that the claimant may have suffered detriment – being suspected or accused by his manager of concealing having arranged such a meeting when he should not have done – but we did not conclude that this was materially influenced by the claimant having made protected disclosures, nor did we conclude that it was because the claimant had made a grievance about racist language. There seems to have been confusion whether a meeting had or had not taken place, an invitation to a meeting being in the diary. There was reason for him to be suspicious of the claimant on this, giving the ongoing difficulty of the claimant preparing adequate business case documentation. This claim is not upheld

103. There continued to be conflict between the Claimant and PSO about the preparation of his business cases. On 29 April 2015, Sarah Wisbey complained to her manager, Davina Scoble, about "Novica Jevric and the way he spoke to me at reporting 121 yesterday". He had accused her of knowing nothing about project management. She found this "incredibly demeaning, belittling, not to mention hurtful".

104. The claimant also pushed back PSO about some of the drafting, which led to an exchange with Martin Earlam about the use of the contractor Encred, complaining that they had not been bound to produce anything like the background information that he was being required to produce, and that he was not being treated the same as others. The claimant's tone was angry, rude as between colleagues, and particularly so to a line manager. At the end of these complaints, the Claimant concludes: "should we report it to H&S Executive or SFO?" (Serious Fraud Office). The tribunal notes it is clear why he might want to go to HSE, because there is reference to asbestos work, but it is not clear from this where there was fraud, except for a question whether the work had been tendered. Martin Earlam replied on 30 April, "It is more important now to address your allegations of fraud which you make with your reference to the Serious Fraud Office below and made against named individuals in our meeting this afternoon". UCL policy required him to

write immediately to Phil Harding, as Director of Finance giving a description of the alleged irregularity and the scope of the loss, plus evidence and details of the suspected perpetrator. He should act reasonably and without malice. Any complaint or allegation which is found to be groundless shall be deemed to be a serious disciplinary offence. Mr Earlam would treat these allegations in confidence.

105. The Claimant responded a week later: "you said I made an allegation of fraud "against named individuals". I do not recall naming anyone or using the word fraud. However, I will be grateful if you can give me your understanding of any allegations? What exactly did I say?" There is no information from either of them about what exactly was said at the meeting on 30 April. We note only that this was part of a process of the Claimant trying to get business cases through for the Roberts and Medawar projects and being consistently knocked back.

106. This is a further detriment alleged (f.i) arising from this period, that the Claimant was having his business cases knocked back by PSO for inadequate documentation, whether for arithmetic error or a failure to include VAT, or some turn of phrase. The Claimant assets that this was unreasonable as other people's business cases were going through. We had no comparison with other people's put to us, so we are unable to make a decision whether the technical corrections identified were justified or unjustified. There were no facts that led us to conclude that PSO were rejecting his documents because he had made disclosures to Mr Grainger and Mr Knight, or that information about these had leaked to PSO. We know the claimant had needed special coaching on his business case documents before any disclosure was made. There was no evidence that PSO had had a tip off from Martin Earlam or Geoffrey Prudence about his disclosures which might have materially influenced their decisions to delay his business case paperwork. If this was a detriment, it was not on ground of protected disclosures.

The KPMG Report

107. In May 2015 the Claimant emailed Rex Knight, saying "can you issue me with KPMG's draft report? I understand it has been issued", and Rex Knight in turn asked Andrew Grainger: "is the report out? I understand it is not going to have anything useful to him". Mr Grainger replied that he had not seen it or heard anything recently, and: "incidentally, I commenced a disciplinary investigation today into two staff over the need of procurement, one is Novica".

108. Mr Knight says that his remark that the report was "not going to have anything useful to him" came from verbal updates from KPMG about their progress. The report was not going to substantiate the Claimant's more specific remarks about fraud on the part of individuals.

109. In the event the final KMPG report was delayed by illness on the part of KPMG staff, and not presented to UCL's audit committee until August 2015. The report identified as good practice that the ten projects they reviewed underwent the procurement processes in the policy, the governance structure enabled robust review and would support achieving value for money. For development, it was noted that the process for allocating contingency sums was disjointed, staff did not always identify potential conflicts of interest, or that credit checks for existing contractors needed to continue, and that in many of the projects; there was no evidence of post project reviews being performed. There is no detail of particular projects.

Disciplinary Investigation of the Claimant

110. Mr Grainger was questioned in Tribunal about when he found out the KPMG results. He was not updated by KPMG, and did not see the written report until late in the day, but as mentioned, in May 2015 had been told by Rex Knight it would have "nothing useful" to the Claimant. He understood KPMG's work followed a discussion with the Claimant. He said: "I assumed that meant all the allegations were unfounded – it had been looked at and

there was nothing in it". Therefore, he said, he wondered "what was the motivation for the public interest disclosure in the first place – it was 1.6".

111. This was a reference to 1.6 of the Respondent's Public Interest Disclosure Policy which says:

> "the policy is concerned with alleged malpractice in propriety or wrongdoing in the workplace. It is not designed to provide a route through which individuals can publicly question financial business decisions taken by UCL, and it offers no protection to such individuals".

It goes on to say that it is not a way of getting a re-hearing of matters addressed under other procedures.

112. The reference to 1.6 therefore indicates that Mr Grainger, who was aware that HR had asked him to hold back because of the protection provided to whistleblowers, now saw the claimant's action not as whistleblowing, but the questioning of management decisions, not protected under the policy. He pointed out that it was not new to anyone that the procurement process needed improvement, and PSO was part of that process, tightening up the use of procedures. He denied thinking: "so now we can go after him".

113. On 11 May 2015, the same day as Mr Grainger learnt from Rex Knight that there was nothing in the KPMG Report for the Claimant, Mr Grainger wrote to the Claimant to say that following the fraud policy investigation, he had been advised there was a serious breach of financial regulations in the ordering and receiving of the steam meters. Pauline Jory, a Finance Manager, was investigating.

114. Asked what evidence was considered by Andrew Grainger when deciding whether to move to a disciplinary investigation, he said the decision was delayed until things had cleared - a reference to the HR advice to tread softly while the disclosure was fully investigated. That presumably explains the

timing of his letter to the Claimant. He had not reviewed Paul di Paola's evidence in detail, or noted that Rob Durnos said that Nigel Oglesby ordered the meters on his own initiative, or that he had been told off for doing this before. He said he was not bringing proceedings because of the protected disclosure - Geoffrey Prudence had wanted the disciplinary procedure used back in November, but it had been put on hold because of the disclosure.

