RESERVED JUDGMENT & REASONS

EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr M Massamba		IKB Travel & Tours Ltd

Heard at: London Central

On: 24-27 September & 28 September 2018 (in chambers)

Before: Employment Judge D A Pearl
Members: Ms P Breslin
Mr J Noblemunn

Representation
Claimant: In person; final submissions only, Ms V Von Wachter (Counsel)
Respondent: Ms P Hall (Consultant)

JUDGMENT

The judgment of the Tribunal is that:

1 The claim of direct race discrimination concerning the racist comment on 28 September 2016 succeeds.

2 The Claimant's dismissal on 6 October 2016 was an act of race victimisation.

3 The failure to communicate an appeal outcome to him was an act of race victimisation.

REASONS

1 By ET1 received on 24 February 2017 the Claimant brought claims of race discrimination and automatic unfair dismissal. His one page of particulars contained seven 'Chapters'. He was employed by the Respondent as a Business and Marketing Development Manager from 1 February 2016 to 6 October 2016 when he was summarily dismissed.

2 There has been some confusion concerning the issues. On 7 June 2017 it was clarified that the Claimant's grievance alleging race discrimination dated 30 September 2016 was said to be a public interest disclosure; and his dismissal was said to be because he had made this grievance. The dismissal is put both as an automatic 'whistleblowing' unfair dismissal or (after leave to amend was granted on 25 September 2017) as race victimisation, the grievance being a protected act.

3 In the initial preliminary hearing the remaining claims were said to be "in relation to the incidents identified in the seven chapters …" This was repeated by the second Employment Judge on 25 September 2017 and, again, by the third Judge on 18 July 2018. That Employment Judge had direct race discrimination in mind but we note that, earlier, Employment Judge Spencer on 25 September 2017 said that the discrimination claim arising in the seven chapters "will include a claim for victimisation contrary to section 27 … on the basis that the Respondent … treated the Claimant to his detriment in the respects set out in the seven chapters … because the Claimant made a complaint of race discrimination."

4 The remaining claims of whistleblowing relate to two allege disclosures, concerning auto-enrolment and also his terms and conditions of employment. These claims, as became evident early in the hearing, cannot succeed and we give short reasons later on.

5 In resolving the issues we heard evidence from the Claimant; and from Mr Abir Burhan, Mr Yaser Al Khafaji, Mr Lucian Barboi and Mr Saad Al Khafaji. We issued a witness order for Mr Abdalla Ahmed but it could not be served by the Respondent who suspects that he is out of the jurisdiction. Additionally, the Claimant applied, after the close of his case, to call his Mother, largely as a character witness. We considered that this came too late and would not assist the tribunal in the overriding objective of reaching a timely and proper conclusion. We will also follow the witnesses in referring to the relevant actors by their first names. We studied a bundle of 439 pages and various further exhibits that were handed in during the hearing.

Facts

6 We would state at the outset that it is not our function to resolve each and every factual dispute that can be discerned in the evidence. Many of the facts here are agreed and documented. What follow are the findings that are necessary to decide the issues.

7 The Respondent travel agency specialises in travel and tours to the Middle East and East Africa. It is a family-owned business. Abir Burhan is a Director and is referred to as Managing Director. He is the son of Imad Burhan, who is a Director and who founded the business. Saad Al Khafaji is the General Manager and also a Director. His son, Yaser, was employed as a PA to Abir and his Father, Saad, from July 2016 to September 2017. This was stop-gap employment and he has now begun his career as a civil engineer.

8 The Claimant joined in February 2016 and it is agreed that there was a six-month probationary period. It is also agreed that he passed into non-probationary employment on 1 August 2016, with a pay rise. There is very little by way of documented concern about his performance up until that date. Abir has raised two items of poor performance in April 2016. The first (pages 67 to 69) appears to be relatively minor in that the Claimant approached Gulf Air to advertise flights to Iran when that airline had ceased flights to that country. Further, Abir himself seemed to think that they flew to Iran at that time: see page 68.

