EMPLOYMENT TRIBUNALS

Claimant: Mr J Singh

Respondent: Wm Morrison Supermarkets plc

Heard at: Leeds On: 7 and 8 October 2019

Before: Employment Judge Bright Mr G Harker
Mr M Brewer

Representation
Claimant: In person
Respondent: Mr T Welch (Counsel)

RESERVED JUDGMENT

1. The claim of automatic unfair dismissal (protected disclosure) fails and is dismissed.

2. The claim of race discrimination fails and is dismissed.

3. The claim of unauthorised deductions from wages fails and is dismissed.

REASONS

Claims

1. The claimant was employed by the respondent as a warehouse operative from 5 November 2018 to 6 January 2019 (a period of two months). He submitted a claim

on 18 February 2019 complaining of unfair dismissal, race discrimination, and unauthorised deductions from wages.

2. At a preliminary hearing on 11 April 2019 the claim was amended to substitute a complaint of automatically unfair dismissal (section 103A of the Employment Rights Act 1996 ("ERA") (protected disclosure)) in place of the 'ordinary' unfair dismissal complaint, for which the claimant had insufficient qualifying service. It was also clarified that the claimant's race discrimination complaint was one of direct race discrimination (section 13 of the Equality Act 2010 ("EQA") and that his complaint of unauthorised deductions from wages (section 13 ERA) related to unpaid sick pay. At this hearing the claimant appeared to abandon the sick pay complaint, in response to the respondent's evidence that he was not entitled to enhanced sick pay because he had been engaged for less than 12 months (page 45A). He alleged instead that he had not been paid for his final day of work on 1 January 2019 (the day on which he went off sick). That allegation had not explicitly formed part of his claim prior to this hearing but we considered it in any event. We note also that, although the respondent set out the law relating to a claim of health and safety dismissal (s100 ERA) in its written submissions, that complaint has not previously been identified or argued by the claimant and we have therefore not considered it.

3. Although the final hearing took place on 7 and 8 October 2019, it has unfortunately not been possible to issue this reserved judgment and reasons until now, owing to the judge's absence from work through ill health in the intervening period.

The issues

Preliminary issue

4. An issue arose prior to the hearing and again at the start of the final hearing, concerning the claimant's allegations that the respondent had interfered with or deterred his witnesses from giving evidence. The respondent made a counterallegation that the claimant had fabricated evidence to support his allegation.

5. For completeness, we set out here the chronology of those allegations, as obtained from the Tribunal's case file and the parties at the final hearing.

6. On 5 July 2019, the final date ordered for witness statement exchange, the claimant emailed the Tribunal with the allegation that the respondent had stopped his witnesses from giving evidence. We noted that that allegation was also mentioned in the claimant's email to the respondent dated 4 July 2019.

7. The claimant repeated the allegation to the Tribunal on 7 July 2019 and in subsequent correspondence, referring to text messages from third parties informing him of the alleged intimidation. He asked the Tribunal to strike out the respondent's response. The respondent disputed the allegation. Employment Judge Little rejected the claimant's application and directed that the Tribunal would consider the matter at the final hearing.

8. The final hearing was originally listed on 2 and 3 September 2019 but, due to congestion in the Tribunal's lists, it was postponed to 7 and 8 October 2019.

9. The claimant's application to strike out the response was therefore live at the start of the hearing on 7 and 8 October 2019. Both parties at the hearing accused each other of contempt of court/perverting the course of justice, though neither party made an application for postponement of the hearing or any other order. Both parties made clear that they wished to proceed with the hearing on the evidence available and both wished to refer to the text messages in their evidence before the Tribunal.

10. We concluded that there was insufficient evidence before us at the outset of the hearing for the Tribunal to refer the matter to the police or to strike out the response. We considered that it was in the interests of justice to proceed on 7 and 8 October 2019, in accordance with the parties' wishes.

11. The claimant informed us on the second day of the hearing that he had reported the respondent to the police for witness intimidation and supplied us with the incident number. The claimant explained that he had done so because he had been "told to do so by the judge". While there had been some discussion on the first day of the hearing of allegations of contempt of court and/or perverting the course of justice being a criminal matter, the panel do not recall, nor do their notes show, the claimant being encouraged or told to report the matter to the police.