115. Ms Jory completed her interviews and prepared a report on 28 July 2015. Reciting the facts, she concluded: "sufficient evidence has been gathered to demonstrate that the Claimant did not fulfil his budget holder responsibilities under UCL Financial Regulations to ensure that the procurement policy was followed on a project under his management… it appears notification of the unauthorised purchase was not escalated to the appropriate senior management in a timely manner and a deliberate attempt was made to avoid procedures by splitting PID's below £50,000 limit". In her fact finding she recorded that he told Mr Oglesby to get quotes, but not to place orders, and Mr Oglesby thought the invoices had been split into bundles to get retrospective authorisation without him having to go through the full business case process.

116. Mr Grainger says when he got this report he read it, but not the supporting information, so did not go into the detail, so for example, he did not read Rob Durnos's statement about Mr Oglesby's acting without instruction.

117. The charges were put to the Claimant in a letter of 10 September: (1) he did not manage the budget in a prudent manner, and failed to ensure that a team member was required to follow financial regulations when ordering equipment, (2) had not aggregated the items to get best value from the supplier (a reference to the splitting of the invoices) and (3) he failed to escalate the unauthorised purchase to his senior manager in a timely manner, "and an attempt to avoid following due financial procedures by processing the invoices where the value of the purchase went below £50,000 to go through a full business case procedure". He was invited to a disciplinary meeting on 7 October 2015.

118. The charges do not include Mr Grainger's first allegation, when the investigation began, had been that the Claimant had failed to follow a management instruction. The Claimant had queried this when told the matters had been investigated, and Mr Grainger did not reply. In evidence he thought it was the failure to return the meters in August.

Further Detriments

119. It is alleged as detriment (e.ii) that on the 12 June 2015 Martin Earlam accused the Claimant of acting inappropriately during a carbon appraisal meeting that the Claimant had not in fact attended. Mr Earlam says this was on information from Davina Scoble, and in preparation for this hearing had learned she was mistaken. This was at a time when there were a number of complaints about the Claimant's behaviour and when we know the Claimant was under pressure because of the disciplinary investigation. We note there was such a disruptive meeting on 10 June (PSO business case training). This accusation was in our finding a genuine mistake, and not an attempt to place the Claimant at a disadvantage. There was no apology, but we note that this was already a difficult relationship. There are enough features why this occurred to suggest that it was not materially influenced by the protected disclosures.

120. Another detriment alleged is that Martin Earlam initially said to the investigator he had heard about the purchase of steam meters in August (e.iii), but at the disciplinary hearing on 4 November he changed his evidence. The Tribunal concludes that as the panel decided that the Claimant had delayed 2 weeks in informing his manager of the steam meters' arrival, Mr Earlam's change of evidence, if that is what it was, was not a detriment, as the panel did not accept what Mr Earlam said.

121. It is also alleged as detriment (g.i) that on 11 May the Claimant asked for information about the allegation on steam meter purchasing and was not then provided with the investigation report. We note that after being told by

Mr Grainger on 11 May that there was to be a disciplinary investigation, the Claimant asked on 12 May for more information about the management instruction that had not been followed, and whether he could see the report produced following the fraud investigation "on which his investigation is based", as he struggled to see how this related to him. Mr Grainger said that Pauline Jory had been appointed, she would interview him, and that if on conclusion of her investigation a decision was taken to hold a disciplinary hearing, he would have the right to be informed of the evidence. The Claimant was told in September that it was to proceed to a disciplinary hearing; he was shown Pauline Jory's report, but not Paul di Paola's, the fraud investigation. That is the alleged detriment.

122. The panel's view is that this did subject the Claimant to a detriment: there was material in the Paul di Paola report in the preliminary interviews which would be relevant to the disciplinary matters, and had been considered by Pauline Jory. Further, the Claimant was in our view entitled to see that the conclusion had been reached was that he had not engaged in fraud. Material attached to Paul Di Paola's report would have assisted the Claimant, such as the firm assurance that the Claimant could not have foreseen that Nigel Oglesby was going to order these meters to begin with. Pauline Jory's report refers to "the completion of an investigation carried out in accordance with UCL's fraud policy", but did not attach it. The claimant was at a disadvantage in not seeing it, and even if the matters with which he was charged were not founded on that report, it will have preyed on his mind not to see it. He would be understandably uncertain and anxious.

123. The burden shifts to the Respondent to show why this decision was not materially influenced by any protected disclosures. The Respondent's explanation is that the report did not support the disciplinary charges, so it was not necessary to send it. For the reasons we have given we think this is inadequate. Nevertheless, we still have to consider whether the decision not to send him the report (assuming a positive decision was made and it was not oversight) was materially influenced by the fact that the Claimant had made protected disclosures. We were suspicious that Mr Grainger did not

supply the report when it was requested in May, instead suggesting he make a subject access request under the Data Protection Act subject access request, which was not dealt with for 6 months. There are reasons why investigatory material may not be released to staff under investigation which may result in disciplinary action, which may be good reasons. We consider below whether Mr Grainger's failure to send the report in May was influenced by protected disclosures. It is not clear who made the decision not to send the report out in September. By that stage Mr Grainger was no longer managing the process because the Claimant's representative had objected him doing so, (1) because the previous grievances about Martin Earlam and Mark Lawrence were managed by Mr Grainger, and (2) because of a further protected disclosure made to Mr Grainger (and subsequently Mr Knight) which raised "serious concerns in terms of the conflict of interest between a number of UCL employees that had been at the receiving end of the public interest disclosure entitling Mr Jevric to protection against detriment, the grievance procedure and Mr Jevric's position in the disciplinary process". As a result Mr Grainger was removed 10 days before the 10 September letter went out under the name of Linda Gurney, HR Consultant, attaching the bundle of documents, which did not include Paul Di Paola's report. In the circumstances we do not know who made the decision not to include it, or even if a decision was made at all – it may simply be that a ball was dropped in the handover. The disciplinary panel was not being asked to consider whether the Claimant was guilty of fraud. We were not persuaded that a protected interest disclosure materially influenced any decision (assuming a positive decision) not to send him the di Paola report.

124. It should be noted that at the same time Nigel Oglesby was disciplined in relation to the ordering of steam meters. He was found guilty of failure to follow procedure. He had not made disclosures.