9 The second matter is omitting a subject line in a mass emailing. This had no bearing on the dismissal six months later. It does not appear to have been raised with him at the time, but if it was, it clearly had no adverse consequence for him at the conclusion of the probationary period.

10 The next two matters of underperformance alleged by Abir are as follows. First, on 19 August 2016 the Claimant sent to him an invoice for payment and he failed to tell Abir that "the Respondent's name had been denoted incorrectly in the invoice." The tribunal finds it hard to understand how this could possibly be raised as a criticism of the Claimant. The supplier generated the invoice and in the description of services (for which $800 was owed by the Respondent) described the Respondent as IKB Travel and Tours. In the top right hand box, marked "To" the supplier had written: "IKP Travel London, UK." This has no bearing on the Respondent's liability to meet the invoice and it is a criticism of the Claimant that seems to be groundless.

11 The second item is the drafting of a letter by him and not using headed notepaper. This is also a trivial error, if error it was. The text is not criticised by anyone and it was sent by the Claimant to Abir 12 September 2016 for his comments before it was sent off in final form to Camden Council. Abir replied: "please correctly format the letter in standard letter format." He also asked who in the council would be receiving it. In a second email on 15 September he told the Claimant that "real companies always use letter headed paper" and that writing basic letters was fundamental. In a third email he said that the Claimant's computer would contain a letterhead on the desktop. The Claimant says simply that he had not found it before that point and that he had no cause earlier to look for any letter headed paper. Since the draft was never sent in that form, and in the light of the emails between pages 102 and 104, any suggestion that the Claimant was underperforming, or that this was part of what was subsequently termed gross misconduct by the Respondent, cannot bear scrutiny.

12 Abir's witness statement says nothing about May and July meetings with the Claimant, the latter being for the purpose of considering what to do at the end of his probationary period. Saad, however, states that probation meetings (as he calls them) took place in May and July "to highlight the Claimant's poor performance." Indeed, he says that the Claimant was given "warnings about his work with us." This is inherently unlikely. First, it is inconsistent with Abir's evidence. Second, these warnings were never documented or subsequently referred to, other than after the dismissal. Third, Abir stated in his witness statement that on 30 September he believed the Claimant still to be "a valued member of the team and his duties were critical to business growth." Fourth, Abir

told the tribunal that the Claimant only became difficult to work with in the last few weeks before 6 October. He referred also to the Claimant being elected Employee of the Month as well as to the pay rise. In short, the evidence that the Claimant was regarded by early September as an under-performing employee is unpersuasive.

13 Saad was the Claimant's line manager. When questioned about the Respondent's allegation that the Claimant was performing poorly, his answers were far from satisfactory, or even clear. He told us that the probationary period was ended and a pay rise given because the Respondent "had to keep faith" with the Claimant, even though his performance was lacking. He thought there was no point putting anything into writing. Nor did he consider extending the probationary period. He also referred to the Claimant making "some errors here and there." His evidence that the Claimant's performance was poor is inconsistent with his positive decision to give the pay rise on the satisfactory completion of probation as well as his failure to put anything about performance into writing. We also doubt that he did have any significant concerns about performance. That part of his evidence has, in our view, crept into the statement that has been prepared for the purposes of this litigation long after the event.

14 The next relevant date is 14 September when Abir asked the Claimant to name the top 10 sales agents. His mind apparently went blank but he was able to name five. Lucian was asked at this meeting to name 10 agents and did so, although he was not asked to rank their performance. The Claimant says he felt humiliated at the meeting. The Respondent cites this as an example of underperformance. As to what occurred, the Claimant's account is based upon a 'diary' that he compiled for the CAB on about 8 to 10 October 2016, i.e. under four weeks afterwards. We have found the Claimant to be an accurate narrator of the detailed events that we describe and we accept his account here which is, we note, to be contrasted with the Respondent's more generalised references to this meeting.

15 There is no need to descend to any detail, but for reasons set out more fully in the diary entries, these being connected to holidays, pay level, pension and workload, the Claimant became unhappy after the 28 July probationary meeting and considered looking for another job.