Substantive issues

12. The issues for the Tribunal to decide at the final hearing were:

Unfair dismissal

13. Did the claimant make one or more of the following disclosures:
    - 13.1. A disclosure to Mr Booth on 3 December 2018 that: i) the claimant was subject to race discrimination in that his white colleague, Mr Gowers, was spoken to in a nicer manner and was allocated bigger picks; and/or ii) the workplace was unsafe because oil was not being cleaned up from the floor and pallets were unsafe.
    - 13.2. A disclosure to Mr Phil Hall on approximately 18 December 2018 that the claimant was being racially discriminated against by not being given bigger picks.
    - 13.3. A disclosure to Mr Nigel Homer on approximately 18 December 2018 that: i) the claimant was subject to race discrimination in that his white colleague, Mr Gowers, was spoken to in a nicer manner and was allocated bigger picks; and/or ii) the workplace was unsafe because oil was not being cleaned up from the floor and pallets were unsafe.
    - 13.4. A disclosure to Ms Murray and the respondent's chief executive officer, Mr Potts, on 3 January 2019 that: i) the claimant was subject to race discrimination in that his white colleague, Mr Gowers, was spoken to in a nicer manner and was allocated bigger picks; and/or ii) the workplace was

unsafe because oil was not being cleaned up from the floor and pallets were unsafe.

14. If the claimant made one or more of the above disclosures, was the disclosure in question a protected disclosure for the purposes of section 43B ERA? The respondent accepts that the disclosure to Ms Murray and the respondent's chief executive in relation to race discrimination was a protected disclosure. The remainder of the alleged disclosures are disputed.

15. If the claimant made one or more protected disclosures, was the principal reason for his dismissal the fact that he had made the disclosure(s)?

Race discrimination

16. Has the respondent subjected the claimant to the following treatment:
    16.1. Team leaders ignoring him, while speaking nicely to Mr Gowers;
    16.2. Mr Booth saying something along the lines of: "You're not our colour or in our gang and we run things around here and if you complain we'll get you out and you will not be kept on at all".
    16.3. Mr Homer saying something along the lines of: "you won't get any big picks, you're not our colour or in our gang and you'll be out".
    16.4. Unfair allocation of 'big picks', in that white workers, in particular Mr Gowers, were allocated more.
17. Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged les favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on a white employee, Mr Jonathan Gowers, as an actual or evidential comparator.

18. If there was less favourable treatment, was it because of race? The claimant identifies himself as British Indian and Mr Gowers as white British.

Unauthorised deductions from wages

19. Was the claimant, on or about 18 January 2019, paid less than he was entitled to be paid and, if so, how much less?

<u>The evidence</u>

20. The claimant gave evidence on his own behalf and called no further witnesses.

21. The respondent called:

    21.1. Mr M Booth, Team Manager 21.2.
    Mr N Deighton, Shift Manager.

22. The parties presented a joint bundle of documents, to which documents were added at pages 45iv, 45v and 137 – 143 in the course of the hearing. References to page numbers in these reasons are references to pages of the agreed bundle.

Findings of fact

23. There were a number of disputes between the parties as to what happened ('the facts'), including the issue of contempt of court and whether Mr Booth made certain comments. We have considered each of the factual disputes separately and we record our unanimous findings of fact on each issue below. We are required to decide the facts on the evidence before us, applying the 'balance of probabilities' standard of proof and that is what we have done. This means that we listened carefully to the evidence each party gave, took account of all of the evidence surrounding that version of events and asked ourselves whether the version of events given by the party on whom the legal burden of proof lay was more likely to have happened than not. If not all the relevant evidence was presented, then our decision may have been the right one on the evidence, but wrong in reality.

Credibility

24. Both parties asked us to find that the other's evidence could not be believed because of their behaviour in relation to the alleged witness intimidation. The claimant alleged that Mr Booth had intimidated potential witnesses who would have otherwise supported the claimant's version of events. The respondent alleged that the claimant had falsified text messages and allegations of witness intimidation to discredit the respondent. The respondent also referred us to the claimant's assertions that he had been unaware his position was temporary, as further evidence that he was not being truthful.

25. While we would normally be reluctant to find that a witness is generally 'credible' or 'incredible' on the basis of their behaviour during Tribunal proceedings, in this case one of the central allegations concerns private comments made by Mr Booth to the claimant. It is, in effect, one person's word against the word of the other. In determining whose version of events is truthful, we are therefore required to decide who we believe. The parties specifically asked us to make findings as to whether the claimant and/or the respondents' witnesses were lying about the alleged witness intimidation and/or text messages. From those findings of fact, they asked us to draw conclusions about the general credibility of the other side's witnesses in relation to the core complaints in the claim. Given the seriousness of the allegations and/or the degree of untruth inherent in falsely pursuing such allegations, we accepted that our conclusions regarding the contempt of court issue may cause or even require us to draw inferences about the truth of the evidence relating to the core allegations.

26. In making our findings of fact below we have considered the contemporaneous documents, the claimant's grievance and any complaints he made at the time. We have also compared the conflicting accounts with what occurred later and referred to any evidence of parties' behaviour immediately after the incidents in question and the timing of the incidents. We have also considered any evidence of the parties' behaviour on other occasions and the inherent plausibility or implausibility of the evidence as a matter of common sense.

Alleged witness intimidation/falsification of documents

27. The witness intimidation allegations began on 4 July 2019 when the claimant sent his witness statement, in the form of an email to the respondent, saying:

> I have just got a tex this thur. morning from my witness which saying we cant be your witness now at tribunal because white managers of our section going round saying anyone witness for jasbir singh will be out.