Delayed Subject Access Request

125. A separate complaint of detriment in that following Andrew Grainger's suggestion, on 29 May 2015 the Claimant made a subject access request for Paul Di Paola's report on. It was not responded to until 27 November 2015, and even then he did not get the report. The detriment is the long delay, which meant the Claimant did not get Paul Di Paola's report by the route suggested by Mr Andrew Grainger either. When the Claimant followed it up in December 2015, the team treated it as a new Data Protection request. The Claimant was not given an answer to why it had not been replied to before. The data team then asked Andrew Grainger and Eileen Harvey if they held the report. We do not seem to have their reply, nor does Mr Grainger cover it in his witness statement. At some stage after that - the date is not known - the Claimant was given a heavily redacted version.

126. The Tribunal has to decide whether there was a reason why the Claimant did not get an answer to his May 2015 email. There was no information from the Respondent about why the team did not answer, whether they were under heavy pressure, or another reason why someone did not answer, whether there was an investigation into why there was no answer, or indeed whether any enquiries were made at the time.

127. In the absence of an explanation from the Respondent of any kind, our conclusion is that the reason why the report was not sent to the Claimant either between July and September 2015, while Mr Grainger was managing the process, or under the Data Protection route between May and December 2015, is because the report did not assist the management case. Mr Grainger may have been involved in not sending the report to him, because of the reference to him by the Data Protection team in December. We also know that Mr Grainger was concerned that the Claimant had been guilty of fraud in relation to the steam meters, and that in November 2015 the managers attempted to intervene in the deliberation and conclusions of the disciplinary panel (see on), and keeping the di Paola report away from him is in keeping with this behaviour. We concluded this failure to provide the report was materially influenced by Mr Grainger's conclusion in or around May 2015 that the Claimant had misused ("6.1") the protected disclosure procedure

when going to Mr Grainger in June 2014, and subsequently to Mr Knight in October 2014, about breaches of process. In other words, this was a detriment which was materially influenced by the making of disclosures.

128. The claimant was at a disadvantage, though as it related to a matter on which the panel gave an oral warning only, that was small. It is unlikely to have made much difference to the outcome, but having it will have reassured the claimant that there was nothing worse buried away, or that vindication of him was not being concealed.

129. The respondent argues that detriments short of dismissal are all out of time. It is not clear to the tribunal when time might run from, as we do not know when he got the report or even if this was before dismissal. If it was out of time, we hold it just and equitable to extend time, having regard to the element of delay, if not outright concealment originating with the respondent. Any lack of cogency in the evidence lies with the respondent not explaining why the process was delayed.

Sixth Protected Disclosure

130. Returning now to other events in May 2015, on 29 May 2015, the Claimant sent his sixth protected disclosure, to Geoffrey Prudence, with health and safety concerns, in particular that air compressors had been installed in a particular room without any documentation, that no risk assessment had been done, and asbestos might have been disturbed. Considering whether this is protected, we concluded it was a disclosure of information, namely that there appeared to have been no risk assessment for asbestos, and other matters about asbestos too. It was a genuine belief, and it was reasonable, in the absence of documents which the Claimant had tried to check, even if his motivation may have been anger that he was criticised for lack of documentation when others were just as bad and should be criticised too.

131. Taking precautions for the risk of asbestos to health is clearly a matter of public interest, not least because safety at work in general and the risk of asbestos in particular has been the subject of so much legislation, and because the injury from even small doses can be fatal. Mr Prudence had the

matter discussed at a leadership meeting on 1 June to be addressed by Martin Earlam, where it was concluded that "management control on the risk-based approach was required", i.e., the claimant had a point.

132. Mr Earlam responded on the health and safety concerns on 3rd June. He said there were no immediate or urgent H&S risks. He does not address the detail of whether an asbestos risk assessment had nor had not been done, or should or should not have been done. More interestingly Mr Earlam also added: "I am getting bored and frustrated with these constant email slurs and questions which I believe to be a deflectionary tactic to steer me/us away from issues associated with Novica's poor behaviours, attitude and their approach to health and safety and procurement. What right does he have to ask these questions?" Clearly it is evidence of hostility, at the time of a protected disclosure. We will have to consider to the extent to which this played into any involvement Mr Earlam had with what is later alleged as detriment to the Claimant.

Disciplinary Two

133. We move to the event which led to the Claimant's suspension from work, never to return.

134. On 10 June 2015, PSO arranged a case training session at which the Claimant was present with a number of others. Davina Scoble emailed Martin Earlam that afternoon to say that the Claimant was clearly upset by the recent feedback on his business cases and PSO's role in that, and "he took every opportunity at the session to be disruptive". She added that it was not an isolated case, as he had been equally disruptive at SMP board, carbon appraisal training and risk training. She added that his behaviour "seeks not only to derail the session but disengages all other attendees". She had had four informal complaints about his behaviour that morning from SMP colleagues, saying they were reluctant to attend further sessions at which the Claimant would be present. She proposed the Claimant have one

to one training going forward. The rest of the group would have group sessions.

135. The next day Mr Earlam discussed this with the Claimant. He was told that going forward he would have individual training sessions, away from the rest of the group. That evening Davina Scoble emailed the Claimant saying that the PSO will be undertaking his training on a one to one basis going forward if he had any queries he should speak to Martin Earlam. The Claimant complained about it, and Martin Earlam then joined in, saying: "Novica, I explained to you a number of times in our one to one why this would be happening. I will be happy to meet again and reiterate."

136. The Claimant's response later that evening was this:

> "Martin, we never talk about isolating me from the team. NEVER! If you told me before I would not be now asking WHY? I am asking you in front of everyone why do you want to isolate me from the rest of the team? Do I smell or am I ugly, do I ask too much or … WHY!!! Should I have separate toilet and entrance to mock, maybe you can paint a yellow star on my back? Both of you should be open and transparent and tell in front of everyone WHY? Please be specific?
>
> Regards
>
> Novica Jevric"

137. This impassioned email was sent not only to Martin Earlam and Davina Scoble, but to twenty other members of the team as well. The Claimant now agrees that it was a deeply offensive email to send to Martin Earlam; it compared him to a Nazi bent on genocide. It is also clear that emailing it to a large group of colleagues, unconnected with their dispute, was unnecessary, humiliating and embarrassing. At the time the Claimant says he had not considered the implication, seeing it only from his own point of view, being isolated from the group.