16 The next relevant date is 21 September and, again, the clearest evidence comes from the Claimant and his diary entries. Abir does not refer to this date at all. The Claimant's evidence illustrates that relations were at this point strained with Abir but otherwise the conversation of the 21st appears to have no other relevance to the case.

17 We next come to the SMTP issue. On 27 September an employee of SMTP, who provide services to the Respondent, wrote to Abir: "I haven't heard back from you on my email below for some time now and would like to follow up on it." The email in question is at page 117 and is undated, but it was addressed to Abir and there could be no criticism of the Claimant for not dealing with it. It related to a requirement of SMTP that the Respondent remove certain names from its mailing list. We are prepared to accept that it is a standard email that the SMTP

system generates, but our finding is that it went to Abir and had not been acted on. Abir sought in evidence to blame the Claimant for not acting on 'pop-ups' that appeared on the Respondent's screen. The Claimant denied ever seeing such pop-ups. However, Abir also told us that it was an important matter for the Respondent to act on if it did not want its email account shut down. It therefore appears clear that he must have slipped up in not responding earlier to SMTP himself.

18 This is not the dispute that concerns the parties. On the following day Abir responded to the SMTP email by telling the Claimant "Michael call them speak to them then email them." The Claimant did call them, explained that the email list was being updated and asked if he should email SMTP Support; and also asked for a confirmation email of that conversation. The reply he was given over the telephone was that once the updating had occurred "they will send us back an email and I do not have to email them as they have made a note on the account."

19 At 6:40 pm he emailed Abir. "I called them and they took note on our account that we are updating our mailing list. I have removed hard bounces and complaints from the list."

20 Abir replied at 8:37 pm. "Email confirming you spoke to them. I did say call AND email them." The Claimant replied 30 minutes later (from home): "I called them and they will pass it on to Abuse team. Once the list is updated they will confirm with email." Abir replied about 10 minutes later with stringent criticism. He said he had asked the Claimant twice and given clear instructions which the Claimant had been unable to follow. This was unacceptable. He had gone against management instruction and this was not the progress that they had told him the week before they expected. He was to consider the email as a warning. The Claimant says he was astonished and shocked to read this and we accept this evidence. Abir responded in terms that, in the tribunal's industrial experience was unduly hostile, harsh and bound to antagonise the employee. The Claimant had done what he was asked to do and he had held back from writing an email to the service provider only because an email from them had been promised. No reasonable manager would issue any sort of warning in the circumstances.

21 On 28 September the Claimant states that Abdalla called him "a black monkey" in the office. Two days later he formally complained about this in an email addressed to his line manager, Saad, who was in Iraq, and copied to Imad, who was with him. He said that Ilani, an Accounts Assistant, was present, as were Lucian, Yaser and Mohammed. The Respondent's case is that the Claimant has fabricated this allegation, knowing that his employment was precarious because of his poor performance. We are required to decide whether the Claimant's allegation is made out.

22 We note, first, that the Claimant's account has always been consistent and that he set out what happened in his email of 30 September. He recounted the following. (a) Yaser laughed at the comment. (b) Abdalla said "that's good right." (c) Ilani said "no that's not good, it's offensive and rude." (d) the Claimant told Abdalla it was offensive.

23 He then sets out that the next day, in the morning, he told Yaser that he had been caused deep offence and was upset. "I asked Yaser if he could inform Abir of the details of the incident …" Yaser replied: "Oh Abdalla is an old man and you joke with him at times." The Claimant then explained that "even if a joke with someone there are boundaries on things you say and don't say. It's a serious matter and that he should inform Abir …" The response was that it did not have to be reported and Yaser said this was "as it's no big deal and if it was me I would not pass it on to Abir." The Claimant said it was a big deal and had caused him distress. Ilani then joined in and said it was offensive and not nice, adding "would you like it if someone was rude to your race?"