28. On 5 July 2019, the day on which witness statements were ordered to be exchanged, the claimant sent an email to the Tribunal saying:

> for judge they have stopped my witness from coming to give evidence i have tex message.

29. On 7 July 2019 the claimant sent a further email to the Tribunal saying:

> they have interfered with my witness ans said if your witness for jasbir singh your out of a job see tex very serious offence and they never exchanged witness statement as agreed…i there for ask the court now with this serious matter they have prejudice my claim against them by threating and stopping my 2 witness from giving evidence regards there racist managers there i ask the court now to strikeout there defence and issue a judgement in my favour…they must have thought these witness would not tell me what they have done...

30. That email attached a photocopy of an iPhone screen on which there were two text messages. The service provider was shown as EE, the time 10.20. The number from which the texts were sent is +44 7424 016832. The date is not legible. The text messages (identified hereafter as "Message 2" because of the order in which the messages were disclosed) read:

> Dear jas we can't be witness now as white managers of our section going round to all asians anyone witness for jasbir Singh will be out can't take chance got kids and mortgage things still bad here good look they need stopping you stood up to them j
>
> Dear jas cant' be witness now all white managers of section saying anyone witness for jasbir Singh will be out can't take risk got mortgage and children things still bad here good luck they need stopping.

31. The Tribunal forwarded the claimant's email dated 7 July 2019 to the respondent on 17 July 2019, asking for their comments by return. The respondent replied on 18 July 2019 noting that the claimant had failed to set out the name of the individual sending the text message, confirming that the respondent had not prevented anyone from attending as a witness for the claimant and stating that the claimant had not communicated the potential witness he wished to call.

32. On 18 July 2019 the claimant emailed the Tribunal saying:

> to the judge i have tried calling the no its turned off i suspect they don't want morrison to be find out who they are as they have been threated with the sack if morrisons find out who they are.

33. A further email on 24 July 2019 from the claimant said:

> i await the judge decision now as what will happen they have cleary interfered with witnesss and prejudice my claim in full they will go to any lenths otherwise why would i get a texs from my witness saying we have been threated by morrisons if we your wintess we are out.

34. On 5 August 2019 the claimant wrote to the Tribunal:

> there is no fair trial now you have the tex my witness send me saying morrisons managers have been going around warehouse saying any witness for jasbir singh will be sacked out how would i get a fair trial now when morrisons have prejudice my claim and case and interefered and stopped my witness from giving evidence for me against these racist managers. Do you the court call that fair and reasonable what they have done and saying what morrisons have done to be correct and fair i don't think so pass to the judge i would like the court to strike out morrisons defence and issue a judgment in my favour for 6400 pounds since they have stopped my witness from giving evidence for me i await the court and judges decision asap.

35. Employment Judge Little considered the claimant's application to strike out the respondent's defence and declined it, but invited the respondent's further comments. The respondent replied on 16 August 2019 referring to its previous comments.

36. By email on 24 August 2019 the claimant wrote to the Tribunal:

> just come throw now this will be used as evidence to show what a liar mark booth is and morrisons will do and try anything and everything and go to any lengths and lie to the courts and interefere with another witness and proves what ever he says to the court 3Sept2019 he can't be relied on or believed.

37. The attached photocopy showed a mobile phone screen, the service provider as EE, the number as +447769 875978 and a text message ("Message 1") sent at 15.30 saying:

> Hi got y number Asian guy at work i did see y fall at work grocery section 1 jan 19 on sauce i was in next isle and y hit y head mark booth and phil our managers of section told me to say i never say y fall and lie i said why should i lie they said because he bringing a racist claim that's all y need to know and told me to stick to this or it wont be good for me im sorry I had no choice.

38. At the hearing on 7 October 2019, the claimant produced his mobile phone and showed Message 1 to the Tribunal, with a reply dated 24 August at 1825, asking the

sender to call him back. He also showed us a message ("Message 3") dated 13 August 2019 at 17.45, from the number +44 7424016832 which read:

> Dear jas can't be witness now all white managers of section saying anyone witness for jasbir Singh will be out can't take risk got mortgage and children things still bad here good luck they need stopping.

39. We set out the messages in full above, because we were invited by the respondent to note the similarities in wording of the various messages, despite the allegedly different identities of the senders. The claimant did not explain the similarity in wording, despite being asked to do so in cross examination.

40. The claimant was also unable to say who the messages came from and could not name any of the people he said would have been his witnesses but for the intimidation. At the hearing he explained that he did not know their identities because he had not spoken to them directly. He told us he had given his phone number to a British Asian forklift truck driver who worked on his shift, on the understanding that if anyone was prepared to give evidence to support the claimant's claim, they should get in touch with the claimant by text. The claimant told us he therefore did not know who sent the text messages to him, and therefore could not provide their names. He did not appear to understand that he was required to prepare and exchange written witness statements for any witness evidence they might have given.