138. This prompted the Claimant's suspension: the email was forwarded by one of the recipients, Davina Scoble, to her superior Sian Minett, who in turn brought it to the attention of Andrew Grainger. In this connection on 15 June she said to him that the Claimant's behaviour was deeply disruptive to her team and complained of the Claimant's "rudeness, disrespectful and bullying behaviour and repeated deliberate disruption of meetings and training sessions".

139. On 15 June Andrew Grainger decided to suspend the claimant. Martin Earlam had explained at length the need for separate training sessions in light of the Claimant's behaviour, and complained his email was "not the expected behaviour of a senior manager". Andrew Grainger discussed the matter with Eileen Harvey of HR on 16 June. Davina Scoble had complained about the Claimant's behaviour at various meetings, the Claimant's disparaging behaviour had included calling her a "girl". Davina Scoble said that the email of 21 (presumably 12) June was "workplace bullying with yet another unfounded/groundless false allegation, something I am no longer willing to tolerate". Martin Earlam complained to Geoffrey Prudence on 16 June of "his email outburst of Thursday evening … was in the same way that our formal performance discussion on 7 October 2014 triggered accusations of derogatory language and insinuations of financial and commercial impropriety which I of course strenuously deny and have subjected me to tremendous personal stress" (a reference to the accusation of racist language and of taking backhanders).

140. On 17 June, Andrew Grainger called the Claimant to a meeting and read him a letter (dated 18 June) saying that he was suspending him on full pay pending the outcome of a disciplinary investigation. The investigation would be carried out by Janet Lancaster. He must remain in contact whilst suspended. Suspension was not disciplinary action but failing to comply with its terms might result in disciplinary action.

Access to Information when Suspended

141. It is now appropriate to pause again to deal with an alleged detriment about the Claimant's access to information to prepare his case while the disciplinary proceedings are pending, namely, that being suspended he was now deprived of access to his computer at work. On a number of occasions, for example 22 October 2015 and 17 December 2015, he and his trade union representative requested access to his emails, diary and notebooks. He was allowed supervised access to the laptop for one day only, which is said to have been inadequate, because the laptop was not specific to him and he kept being locked out, which made the process of reviewing emails very slow. Andrew Grainger, when asked about this, said that it was HR advice that people under investigation should not have access to their emails during the process. It is not easy to trace the detail. The Claimant was told at the suspension meeting that personal data would be downloaded and send it to him. By October the Claimant was complaining that this had not happened. His union representative intervened. Linda Crook of HR said that it was not clear why he needed additional material. The Claimant's case is the data file he was given had 28,000 emails on it and he could not open the calendar data at all. There was a lot of other data on his desktop and personal drive, which it should be possible to send him. There is much fractious correspondence about the scope of his enquiry, and that he wanted data about other people.

142. The Respondent's case is that he was provided with all the relevant emails relied on by the investigator and he had access to his own emails.

143. We note that if he had difficulty accessing everything he wanted to see at the time that he was allowed to supervised access to the system, we could not trace that he had complained about that, or requested a second session.

144. Our conclusion on this dispute is that it is not clear that there was detriment, in that the Claimant was allowed access to his material, but with not enough time, given the technical difficulties of accessing it. Reviewing the correspondence, it was not clear to us that this was materially influenced by

the fact that he had made protected disclosures. There are clear reasons why any employer wishes to reduce the access a disgruntled employee facing disciplinary action has to its IT system, whether for fear he will tamper with evidence, or just sabotage. The practice is widespread among institutions and companies in the private and public sector. There was no denial in principle, nor is it clear that if the claimant had demanded further opportunities for access it would have been refused. He had not been suspended from work for a reason connected with protected disclosures – complaints about him came from managers not involved. Given that he was given some access, that it is standard practice not to give unlimited access, and the claimant did not ask for more, we cannot find that this disadvantage was influenced by the fact that he made protected disclosures.

Disciplinary One – Steam Meters

145. Pauline Jory's investigation report into steam meters was completed on 29 July 2015 and on 10 September he was invited to a disciplinary hearing on this issue on 7th of October 2015, though in fact it took place on 4th November. There were 3 charges of gross misconduct: failing to ensure a team member followed financial regulations when ordering the meters, not aggregating items to get best value, and failing to escalate the unauthorised purchase in a timely manner to a senior manager, instead avoiding procedures by attempting to process them so as to avoid procedure.

146. It is alleged as part of detriment j. that the decision to discipline the claimant for this was because he had made protected disclosures. We did not consider that the disclosures had a material influence. Pauline Jory (and Paul di Paolo) knew little about any protected disclosures. Neither was in the Department. On the face of it, UCL was liable for £250,000 worth of steam meters for which no procedure had been followed documentation prepared. This is adequate reason for any employer to investigate, and on the evidence, proceed to discipline. Nigel Oglesby was also disciplined. His own manager, Rob Durnos, his supervisor, was not, but unlike the claimant, he had no involvement in trying to get the paperwork through under the radar.

147. The claimant submitted a detailed refutation in writing. He also spoke at the hearing, which lasted over 3 hours. After the hearing, HR asked the panel to reach a conclusion, but not decide the penalty until the second disciplinary had been heard.

148. The outcome was decided on 7 November 2015: the first and second charges were not upheld. On the third charge, he had failed to notify senior management of the problem, but had not deliberately avoided business case documents. For that, he was given a formal oral warning, to be held on his personal file for 6 months. However, at the request of HR this was not communicated to him until 6 January 2016. The delay was because Wendy Appleby was told that further evidence had come to light about steam meters from Geoffrey Prudence and consisted of correspondence from the suppliers. Pauline Jory and HR considered it and did not think it relevant, so told the panel to go ahead and issue their decision.

149. It is part of the detriment listed at j. that their procedures were not followed during disciplinary procedures. The late introduction of the correspondence from steam meters may have been motivated by Geoffrey Prudence's determination to have the claimant disciplined in which disclosures may have played a part, but the correspondence was recent, and as the intervention was not effective, the only detriment was the two-month delay, and in the overall context of the delays in the disciplinary proceedings, made little difference; by the beginning of December the claimant was working for MRC.
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Disciplinary Two – Unprofessional Behaviour

150. Janet Lancaster's 30 page investigation report, dated 26 July 2015, concluded that there was "sufficient corroborative evidence of a persistent pattern of unprofessional behaviour" by the claimant, which affected working relationships with its managers and others. It was important that the delay in

moving to the complaint investigation stage had given the claimant an opportunity to "self reflect and seek to improve his behaviour".