24 The next incident described in the grievance email has four elements. (a) On 29 September the Claimant telephoned Abir, hoping to tell him about these events, but there was no answer. (The Respondent accepts that there was a missed call.) (b) He then sent a text message: "Can you let me know when your free please? I tried calling you just now!" (c) In the late afternoon, in the office, Abir seem to avoid the Claimant. (d) After work the Claimant was heading home with Yaser and Ilani. Abir was on the other side of the road and Yaser went to speak to him. Abir did not acknowledge the Claimant.

25 Pausing at this point, this is a detailed account and our first conclusion is that in other respects we are satisfied that the Claimant has a good and accurate grasp of factual detail. We have found his credibility and accuracy of recollection to be good. Second, the Respondent's allegation that he has lied about all of this necessarily amounts to his having constructed and fabricated an account of great sophistication and some complexity. He could not have known, for example, that Abir would not pick up the telephone when he called, or answer the text message that was sent to him. Further, he has within two days set out a detailed account that involves others at various points and the Claimant could not possibly have known that his email of complaint would not be acted on or that other witnesses would not immediately be asked whether his account was true. If this was all a fabrication, the risk of it immediately unravelling was very high. However, the Claimant's evidence has struck us as measured and straightforward and the more likely explanation is that he described in the email precisely what had taken place.

26 The third factor that confirms this view is the weak attempt to set out anything to the contrary. Ilani has not been called and nor has Mohammed. It is asserted that witnesses were later interviewed, and we will return to this, but no note has been made of any of their supposed denials or their accounts. Abdalla's account, whatever it was, was not written down. There is, however, a witness statement from the absent Abdalla that we have admitted.

27 Paragraph 6 says that when he was told of the allegation "I was mortified. I cannot understand why Michael would say such a thing. Initially I thought it was a windup." This is a surprisingly scant response to the allegations that the Claimant had raised. It is devoid of any useful detail and does not deal with the conversational exchanges that the Claimant reported. It also refers to Abir approaching Abdalla about the allegation some time in the first week of October and this undermines the Respondent's case in one respect, as we note below.

This statement is in our view an evasive and damaging statement for the Respondent.

28 Other features of the evidence confirm our conclusion that the Claimant has given accurate evidence. Ilani is said to have told the Respondent (after 17 October) that he did not want to get involved. As Ms Von Wachter has pointed out, this is a curious response if the Claimant has made up the story and falsely placed Ilani right at the centre of the exchanges with Abdalla and Yaser. It suggests that he does not deny saying what the Claimant reported him to have said. On the balance of probabilities we consider that he would be more forthcoming if the Claimant had maliciously roped him into his allegations when, in reality, no offensive comment had been made and when, necessarily, the comments attributed to him were wholly untrue.

29 Next, Yaser's witness statement shortly denies the Claimant allegations, although with little detail. His stance, as was explained in evidence, is that no racist comment was made and he never reacted in the way alleged by the Claimant. There is a stark conflict between them. On one point Yaser seemed to be uncertain and it assumes some importance. He was asked about whether his Father could be contacted while he was in Baghdad. (Saad told us that he stayed at a hotel in the airport.) Yaser said "we were not in contact. He was unreachable in terms of telephone calls and emails." He then added that he was out of contact "for the most part". He expressed a guess that his Father had called his Mother while he was away. He then added "we spoke once or twice when he was away."

30 Lucian says in his statement that he heard no offensive comment but may have been wearing headphones at the time. His oral evidence is that he did not recall the racist comment or any conversation about it. He did not remember any conversations about the Claimant's dismissal. He said that he could not remember when he was asked for his account by Saad. "Maybe Saad asked me when he came back and the thing exploded." He then explained that this was the time when the tribunal claim was lodged. We have considerable doubts as to whether Saad ever did interview him about the Claimant's allegations soon after Saad returned from Baghdad.

31 The Claimant's 30 September grievance email was sent to Saad in Baghdad and also copied to Imad Burhan who was out there with him. A notable omission in this case is any evidence of any sort concerning whether Imad opened the email. Saad has nothing to say on the topic. There is no document that assists. Imad was not called. He was never asked at the time to give a statement. It is our conclusion that it is more likely than not that he opened the email. We know that the emails were received in Baghdad and there is no reason to believe that he could not have opened it soon thereafter. Imad is Abir's Father.