41. The respondent pointed to the fact that message 3 appeared to be worded identically to part of message 2 and was sent from the same number, but on a different date. The claimant was unable to explain why he was sent part of the message twice. Although it is of course possible for the same message to be sent twice, we consider it anomalous that only part of the message was replicated without any apparent explanation or cause.

42. The respondent questioned why the claimant was unable to produce the original message 2 on his phone, when the other messages were still there. The claimant told us at the hearing that his mobile phone was stolen on 10 July 2019, and we accepted that he reported it as stolen to EE on that day (page 139).

43. The claimant gave evidence that he called the senders' numbers back repeatedly to try to find out who had sent the text messages, but he did not get through to anyone. In particular, in cross examination he confirmed that he tried to call the sender of message 3 many times. However, despite those calls apparently having been made from his current mobile phone, he declined to show the respondent or the Tribunal his call history on that phone, despite being challenged by the respondent to do so at the hearing.

44. The respondent submitted that it would be easy for the claimant to have obtained different sim cards, so as to send the various text messages to himself and that this could account for the similarities/repetition of wording and anonymity of the senders. The claimant denied that this was the case.

45. There was a third possibility, not identified by either party but which the Tribunal raised with the parties. That was that the messages were authentic but untruthful, i.e. that any falsehood was on the part of the potential witnesses, not the claimant or the respondent. This might have been the case if, for example, the claimant had asked someone to be a witness, but they were reluctant to do so and embarrassed to admit that to the claimant. They might therefore have falsely blamed the respondent for preventing them, so that the claimant would not be ungrateful. We considered this possibility but ruled it out, for the reasons set out below.

46. There were a number of factors which caused us to doubt the claimant's evidence. They were:

46.1. The unexplained duplication of the wording of the two parts of Message 2 and the duplication of working between Message 2 and Message 3. We considered it implausible that such similarly worded texts would come independently from different people. The unexplained resending of part of Message 2 in August as Message 3 also made no sense in the claimant's account.

46.2. The claimant's ignorance of the names of his potential witnesses and the inherent implausibility of the claimant's version of events. The claimant told us that individuals, who were not known to him by name, volunteered to him unprompted the information that they would <u>not</u> be giving evidence for him. As a matter of common sense, one might expect potential witnesses to text the claimant unprompted to volunteer to give evidence or tell him their names. Alternatively, it is plausible that witnesses who had already discussed giving evidence with the claimant (and would therefore be known to him) might text him to back out of that commitment. But it is inherently unlikely in our view that employees, who the claimant did not know and therefore who presumably had no sense of obligation towards him, would send a number of unsolicited messages out of the blue to tell him they would not be giving evidence to support him. The only plausible explanation for the text messages on that analysis is that they are false or that we have not been given the full picture.

46.3. The claimant's refusal to disclose his call log following the August text messages, which denied the respondent the opportunity to explore whether he had indeed tried to call the mysterious numbers to identify them. The refusal to disclose the call log implied that the repeated calls to the numbers were not made, possibly because the claimant already knew where the messages came from.

46.4. The claimant's explanation of how the potential witnesses had been given his phone number was convoluted and improbable. It relied on an unnamed forklift truck driver taking the claimant's number and passing it on to such other employees as might have seen and/or been prepared to give evidence to support the claimant. From the claimant's account, it was unclear to us how these potential witnesses would have known what the issues would be in the claim or what evidence they would be expected to give or why. It also seemed to us an unlikely coincidence that such witnesses (having had no previous contact with

the claimant) would have sent their first communication to the claimant the day before the date for exchange of witness statements.

47. We concluded, on the balance of probabilities on the evidence before us, that the text messages were not authentic and that the claimant's allegation that the respondent interfered with witnesses was false. We find that the respondent's managers did not try to prevent any potential witnesses for the claimant giving evidence.

Nature of the claimant's contract

48. In his claim form the claimant states that his role was permanent and that he was unfairly dismissed. The respondent says the role was a temporary fixed term role over the Christmas period. It says the termination of the claimant's employment was because the contract came to an end. The claimant says this was an excuse and, at the preliminary hearing on 11 April 2019, he asserted that the real reason for his termination was because he made protected disclosures.

49. The claimant's witness statement gives evidence that the first time he became aware that the role was a temporary one was at the preliminary hearing. However, there were a number of documents in the bundle which contradicted the claimant's assertion that the role was permanent and/or that he did not know that it was temporary.

50. First, the advertisement sent out by the respondent in October 2018 was for 'Christmas Temps', working on a contract 'until early January 2019'. However, we accepted that the claimant may not have seen that particular advertisement, given that he applied for the role through an independent recruitment website.