151. It is alleged as detriment as part of j. that the decision to go to disciplinary proceedings on this was materially influenced by protected disclosures. In our conclusion there was enough difficult behaviour on the part of the claimant to justify disciplinary proceedings on the basis of what occurred in May 2015, without going into earlier interactions with his managers, but to the extent that we have investigated many of them in this decision, there was considerable evidence that they were difficult before any disclosures occurred. The disclosure about asbestos as a hazard to health, as noted, caused an expression of hostility from Martin Earlam, but in our view the claimant was neither suspended nor investigated because of that. Martin Earlam was already finding the claimant difficult to manage – this was no step change.

152. On 17 September 2015 the claimant was sent the investigation report, with all the documentary evidence relied on and told that there would be a disciplinary hearing on 9 October 2015 on three charges of misconduct (meeting with Sarah Wisbey 28 April 2015, business case session 10 June 2015, improper conduct to Davina Scoble 30 March - 30 April 2015) and two charges of gross misconduct, one of improper conduct to Geoffrey Prudence in writing and in meetings between June 2014 and June 2015, the other of improper conduct towards Martin Earlam between August 2014 and June 2015.

153. The disciplinary hearing took place on 6 November 2015, also conducted by Wendy Appleby, then adjourned to 13th November and 23rd November. After the first hearing day, after the panel decided that the claimant was to get an oral warning on the first charge, and just before the second hearing day, Eileen Harvey of HR emailed Wendy Appleby on her view that dismissal of the claimant was the "preferred option" for the Department, and she prepared a briefing note on the options, explaining how they could move to dismissal even if the final act of misconduct was not found gross of itself. After the

second day, she asked for a discussion of this. Ms Appleby said that she was not going to circulate the HR briefing note to other panel members because it compromised the independence of the panel. After the summing up on the third and final day, the panel concluded that there was insufficient evidence of misconduct to dismiss the claimant, because his department had not taken action against him for his behaviour at an earlier stage and as it arose.

154. At this stage HR asked Wendy Appleby to delay telling the claimant the outcome until she had spoken to consultancy services about how the outcome should be delivered to the claimant.

155. At this point, 24 November 2015, Richard Jackson, who had presented the UCL case, complained that the panel had not given the university a fair hearing, in particular the claimant's representative had gone through a large amount of email material which was produced to the second hearing and had not been put to management witnesses. He sent this to Andrew Grainger who forwarded it to HR, saying the handling had been unfair to management, and "vital evidence" on the steam meters have not been presented either. The claimant's representative was told that new evidence meant a delay in the outcome and he protested on his behalf on 2 December. On 7th December Richard Jackson was interviewed. He did not want the hearing reopened but thought those who conducted disciplinary hearings needed training. Wendy Appleby was asked about the conduct of the hearing. She said the panel was under pressure to dismiss, and several members were inclined to be lenient because they were concerned about the "general culture and leadership in the Department", and that the claimant had not been warned that his conduct could lead to dismissal.

156. Other disciplinary panel members were interviewed in January. Marcia Jackson in particular thought that management had "bundled up a series of incidents to make it seem more serious" and that if his behaviour had been tackled earlier some of the more serious incidents might never have occurred, such as the yellow star email. R. Brayfield, the principal HR

business Partner concluded in a report on 29 January 2016 that the hearing had been impartial and fair.

157. As a result, the claimant was at last told the outcome on 8 February 2016: the charges on Sarah Wisbey and Davina Scoble were not upheld, but the charges on his behaviour on 10 June, towards Geoffrey Prudence over the 12 month period, and his behaviour towards Martin Earlam were. He was issued with a final written warning, to stay on file for 18 months, but would then be disregarded "provided your conduct improves and there are no further complaints of misconduct of any kind".

158. The final part of the detriment alleged at j. is that the respondent did not follow procedures in this disciplinary either. It is possible that the attempted interventions with the panel, both in protest that the first procedure was not fair, and the briefing note from HR about being able to dismiss, were motivated by the managers who were in part vexed by the protected disclosure allegations, particularly if indignant that they had been found by KPMG to be unfounded, as there was little evidence that this was the view of HR independently of the departmental managers; but we did not think that they resulted in significant detriment, because the panel stood firm. There was some detriment in that they added to delay, as presumably the claimant would otherwise have been informed of the outcome at the end of November or beginning of December, rather than the beginning of February, but he had started work at MRC; in any event it is unlikely to have made a difference to what happened next, or to whether he could return to work.

MRC

159. After being suspended in June 2015, the claimant looked for another job. He explained to the tribunal that he feared the worst and wanted to find a job before he had a disciplinary record and a dismissal to explain away. He had an offer on 5 August 2015 from the Medical Research Council (MRC) of employment for 3 days a week. He waited, hoping to find out if the matter would proceed to disciplinary hearings, and tried to put off MRC by suggesting he was wanted on UCL projects from which he could not be

released, but on 23 October had to agree to start on 1 December 2015. From that date, unknown to UCL, he was paid full-time by the respondent, and part-time by MRC. Of course this is a breach of contract, but there must be some sympathy for the dilemma of the claimant, who had a family to support, expected to be dismissed, wanted to make sure he had a job to go to, and kept facing postponements of meetings, and delays in getting the investigation reports. In fact, had it not been for the management objection to what was seen as the lenient outcome of the hearing panels, he would have been told about the oral and final warning before he had to start with MRC, and it is possible he would not have started there at all, as he may have expected to return to work with UCL.

Final protected disclosure

160. On 29 February 2016 the claimant forwarded to Michael Arthur, the respondents' Provost, a string of emails to Mr Derfel Owen, Director of Academic Services, dated from 30 September 2015, in which he referred to the original protected disclosures and expressed concern that the KPMG report had not dealt with them, particularly on the appointment of Encred. The other email the claimant forwarded to the Provost was an email he had sent to Mr Owen, written on behalf of Lord Clement Jones as chair of the UCL Audit Committee, stating that the procedure for investigating disclosures have been properly followed by the internal investigation from someone outside Estates, and by the incorporation of the allegations in the existing audit of capital programmes (the KPMG report.) The claimant had questioned Mr Owen on why Rex Knight had told Andrew Grainger about the disclosure,, and why Rex Knight told Andrew Grainger that there was nothing for him in the KPMG report when there was no draft available at that time.