32 The only evidence we have is Abir stating in his witness statement that Saad and Imad both only became aware of the Claimant's email after his dismissal on 6 October. It is far from clear how Abir knows this and he does not say. Nor does he say whether or not he and his Father spoke by telephone or communicated by text or email before 6 October. There is no denial of the implied allegation that they did so. Paragraph 41 is also framed in terms of Imad not being

the correct addressee for the Claimant's grievance. Read together, paragraphs 41 to 43 do not inspire much confidence that Abir is giving the full story.

33 On Monday 3 October the Claimant did not feel well enough to go to work and shortly before 6 am he sent an email to Saad explaining this and he copied it to Yaser. Sending it to his line manager, even though he was in Iraq, is consistent with his sending the grievance to him some days earlier. Abir responded by telling the Claimant on the afternoon of 4 October that he should also let him know as well as Saad and Yaser. Some hours earlier, at 5:26 am on 4 October the Claimant told Saad that he was still not well and "I should hopefully be back at work before Thursday 6th October." It has transpired during the case that all parties read this as meaning that he would return by 6 October. He therefore did not attend the office on 5 October but Abir took him to task for this at 8 pm that evening when he emailed him and alleged that he had not let anyone know that he would be off. This was not acceptable, he said, and the Claimant must inform the Respondent he would not be attending and he also asked that he get a sick note from the doctor for the three days off that week. This email therefore raised two issues: first, whether the Claimant had informed his employer that he would not be in and second, the request for a sick note. The Claimant first sent the link to an NHS site and he was seeking to show that he was not obliged to get a doctor's sick note for that length of absence. Then, within the hour, he forwarded to Abir the email he had sent to Saad the day before. Abir then said that they could not work with 'hopefully 'and alleged "you are being very difficult with your replies."

34 It emerged in evidence that Yaser accepts that he did not inform Abir of the Claimant's email concerning sickness on 4 October. He also accepts that, although he was copied in to Abir's emails (in fact he was the main addressee) he did not respond to Abir to put him right.

35 Abir told us in evidence that when he woke up on the morning of 6 October he had no intention of dismissing the Claimant. In the light of not only what occurred that day but also the various inferences that we are prepared to draw from the earlier evidence, we reject this evidence. His suggestion that he decided to dismiss the Claimant as a result of what they discussed over the telephone morning is one we consider to be far-fetched. In any event, there is on page 426 a statement that Abir at some stage made, although we do not know when. This states that in the final two weeks of his employment, before 6 October, the Claimant "had become very aggressive and uncooperative work hence leading to his termination." It seems plain to the tribunal that he had decided to dismiss that day. This fits in with the Claimant's account, which again we consider has to be an accurate one. He states that Abir telephoned him and said he wanted him to come up for a meeting and this is, on all the available evidence, the meeting where he intended to dismiss the Claimant. The Claimant was suspicious and asked if two other employees could come up. Abir said he and Yaser would choose who else would be present. The Claimant protested and said he wanted Ilani and one other Abir said they could not come as they were busy. The Claimant maintained his position and suggested that the conversation be recorded in lieu of his being accompanied. This was agreed.

36 The Claimant also records Abir coming down in advance of the scheduled meeting and asking him why he wanted people present and the Claimant said that he was not comfortable. Again, we find as a fact that at this point Abir knew full well that he was going to dismiss the Claimant. We also refer to paragraph 40 below.

37 The dismissal meeting itself has been recorded and we listened to some of the tape. At the outset Abir said there was no need to record the meeting but he left it there. He then gave the letter of dismissal to the Claimant that he himself had typed. This is at page 161 and should be read for its full terms. In summary, it stated that the Claimant had not grown into the role, that the job was not right for him and he was being terminated with immediate effect. It was headed 'Termination of employment for gross misconduct.' It alleged that he had been given many chances but that he still did not know who the top five sales agents were and that this was shocking. It further alleged that he regularly made mistakes and that he was poor at communication and timekeeping. Many more issues and errors could be listed, he said. The Claimant was then asked if he agreed with the letter and then, somewhat curiously, was asked if he could do anything to improve.