51. Second, the claimant's application form (pages 47 – 50) explicitly asked the question: "This is a temporary role until 13th January, are you happy to continue with your application?", to which the claimant answered "Yes". In cross examination the claimant accepted that he must have therefore understood, at the time of his application, that the position was a temporary one.

52. Although the claimant denied having received it, we accepted the respondent's evidence that it sent the claimant an offer letter on 25 October 2018 stating, "I am delighted to offer you a fixed term position with us as a Warehouse Operative…Your fixed term contract is until Sunday 6th January 2019" (page 67 – 68).

53. The claimant argued that he believed his position was permanent because he was told at his interview or induction that he would be kept on if his picking was good enough. We noted that, even on the claimant's account of the conversation at the interview or induction, the promise of permanent work appears to have been conditional. Mr Booth accepted that the claimant may have been told that the business aimed to keep on temporary staff if the preChristmas volumes were maintained, but there was no evidence before us of any contractual term to that effect. It was clear from Mr Booth's evidence that, had the work been available, the respondent had every intention of keeping on its Christmas temps. However, the pre-Christmas volumes were not

maintained, there was therefore no work available after Christmas and the respondent decided to let its Christmas temps go. It was unfortunate, in our view, that the final confirmation of this decision was not communicated to the claimant until five days before the expiry of his fixed term contract.

54. The claimant argued that, because Mr Gowers was recruited at the same time as him, underwent the same training and induction and carried out the same role as the claimant, the respondent must have recruited them both on the same contract. He says the respondent treated them differently by retaining Mr Gowers and dismissing the claimant. We accepted from the letter dated 11 October (page 68a) that Mr Gowers was employed from the outset on a permanent contract. The respondent gave evidence that Mr Gowers trained alongside the claimant merely because of a quirk of timing. While it was not clear to us when Mr Gowers was recruited or why Mr Gowers and the claimant were recruited to do the same job on different contracts, the fact that employees are recruited at the same time, undergo training and induction together and carry out the same duties is not determinative of the type of contract. The claimant has not pleaded that he was treated less favourably than Mr Gowers by not being offered a permanent contract from the outset.

55. We find that the claimant knew that the role was a temporary, fixed term one at the outset of his employment, although he may have been led to believe that it was likely to become permanent by the respondent. The claimant's assertion that he had never been informed of the temporary nature of the role and had no knowledge of that fact until the preliminary hearing was not supported by the evidence in the bundle and was not credible in the circumstances.

Nature of the claimant's work

56. It was not disputed that the claimant's work involved collecting cases of products from bays in the warehouse ("picking") nor that there were difference 'sizes' of 'pick'. We accepted the respondent's characterisation of the different sizes of pick. For example, a 'big pick' would involve the picker being allocated the task of picking lots of cases from fewer bays (e.g. 180 – 300 cases from one bay), while a 'small pick' would involve picking a lower number of cases from a greater number of bays (e.g. 1 – 100 cases from lots of bays). It was not disputed that warehouse operatives generally preferred bigger picks because they involved less travelling around the warehouse and therefore meant targets could be more easily met and, potentially, the shift finished sooner.

57. We accepted the respondent's evidence that picks were allocated to operatives indiscriminately and automatically by the respondent's WES computer system. However, we heard from both Mr Booth and Mr Deighton that Mr Hall, the Asset Room Manager, could and did override the WES system on an ad hoc basis, to allocate bigger picks to employees if they complained that they had had a series of small picks. We accepted the logic of Mr Booth's evidence that this was because it was in the managers' interests to enable employees to meet their targets more easily

in this way so that the department would reach its targets and extra overtime costs could be avoided.

58. We took particular notice of page 69. This document was produced by the respondent and the data shown was not itself disputed by the claimant, although he disputed the interpretation of that data. The data showed that for seven of the eight weeks of his employment, the claimant visited fewer bays than Mr Gowers and picked fewer cases than Mr Gowers, but that he visited bays with a higher number of cases per bay.

59. We agreed with the respondent that the significant figure when assessing whether the claimant had smaller picks than Mr Gowers was the figure for cases per bay. A higher number of cases per bay indicated that the pick was bigger, and therefore easier, than a lower number of cases per bay. In other words, if there were more cases per bay the employee would be able to pick more items from that bay and not have to visit so many bays to reach target. We accepted that what the figures show is that the claimant had bigger picks than Mr Gowers but that Mr Gowers nevertheless outperformed the claimant, picking a higher number of cases. The respondent denied that the claimant's performance was a problem, and we accepted that Mr Booth viewed the claimant's performance as perfectly satisfactory.

Four-week review meeting

60. The claimant had a four-week review meeting with Mr Booth on 3 December 2018. The claimant says he made a protected disclosure to Mr Booth, that:

    60.1. He had been subject to race discrimination because his white colleague, Mr Gowers, was spoken to in a nicer manner and was allocated bigger picks; and
    60.2. The workplace was unsafe because oil was not being cleaned up from the floor and pallets were unsafe.