161. On 8 March 2016, according to the minutes, Lord Clement Jones chaired a meeting of the respondent's Audit Committee which was attended by the Mr Owen as its secretary. Item 23 shows that a public interest disclosure had been received by member of staff, and the chair made a verbal report, explaining that the process had been followed the first time, and he had decided in his discretion not to reinvestigate. He had sought more

information from the discloser, and from Rex Knight as Vice Provost, and concluded that there was no further action required. The Provost's secretary wrote to the claimant on 12 April, in his absence abroad, that a full investigation had been undertaken, he had exercised his right of appeal to the chair of the audit committee, who had dismissed it, and there was no further process available.

162. In the view of the tribunal, there is no evidence that this disclosure was made known to Andrew Grainger or Geoffrey Prudence, or that it influenced the decisions they made. Although both were questioned on behalf of the claimant, it was not clear that either was aware of this additional disclosure. We know from other facts that they appear to have been determined that the claimant should not return to work in the Department. It is theoretically possible that Rex Knight shared this ongoing pursuit of the KPMG report and its conclusions with Andrew Grainger, but without evidence it is but speculation, and we do not conclude that it materially influenced Andrew Grainger's decision that the claimant should not return to work in the Department.

Appeals

163. The claimant appealed the final warning.

164. The appeal on disciplinary one was heard on 20 April, and the claimant told on 28 April that the decision was upheld. The appeal on disciplinary two was heard 6 May, and the claimant was told on 10 May that the decision was upheld.

Return to Work

165. All this while, the claimant was still on paid suspension.

166. Following the decision of 8 February, the claimant was due to return to work, but his managers protested. Martin Earlam said that if the claimant returned to work he feared he would "intimidate and undermine us both at every

opportunity" ('us' being himself and Geoffrey Prudence). He also referred to rumours that suggested a breach of his conditions of suspension. Geoffrey Prudence passed this on to Andrew Grainger.

167. On 24 February the claimant met HR and said he wanted to return to work. No action was taken. On 4 March the claimant's representative asked for a meeting about a return to work, and on 8 April had to complain of no action on this.

168. Meanwhile on 21 March, Martin Earlam, still not knowing what was happening, but believing the claimant was now to return, wrote that he believed he had been the victim in this complaint, had not been supported by the university, and was having stress-related problems.

169. On 12 May, both appeals having now concluded, the claimant and his representatives met Andrew Grainger, who read a prepared statement telling the claimant that two of his most senior managers could no longer work with him this, which put the department in an untenable position. He said there was a high risk that either Geoffrey Prudence or Martin Earlam would resign if he returned. That put at risk the working of the Department at a critical time, and increased the risk of stress to staff. He had considered as alternatives another role outside Facilities and Infrastructure, external mediation, redeployment within UCL, and what appears to have been an unsuccessful attempt in February at a settlement agreement. He concluded: "given that none of the above options appear to me to be feasible and as I am clear that it would be highly disruptive for UCL if you were to return to your role, I believe that it is in UCL's best interests for you to leave UCL's employment and I will therefore be making a recommendation for employment to be terminated". He would be asked to attend a meeting to discuss that recommendation, and he was being suspended, and should not come to the premises or contact any UCL staff.

Dismissal

170. Nothing happened for another month, when on 6 June HR invited the claimant to meet Dr Mike Cope on 13 June. At that meeting Andrew Grainger explained his case, and the claimant's representative protested that breakdown in work relationship was not a disciplinary matter, or grounds for dismissal. Nevertheless, on 15 June Michael Cope wrote to the claimant, copied to Andrew Grainger, saying he did not believe that he could return to work with Geoffrey Prudence and Martin Earlam as there was a significant risk that they would both resign if he returned. There was no suitable alternative post in Estates because of the close link with Facilities; before he made "a final decision about dismissal", he wanted to check that there were no alternative grade 9 posts.

171. HR sent a list. None was suitable.

172. The claimant protested on 29 June that he was willing to apologise to Martin Earlam; he did not think Geoffrey Prudence and Martin Earlam would resign; Andrew Grainger was conflicted, and with training and mediation they could go forward.

173. On 20 July Mike Cope invited the claimant to a further meeting. On 2 August he explained that a return to work would be detrimental to his colleagues' health, the danger that Grainger might have been conflicted had been recognised, which was why he had not participated in disciplinary process, but as head of Department it was right that he should make a recommendation. He accepted Andrew Grainger's evidence that the relationship had broken down to the point where it had gone beyond mediation and training. The claimant was told that his employment was being terminated, but he was to remain on the redeployment register for 3 months.

174. On 8 August the claimant appealed this decision. The appeal hearing took place on 7 October; the dismissal was upheld by Dr Calcot on 13 October. In the meantime the claimant applied on 21 September for two alternative jobs with the respondent, but it did not go forward.

175. The tribunal concluded from these facts that the decision that the claimant should not return to work and should be dismissed, despite the outcome of the disciplinary hearings, had been made by Andrew Grainger, and the subsequent meetings were for form's sake. The outcome was inevitable. Dr Cope took Andrew Grainger's word for it and he made no investigation of his own. Dr Calcott carried out no independent investigation, as she believed that she should reopen Dr Cope's decision but review what evidence have been available to him. To be fair, much of the appeal hearing and representations seemed taken up with the claimant's assertion that this was the end point of the long process of disadvantage because he had made protected disclosures, which Dr Calcot thought had nothing to do with the decision of Dr Cope.

Return of Belongings

176. The final detriment, short of dismissal, that is alleged is that the claimant's written request on 4 August 2016 the return of his personal belongings was ignored. The claimant says there are a number of textbooks in his locker, his personal simcard in his work telephone, and other personal files on the respondent's laptop issued to him. The facts are disputed. The claimant makes the assertion, but did not otherwise produce documents to prove the existence of these items (for example, the simcard). The respondent asserted that there was nothing in his locker except the property belonging to the respondent. We had the impression that they had not carried out much or indeed any enquiry. At the very least, someone from HR could have contacted him to discuss it. Potentially he suffered a disadvantage, but it is difficult to assess how serious this was in the absence of clear evidence of what he left behind. When we turn to whether this was materially influenced by the making of protected disclosures, we doubt that disclosures had anything to do with it. By this point the respondents HR Department had acceded to the expressed wish of his managers, as endorsed by Dr Cope's decision, to dismiss, and we think it more likely that the claimant's request was lost by the HR department, or dismissed on the basis that it was not

important. It was not followed up, which makes it more likely the reason is that it was lost in bureaucracy in the vacation.