38 In the next exchanges he was asked "do you want to keep your job?" To which the Claimant said that that made no sense. The Claimant denied there had been warnings. Further on, Abir said that he was asking "would you like to remain in your current job?" The Claimant said: "you just terminated me so why would you ask me if I want stay in the job?" After another question from Abir he said he was going to go home. The matter came up again and the Claimant asked, understandably, what he was expected to talk about. Abir responded that it was so that he could improve in his next role, i.e. with another employer. Later on he also referred to the Claimant being very confrontational with him over the last week or two. Some of these exchanges strike the tribunal as being bizarre, particularly the repeated suggestion that asking the Claimant if he wished to remain in the company was somehow linked to helping him understand what he had done wrong. Abir said it was to help him improve in his next job. These are, to say the least, unusual points to be made by an employer dismissing an employee.

39 In evidence Abir said he wanted the Claimant to apologise and ask for his job back. This is highly unrealistic. Abir knows nothing, he said, about correct procedures, Acas guidance or unfair dismissal. He had set out no proper written warning to the Claimant, there was no advance notice of what was being discussed, the Claimant had no opportunity to contest the allegations or, beyond that, to improve and, in any event, all fairness was dispensed with. It comes as no surprise that the Claimant wanted nothing more to do with the meeting.

40 The Claimant has again, on points of detail, established his case with accuracy. He recalls Lucian being called upstairs to see Abir before the meeting and then discovering, after the meeting, that his access to the Internet and email had been disconnected. He assumes that that was why Lucian was called up and the net effect of our discussion about this with Lucian was that he agreed broadly that it may have taken place. We find that it did.

41 Abir's oral evidence was unconvincing and in part contradictory. He told us early on in his cross examination that the reason he asked the Claimant to see him was not to be terminated, but have his performance reviewed. That is plainly not the case. As we have found, Lucian had been asked to disconnect the accounts; and Abir had written a letter of dismissal. Abir then went on to say that he thought the Claimant was quite pleased that he was being dismissed and that Abir now sees the Claimant had contrived the whole of his case. He believes that he has made up his allegation of racial abuse, for his own benefit.

42 Saad also gave evidence that is difficult to accept. We have no hesitation in rejecting his assertion that the email to Gulf Air concerning flights to Iran was a "large issue." We have dealt above with some of his contradictory answers relating to the probationary period and its ending. The Respondent's evidence is that Abir told Saad that he had dismissed the Claimant after the event sometime after 6 pm on 6 October. Saad says that only then did he go back to his unopened emails to see if there was anything from the Claimant and he found the 30 September grievance email with his allegations. We were not satisfied with the accuracy of other parts of his evidence and we have considerable reservations that this is true. In any event, it does not explain what happened to the email in identical terms that Imad received. The Respondent's case is that the Claimant's dismissal had nothing to do with his allegations of race discrimination. Saad told us that once he had seen the grievance email he wondered whether it was related to the dismissal. He said that it concerned him and then immediately added that he did not see it as a problem that was linked to dismissal. Whether these could have been his thought processes at the time is, in our view, open to great doubt.

43 He said that when he came back to the UK he interviewed witnesses about the Claimant's allegations. We have already noted that this contrasts with Abdalla saying in his witness statement that in the first week of October Abir spoke to him about those allegations. As we have noted, there is no written evidence to confirm anything that anybody is supposed to have told Saad or Abir. After some to-ing and fro-ing in cross examination, Saad accepted that he came to the view after he had spoken to people shortly after his return that the Claimant had lied and given a false story. He accepted that this could be paraphrased as the Claimant engineering a cynical ploy so as to make a claim in the event that he was dismissed. This was also the view of his son, Yaser.