61. Mr Booth accepted that he had had a conversation with the claimant about his picks during the claimant's four-week review meeting. However, Mr Booth denied that there was any suggestion that one of the claimant's colleagues was getting bigger picks than him because of race. Mr Booth also denied that the claimant made any mention of the way he or colleagues were spoken to or about the workspace being unsafe. In cross examination the claimant was unsure whether he had told Mr Booth about oil spills in the four-week review meeting and we therefore accepted Mr Booth's clearer evidence of what was said in the meeting.

62. The claimant said that, when he complained in the meeting, Mr Booth told him, "you're not our colour or in our gang and we run things around here and if you complain we'll get you out and you won't be kept on at all". Mr Booth denied making those comments. There was no one else present in the meeting. The contemporaneous account of the meeting, the four-week review form (page 70) supported Mr Booth's evidence, although it was he who had completed the form. However, the claimant accepted that he had signed the form to agree its contents. He told us he had not had an opportunity to read the contents of the form before signing. However, if that were the case, the act of signing it without checking the wording

suggests to us that there was nothing controversial or contentious said in the meeting. Had the conversation contained criticism by the claimant of the respondent or racist comments by Mr Booth, we consider it unlikely that the claimant would have signed the form without checking what it said. We therefore find that either the claimant agreed with the contents of the form or, if he did not check them, it was because the conversation was uncontroversial. We therefore preferred Mr Booth's account of the meeting. Mr Booth's evidence to the Tribunal also accorded with the account he gave to Mr Deighton at the time of the grievance investigation (pages 123 - 126).

63. Our observations about the credibility of the claimant's evidence set out above also incline us to prefer the evidence of Mr Booth. We find that the claimant did not make the alleged disclosures to Mr Booth in the meeting on 3 December 2019 and Mr Booth did not make the alleged comments regarding the claimant's race.

18 December 2018

64. The claimant said he disclosed to Mr Hall on or around 18 December 2018 that he was being racially discriminated against by not being given bigger picks. We have not heard evidence from Mr Hall at this hearing. However, Mr Deighton interviewed Mr Hall as part of the investigation into the claimant's grievance (contemporaneous notes of which are at pages 105 – 108). We accepted Mr Deighton's evidence, supported by those notes, that Mr Hall told him that while the claimant did mention that he felt he was not getting such big picks as other employees, he made no mention of any connection with his race. There was insufficient evidence to suggest that Mr Hall had a motive for lying to Mr Deighton, and, on the basis of the contemporaneous documentation and Mr Deighton's account of his interview with Mr Hall, we find that the claimant did not mention race discrimination to Mr Hall.

65. The claimant said he disclosed to Mr Nigel Homer, the Asset Room Manager, on or around 18 December that:

    65.1. He had been subjected to race discrimination because his white colleague, Mr Gowers, was spoken to in a nicer manner and was allocated bigger picks; and
    65.2. The workplace was unsafe because oil was not being cleaned up from the floor and pallets were unsafe.

66. In cross examination the claimant told us that he did not tell Mr Homer about the oil spillages and racist comments. He then said he could not remember if he told Mr Homer about race discrimination. Although we have not heard any evidence from Mr Homer at this hearing, the contemporaneous notes of Mr Deighton's investigatory meeting with him (page 109 - 111) made no mention of either allegation and accorded with the evidence given by Mr Deighton about the investigatory meeting. We therefore find that the claimant did not make either of the disclosures alleged to Mr Homer.

67. The claimant alleged in his claim form that Mr Homer told him "You won't get any big picks you're not our colour or in our gang and you'll be out". However, in cross examination, when asked about Mr Homer's alleged comments, the claimant told us,

"I'm not too sure what's going on but if I've said it there [in the claim form] he must have said it to me". It appeared to us that he did not in fact recall Mr Homer using those words. Further, Mr Deighton's investigation of the allegation did not conclude that Mr Homer had made racially discriminatory remarks. On the balance of probabilities, and taking account of our findings about the claimant's credibility above, we find that Mr Homer did not make the comments alleged.

68. We conclude that the claimant did not raise any concerns about race discrimination or health and safety with any of the respondent's managers prior to 1 January 2019.

1st January 2019

69. It was not disputed that, on 1 January 2019, Mr Booth confirmed to the claimant that his position would not be made permanent. Mr Booth explained that he had enquired about the extension of the claimant's fixed term contract previously, but that it was not until 1 January 2019 that he was in a position to give the claimant an answer.

70. The claimant agreed that, later that day, he reported to Mr Booth that he had fallen over and hurt himself. He went home and was off sick with concussion until the end of his contract.