Relevant Law – Unfair Dismissal

177. Section 103A of the Employment Rights Act 1996 provides: "an employee who is dismissed shall be regarded …as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

178. Thus the causation issue for dismissal differs from detriment: if there is more than one reason, the tribunal must find the principal reason, not whether other reasons "materially influenced" the decision to dismiss.

179. Section 98 of the Employment Rights Act 1996 ("ordinary" unfair dismissal) provides that it is for the employer to show the reason for the dismissal, and that it is a potentially fair reason, namely conduct, capability, redundancy, breach of the enactment or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" - section 98 (1) and (2). If a potentially fair reason is shown, it is for the tribunal to determine whether the dismissal is fair or unfair, having regard to the reason shown by the employer, and that "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case).

180. A reason for an action is a set of facts or beliefs known to the employer. The Tribunal must identify the decision maker, and the Tribunal was referred to cases where a decision maker may be acting on "tainted information", supplied by someone else's motivation is discriminatory- **CLFIS(UK) Ltd v Reynolds (2015) ICR 2010**, discussed in **MPS v Denby UKEAT/0314/16**, and **Royal Mail v Jhuti (2017) EWCA Civ 1632**, in which we read the warning about reading across law derived from discrimination cases to the Employment Rights Act regime of protection for protected disclosures, and

which discusses the questions of who makes decisions for an employer as analysed in **Orr v Milton Keynes Council (2011 ICR 704**.

Discussion and Conclusion – Dismissal for Protected Disclosures

181. The Tribunal started from an observation that as far back as November 2014 the claimant's department concluded he should be disciplined, and probably (judging by the reference to gross misconduct), dismissed, at the point at which Geoffrey Prudence and Martin Earlam wrote their reports. The disciplinary process on what concerned them then (steam meters) started late, after the race grievance and public interest disclosure procedures were followed to a conclusion, and were themselves extremely protracted. The misconduct matters of May 2015 supervened. Unusually, managers asked for fresh evidence to be taken into account after the steam meters disciplinary hearing, and they then, by HR, seem to have attempted to intervene in the decision making. Even before the second disciplinary matter was concluded, HR asked the panel to defer announcing the decision because dismissal was the "preferred option" for the department. After both disciplinaries concluded with warnings, the Department made a case for not being able to work with claimant; matters proceeded slowly while the appeals were heard, but the dismissal was foreshadowed by the stance taken by the managers in February and March 2016.

182. What part was played in this by protected disclosures? By November 2014, Geoffrey Prudence knew or had guessed that the claimant had made disclosures about him. Martin Earlam had now learned (from the HR advice to hold fire on disciplinary action) that disclosures had been made which might implicate him. But there was plenty of other material to make them contemplate disciplinary action. He had been difficult and disruptive not just as a subordinate but as a colleague, best demonstrated by his conduct at meetings with other departments, and his dealings with PSO, and there was the computer meltdown. The most telling point is that when Martin Earlam decided to hold the claimant to better performance – October 2014 – which provoked the accusation of racial name-calling, Martin Earlam did not know

about protected disclosures, believed the steam meters were ordered with the claimant's knowledge, and was shocked by the accusation of racism. (Victimisation is not pleaded).

183. Although his managers had decided in November 2014 that he must be disciplined for gross misconduct, the charges at that point focused on steam meters before the issue had been investigated. It is possible that once investigated, they would have become reconciled to the claimant continuing in the Department. This must be hypothetical, and we shall never know, because of the intervention of the events of April to May 2015, culminating in the claimant's outburst. On that occasion it was not Martin Earlam or Geoffrey Prudence who complained, but others outside the department who found his behaviour intolerable. The claimant himself acknowledges he did not consider the impact of what he said about Martin Earlam in the yellow star email, but does now, and that it was hurtful and offensive. By the time the managers were making representations to HR about the claimant's fate in November 2015, these events played a significant part.

184. In this case, we have to examine who made the decision to dismiss, and why. The decision was made by Dr Mike Cope. As discussed, we concluded that there was no evidence Dr Cope did anything other than chair a formal procedure specially devised when the HR Department met the strongly expressed view of Andrew Grainger that his subordinates could not work with the claimant. Dr Cope listened to the claimant's representation, but there is no evidence that he considered the matter independently. Thus it is likely to be Andrew Grainger who was responsible for the claimant's dismissal, in his firm view that he could not return because it would compromise the department's effectiveness. This was based on what had been said to him by Geoffrey Prudence and Martin Earlam. The strongest evidence of inability to work with the claimant came from Martin Earlam, who was by now genuinely distressed by the yellow star email on top of everything else about the claimant's difficult behaviour and his attempts to manage it. But disclosures had been made to Andrew Grainger. He had concluded the claimant had acted improperly in making them (the reference to 6.1 when he heard about

the likely conclusion of the KPMG report), and may have had strong feelings of his own when promoting his managers' views on whether they could work with the claimant.

185. When we stood back from all these background reasons, while it was clear that the history of making disclosures played a part, especially with Andrew Grainger, we concluded that the principal reason for dismissal was the Claimant's rude and uncontrolled behaviour to managers and colleagues, from 2013 to 2015. We considered, in the light of the discussion in **Paniayotou**, the proposition that the claimant's conduct was caused by his frustration at the respondent's refusal to acknowledge the concerns he had disclosed, but beyond the initial delay of 3 months, the claimant knew that they were being investigated, though slowly, and that an outside body (KPMG) had reviewed them after discussing his concerns with him. His conduct was independent of the respondent's handling of his whsitleblowing. The claim of dismissal for making protected disclosures does not succeed.

Section 98 Unfair Dismissal

186. The reason advanced by the respondent for dismissal is some other substantial reason justifying dismissal, namely the inability of the claimant and his managers to work together and relations had broken down. The respondent submits that the dismissal, though "perhaps a bit rough and ready" was fair, as there were no suitable alternative roles for the claimant. If the dismissal was unfair, the respondent submits that this should be 100% deduction, either on the basis that with fair procedure the claimant would have been dismissed fairly, or that he contributed to his dismissal.