44 This makes the decision that Saad should hear the Claimant's appeal unsustainable. There is no question on the evidence that we have received that Saad was merely going through the motions and had already decided that the Claimant was a fraud and a liar. In a letter sent between the original grounds of appeal and the appeal itself, the Claimant told Saad that his belief was that the real reason for dismissal was that "you did not want to deal with racial abuse and discrimination, and instead of taking up this issue with Abdulla you decided to dismiss me, under a false catalogue of alleged wrongdoings." (Page 176.) This was repeated by the Claimant during the appeal hearing.

45 The Respondent accepts that it never communicated the appeal outcome or any outcome to the Claimant. We note at the beginning of the Claimant's notes of the appeal Mr Saad saying that he would get back to him as soon as possible after

that day, a point also to be found in the Respondent's version. On 21 December he said in an email that he hoped the outcome would be available by the end of that week. There are further conflicts in Saad's evidence. For example, his witness statement does not say that he spoke to staff shortly after his return from Iraq, but it does say that he discussed the matter with Abir after the appeal and it was then that Abir told him that he had spoken to Abdalla and the other members of staff. There is no reconciliation of the two positions. A further discrepancy is the witness statement saying that no outcome on the appeal was given to the Claimant, in the first instance, because Saad was too busy, whereas in evidence he said he may have thought that there was no need to send him an outcome. By this point, as he told us, he thought the Claimant was a liar.

46 We need to make a finding on the central question as to whether or not Abir knew of the Claimant's grievance when he dismissed him. The Respondent's case is based on two pillars. First, that the agreement email was not sent to Abir and, second, that Saad did not open or see the email until after the dismissal. We consider that on the balance of probabilities both of these propositions are not made out but, on the contrary, it is more likely than not that the news about the Claimant's grievance email, or its terms, were known by the point of dismissal. We have no hesitation in drawing at inference from the primary facts and we will set out reasoning in the conclusions below.

Submissions

47 We are grateful to both representatives for their cogent submissions.

The Law

48 Section 13(1) of the Equality Act 2010 provides that 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.

Section 23(1) provides that: "On a comparison of case for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case."

Section 27 of the 2010 Act in its material part provides that A victimises B if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

Section136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics, including race):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine

carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." Mummery LJ returned to the theme in dealing with the competing arguments that have emerged concerning the words "in the absence of an adequate explanation." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Conclusions

The central dispute of fact

49 We refer to paragraph 46 above. The tribunal is asked by the Claimant to infer that Abir knew of his protected act, the 30 September email to Saad. It is said that it defies credibility that the news could not have been communicated to Abir, probably via his own Father, Imad. We will deal with this in stages.

50 First, the Respondent's evidence was, to say the least, unpersuasive and it failed all the conventional canons by which credibility, or accuracy, is judged. Where some detail might have been expected in statements, it was sometimes absent. Relevant things were said in oral evidence that contradicted the statements. There were also evident contradictions in within the accounts of Abir and Saad when they gave oral evidence.

51 Second, it might be thought that the Claimant's credibility is irrelevant to the question, but his accuracy comes into play because the Respondent's case goes beyond denying knowledge of the protected act. It is firmly said that the racist comment was never made. That seemingly raises the defence of bad faith, although Ms Hall has not referred to s27(3) in terms. What we are addressing here is the allegation that the Claimant has fabricated a story about such a comment, because he knew he was either going to be dismissed, or that dismissal was likely, and he set up a false allegation for use after the event, in order to obtain compensation.

52 We regard this as a fanciful theory. If this is really what happened, the Claimant would, we assume, if acting rationally, have ensured that he sent the grievance to Abir, as opposed to Saad (his line manager, in Iraq on business.) It is clear that he did twice try to contact him: he could not have known that Abir would be unavailable or not respond. Moreover, the fabrication of a false allegation would have been very risky. He did not know that the email would not (as is now contended) be immediately seen by the two recipients abroad. He did not know there would not have been some investigation straight away. Trying to speak to Abir suggests that he did want the matter looked into. As we conclude, below, the

evidence is clear that the racist comment was said. But, this still does not answer the question as to whether Abir knew of the protected act.