Grievance

71. The claimant's case is that on 3 January 2019 he made a protected disclosure by email to the respondent's chief executive officer, Mr David Potts, saying that:
    71.1. he had been subject to race discrimination because his white colleague was spoken to in a nicer manner and was allocated bigger picks; and
    71.2. the workplace was unsafe because oil was not being cleaned up from the floor and pallets were unsafe.

72. The claimant's email (pages 32 – 33) complained of racially discriminatory comments by Mr Booth and Mr Homer and also threatened that the claimant would report the respondent to the health and safety executive for running a "dangerous warehouse".

73. The respondent conceded that the 3 January 2019 email was a protected disclosure in so far as the race discrimination allegations, but not in relation to the health and safety allegation. We find from the wording of the email that, while it made an allegation of breach of health and safety, it did not identify the nature of the alleged breach.

74. The claimant's email was forwarded to Ms Sarah Howard, the respondent's People Specialist. It was not disputed that the claimant was offered several opportunities to attend a grievance meeting and the meeting was rescheduled at his request on 16 January 2019. The claimant did not attend any of the meetings offered. He told us that this was because of his injuries and he had emailed and/or telephoned the respondent to explain. However, there was no evidence in the bundle of any response to the respondent's invites. We accepted that the respondent also offered that the claimant could participate in an investigation meeting by telephone (page 86). We found the claimant's evidence in cross examination as to why he did not take up that

offer evasive and confused. We find that the respondent carried out the investigation without any input from the claimant, because of his failure to engage with the process.

75. On 22 and 23 January 2019 Mr Deighton conducted investigatory interviews with the relevant managers and some randomly selected colleagues of the claimant (pages 105 – 126). The evidence given by Mr Booth, Mr Hall and Mr Homer to Mr Deighton has already been discussed above. From the randomly selected colleagues, Mr Deighton uncovered evidence that a racially offensive term was used during banter, and that one of the Polish workers identified that 'some people here don't like foreign people'. Mr Deighton asked and was assured by the employees who reported these issues that the managers and team leaders were not involved. We accepted Mr Deighton's evidence that he took action regarding the racist banter, but was ultimately satisfied that the managers and team leaders were not involved and were sufficiently approachable than any issues could be reported to them. His findings did not support the claimant's specific allegations and the claimant's grievance was not upheld.

76. While the claimant challenged Mr Deighton's evidence on the ground that he was friends with Mr Booth, we accepted the evidence of the respondent's witnesses that, while they had been aware of each other previously, they were not friends. We accepted that Mr Deighton, as manager of a different warehouse, was sufficiently independent for the purposes of a grievance investigation and we could see no particular motive for him to approach the investigation in bad faith. The fact that he picked out two witness accounts which could have supported the claimant's allegation, and dealt with them, suggested that he had an open mind and was prepared to take action where he found inappropriate behaviour. For these reasons we accepted his evidence in relation to its corroborative value in our fact findings above.

77. On 30 January 2019 the claimant was sent an outcome letter informing him that his grievance was not upheld (pages 127 – 128).

Reason for dismissal

78. The claimant's employment terminated on 6 January 2019. We accepted the respondent's evidence that the sole reason for termination of his employment was the expiry of his temporary fixed term contract and the fact that there was insufficient volume of work for the respondent to offer its Christmas temps permanent employment.

79. We do not find that the termination of the claimant's employment was, in any way, connected with his email to Mr Potts. He was informed on 1 January 2019 that his employment would not be continuing, before the date of the email to Mr Potts on 3 December 2019. The decision to terminate his employment was therefore taken before the disclosure regarding race discrimination was made. It is simply not plausible therefore that the principal reason for the termination of the claimant's employment was his disclosure to Mr Potts.

The Law

Protected disclosure

80. A protected disclosure is defined in Section 43A ERA as, "a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of sections 43C to 43H".

Qualifying disclosure

81. Section 43B ERA, defines a qualifying disclosure as "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following -

…

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

82. There must be a disclosure of information that amounts to the conveyance of facts, rather than merely an allegation of breach of a duty (Cavendish Munro Professional Risk Management Ltd v Geduld [201] ICR 325). We have also taken account of the guidance given by the Employment Appeals Tribunal ("EAT") in the case of Blackboy Ventures Ltd (t/a Chemistree) v Gahir UKEAT/0449/12, which are set out in full in the Respondent's written submissions.

Automatically unfair dismissal

83. Section 103A ERA provides that, "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

84. If a disclosure is a protected disclosure, the Tribunal must go on to determine whether the disclosure was the reason or principal reason for the employee's dismissal. The Tribunal must therefore examine the decision-making process in the mind of the dismissing officer, including the conscious and unconscious reasons for acting as they did.

85. Where a claimant does not have sufficient qualifying service to bring an 'ordinary' unfair dismissal claim, the burden of showing, on the balance of probabilities, that the reason for dismissal was whistleblowing rests on the claimant (Ross v Eddie Stobart Ltd EAT 0068/13).