187. We are referred to **Governing Body of Tubbenden Primary School v Sylvester UKEAT/0527/11,** and **Perkin v St George's Healthcare NHS Trust (2006) CIR 617,** for the proposition that a breakdown in relations can be a substantial reason. Both cases illustrate that "with a substantial reason relied on as a consequence of conduct… there is no dismissal for conduct itself but it seems to is entirely appropriate that a tribunal should have regard to the immediate history leading to dismissal because it cannot in our view

always and inevitably be trumped simply by the conclusion that there has been a loss of confidence without examining all the circumstances… and substantial merits of the causes ". In **Perkin** the Court of Appeal held that it was not an error of law to look at the **Burche**ll questions even if conduct was not the reason.

188. We start with the point that in **Perkin** the claimant had not been identified as guilty of any misconduct. Our claimant had, and in its own disciplinary processes the respondent had concluded that he was guilty of misconduct, and should be disciplined, not with dismissal but a final warning. This places a burden on the respondent to show why the claimant should nevertheless be dismissed for the same behaviour. The concern of the human resources Department that the disciplinary panels should conclude with dismissal, even before they reached a decision, and the attempts to persuade the panel to reach another decision when they did, before was communicated to the claimant, came from the same managers as made a direct push to remove the claimant from May 2016. The respondent has to account for how and why it is fair that they circumvented their own procedures, which had concluded the claimant should not be dismissed.

189. We reviewed the evidence from which it was concluded that the department would not function if the claimant returned to work. Neither Mr Prudence nor Mr Earlam said in terms that they would resign. Mr Earlam complained that the prospect was very stressful and that management had not supported him, but did not say he would go. Mr Prudence was not specific.

190. In giving evidence the tribunal claimant was clear and remorseful about the effect of this yellow star email or what. He had not recognised that it would come across as accusing him of being a Nazi , as he was focused only on his perception of being segregated from his colleagues for training. We thought his remorse was genuine. In his witness statement he asserted he had apologised. Cross-examined, he had to agreed it was not clear when he had done this, and he pointed out that once he was suspended he had no opportunity to do so. Nevertheless, he offered to apologise in his letter to

Mike Cope in June 2016, several weeks before the meeting at which he was dismissed, and he apologised unreservedly in the hearing. The question for the tribunal is what could have been achieved by mediation. It is not uncommon that after a long drawn out disciplinary procedure human resources departments have to mediate to get people back to work. The claimant and Martin Earlam had worked together, and our impression of Martin Earlam was he was a decent man who could and would have engaged in reconciliation if properly done. Martin Earlam's evidence was that after his experience in the January 2015 formal grievance meeting, he did not think mediation was going to work, but the tribunal observes that from Geoffrey Prudence the tone of that meeting was exasperated and heavy-handed; a meeting conducted by someone trained in mediation technique, whether employed by UCL from outside, would be very different. As for Geoffrey Prudence, he did not say at the time, nor in his statement to the Tribunal, that he would have resigned or looked for another job if the claimant had returned to work, only that he thought Martin Earlam would. In any event, whatever his personal indignation at the suggestions of the claimant's disclosures, he had been vindicated, he was more senior, and less the object of personal attack; managers can and sometimes must have thick skins.

191. We accept that some degree of scepticism as to whether the claimant could mend his ways was realistic. In our view, an employer who has an employee on a final warning for misconduct has the ultimate weapon if the employee does not mend his ways – he can dismiss if there is any repetition at all of such conduct. This does not need more than investigation and a hearing, which most private sector employers achieve in weeks and sometimes days, rather than months and years. We concluded that the employer was unfair in dismissing the claimant without returning him to work, with or without mediation, and waiting to see what happened. Either he behaved, preferably with a meeting and an apology as well, in which case there was no reason for any manager to resign, or he did not, in which case he would be out. No consideration, in our finding, after hearing their evidence, was given by Andrew Grainger or Mike Cope either to mediation or to the effect of the final

warning. Nor was the claimant's written offer to apologise heeded. In **Burchell** terms, there was insufficient investigation of the management assertion that the only way was dismissal.

192. We are mindful of the warning not to substitute our judgment for that of a reasonable employer, but we found it hard to understand how any fair-minded employer could reasonably dismiss without considering mediation and the protection (for the employer and its managers) of a final warning, while, in effect rejecting the conclusions of its own disciplinary panel on the right penalty for the claimant's conduct. That made the decision unfair.

193. We hope it is clear from the analysis of the respondent's options at the stage when the claimant was seeking to return to work that this is not a case where a different procedure would have led to dismissal anyway. We are not able to assess the chance that the claimant would have had another outburst with managers and colleagues because there was no mediation, however informal. His written apology was not conveyed to Martin Earlam, and the January 2015 meeting was not evidence that mediation would be ineffective. It is entirely possible that after long suspension the claimant would have calmed down and behaved, at any rate if his managers behaved well too.

Contribution

194. We considered the argument that the award for unfair dismissal should be reduced for the claimant's conduct, which in the words of **Nelson v BBC (no 2)** should not be merely unreasonable, but blameworthy – "perverse, foolish or bloody-minded". We must consider whether it would be just and equitable.

195. The claimant's conduct, as found by the panel, was poor. They concluded not that he should be dismissed, but return to work. His conduct contributed to the decision to dismiss him only in the dismay expressed by Martin Earlam at having to work with him again. There is therefore an element of conduct contributing to the circumstances that led to the dismissal. Nevertheless, given that the disciplinary panel had concluded that he should not be dismissed for conduct, that mediation was not explored, and there was little

evidence that Geoffrey Prudence would have resigned if he had to work with the claimant, we found it hard to see how it is just and equitable to reduce the claimant's award for a dismissal that was in clear circumvention of the respondent's procedures, and an outcome in part resting on his mangers' determination that he should be disciplined for gross misconduct (so anticipating dismissal) for behaviour to November 2014 which principally concerned the steam meters, where the claimant seems to have been more unfortunate than culpable. We also hesitate to find it just and equitable to penalise the claimant for contribution of the racist nicknames, which was understandably resented, though to those who were not the object it may have seemed over the top, and in circumstances where we would have found harassment but for the time bar. Nor should be penalised for the component of frustration about delay handling the first protected disclosure.

196. We concluded it was not just and equitable to make a reduction for contribution to dismissal.

Employment Judge Goodman on 13 February 2018