Direct race discrimination

86. Section 39(2) of the Equality Act 2010 ("EQA") reads

An employer (A) must not discriminate against an employee of A's (B) –
…
(c) by dismissing B;
(d) by subjecting B to any other detriment.

87. Section 13 EQA reads

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others

88. Section 23(1) EQA reads

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

89. Section 136(2) EQA states the burden of proof:
…
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

Determination of the issues

Automatic unfair dismissal

90. We find above that the claimant did not make any of the alleged disclosures, with the exception of his grievance on 3 January 2019 addressed to Mr Potts, which was forwarded to Ms Murray. We agreed with the respondent's written submissions at paragraphs 31 to 34 that the evidence simply did not suggest that any other disclosures were made.

91. The respondent accepted that the part of the claimant's grievance relating to race discrimination was a protected disclosure, but disputed that the threat to report the respondent to the Health and Safety Executive was, without more, sufficient to amount to a protected disclosure. We agreed with the respondent's submissions that the bald threat made by the claimant in his grievance letter did not convey any information about what breach or circumstances the claimant considered to be a health and safety concern. In Geduld the EAT was clear that there must be a disclosure of information which amounts to the conveyance of facts, rather than an allegation of breach of a duty. The claimant's grievance did not convey any facts about health and safety concerns and that aspect of the grievance did not, therefore, amount to a qualifying disclosure for the purposes of section 43B ERA.

92. The remaining issue is therefore whether the principal reason for the termination of the claimant's employment was the protected disclosure regarding race discrimination

that he made to the respondent in his grievance on 3 January 2019. As identified above, the chronology of events does not support the claimant's argument. It was confirmed to him by Mr Booth on 1 January 2019 that he would not be kept on after the end of his fixed term contract because there was insufficient work for the Christmas temps. The decision not to retain him therefore occurred at least two days before he submitted his grievance. The protected disclosure on 3 January 2019 cannot have caused the decision which was confirmed to the claimant on 1 January 2019. We find as a fact that there was no protected disclosure made to the respondent before 3 January 2019.

93. Separately and in the alternative, we accepted the respondent's evidence that the claimant's contract was a fixed term one to cover the Christmas period and that none of the Christmas temps were kept on because there was insufficient work to justify it. We therefore find that the sole reason for the termination of the claimant's employment was the expiry of his fixed term contract.

94. The claimant's claim for automatically unfair dismissal (protected disclosure) therefore fails and is dismissed.

Direct race discrimination

95. We find above that, while there was some evidence of racially offensive banter among employees uncovered during the grievance investigation, there was insufficient evidence of any manager or team leader speaking to the claimant less pleasantly than they spoke to white employees, in particular Mr Gowers. The evidence of banter amongst employees was insufficient, on its own, to shift
the burden of proof to the respondent, in our view. Further and separately, we find that the evidence gathered by Mr Deighton for the grievance investigation contradicted the claimant's allegation, in that it confirmed that the team leaders and managers were not involved in such banter and were approachable and any issues could be reported to them.

96. We accepted the evidence of Mr Booth that he did not make the comments which he is alleged to have made in the four-weekly review meeting on 3 December 2018. For the reasons set out above, we preferred Mr Booth's account and doubted the credibility of the claimant's account.

97. We found from, in particular, the evidence relating to Mr Deighton's investigation, the lack of corroborative evidence to support the claimant's account and our doubts about the claimant's credibility in general, that Mr Homer did not make the comments which he is alleged to have made on or around 18 December 2018.

98. We found as a fact that the claimant was not unfairly allocated picks. Page 69 clearly shows that the claimant's figure for cases per bay was higher than that of Mr Gowers. The claimant therefore had bigger picks than Mr Gowers in seven out of the eight weeks he was employed by the respondent. Mr Gowers was simply a more efficient picker than the claimant, in that he picked a higher number of cases, despite having to visit more bays to do so. The statistics show that the reverse of the claimant's

allegation is true. In fact, the claimant was systematically allocated bigger picks than Mr Gowers, whatever Mr Gowers may have told the claimant.

99. The claimant's claim for direct race discrimination fails and is dismissed.

Unauthorised deductions from wages

100. The claimant conceded at the hearing that he was not entitled to contractual sick pay, as he did not have sufficient service. He went on to argue that the respondent made an unauthorised deduction from his wages in respect of the work he carried out before going off sick on 1 January 2019. He said he was paid up to 31 December 2018, but not for 1 January 2019. That allegation was not part of the claim before us and had not previously been identified. However, in any event, the respondent's email at page 90 confirmed to the claimant that

he had been paid for the week commencing 31 December 2018. The claimant's evidence was confusing and there was insufficient evidence for us to conclude that the claimant was not paid monies to which he was entitled for 1 January 2019 or any other day. The claim of unauthorised deductions from wages fails and is dismissed.

Employment Judge Bright

Date 28 January 2020