53 There are a number of routes by which he could have obtained knowledge. (a) Yaser could have told him. The Claimant says that he saw them speaking the next day in the street. He believes that Abir was avoiding him. In some cases, the suspicions or intuitions of an employee have to be put on one side. Here, however, the Claimant has been accurate in his detailed evidence and his intuitions have been amply confirmed in the case of the pre-dismissal telephone call from Abir, in which he asked to have witnesses at the proposed meeting. If the racist incident happened, as we conclude it did, then the chances of Yaser not telling Abir seem to us to be small; and the Claimant's evidence suggests that he did just that. (b) Imad opened the email and told his son about the allegation. This seems to us to be the most likely inference to be derived from the evidence, including the absence of any statement or information from Imad. (c) Saad either opened the email or was told its contents by Imad, who had opened it. He would then speak to Yaser and, in all probability, Abir but, in any event, the likely outcome is that Abir would know of the grievance.

54 Our reasoning is more expansive that Ms Von Wachter's (and she heard no evidence) but it comes to the same conclusion. It is unthinkable, she submits, that in this family business Abir was ignorant of the grievance. We agree and draw the inference that he did know of it.

55 The irrationality of the decision to dismiss is a factor we have also taken into account. Abir had some notion about gross misconduct, as notice pay was not paid, but to apply the concept of very serious, fundamental breach to these alleged minor acts is highly unusual and suggests another motive. His evidence about not intending to dismiss the Claimant, then deciding to do so after the Claimant asked for witnesses at what he thought might be a dismissal meeting, then dismissing him because of his attitude, is all verging on the absurd. Asking him if he wanted to carry on working after he had handed him a letter of dismissal is no different. We infer that there was a different motive.

56 We are entitled to follow the words of the statute. The overall evidence discloses ample material (and findings) from which a properly directed tribunal could find or infer victimisation; and the Respondent has failed by evidence to prove that the protected act (the 30 September grievance) was not the reason for dismissal. However, we would record that we are not solely reliant on the 'reverse burden of proof.' We can draw inferences of fact from what are sometimes termed primary facts. From those primary facts we here infer that Abir came to know of the protected act. In the light of his denials and the other factors we have referred to, we conclude that his knowledge of this grievance, with its allegation of race discrimination, was the prompt or reason why he was dismissed. If the Claimant had not reported the racist remark there is no reason to think that he would have been dismissed in such an irrational way; or that the Respondent's evidence would have been so convoluted and unconvincing. It follows that the claim that the dismissal was an act of race victimisation succeeds.

The racist remark

57 As will be apparent, the suggestion that the Claimant has invented the remark so as to forestall an anticipated dismissal, or profit from it, is one we regard as groundless. The Claimant's account is straightforward and the Respondent has not convincingly dealt with it in evidence. In so far as Yaser's evidence contradicts the Claimant's account, we reject it. We refer to our factual findings set out at paragraphs 21 to 30 above. We are satisfied that Abdalla called him a black monkey, as he has alleged; that the Claimant wanted Abir to know what had happened, that he asked Yaser to tell Abir, that he complained within a reasonably short time thereafter in a detailed email and that he has testified truthfully.

58 The only live issue is the factual one as to whether the remark was made. There is no dispute that it constitutes direct race discrimination and it must follow that this claim under section 13 succeeds.

'Whistle-blowing'

59 It is unnecessary to decide whether the grievance could be a protected, qualifying disclosure, as there is a complete factual overlap between this claim and the victimisation claim. We do not adjudicate whether the disclosure was reasonably believed to be in the public interest.

60 The other claims under this head cannot succeed and Ms Von Wachter recognises this in her closing remarks. Any question or request about auto-enrolment could not have been a relevant disclosure because there could have been no breach of legal obligation at that time or any reasonable belief of a future breach. Again, we do not say whether it was potentially believed, reasonably, to be in the public interest. The second alleged disclosure relates to written terms and conditions and there is no possibility that this could pass the public interest test. More important, in both cases any suggestion that the alleged disclosures influenced Abir must fail. There is a complete absence of any evidence that suggests this was this the case, indeed it seems most improbable.

The Appeal

61 We regard the remaining 'chapters' in the ET1 particulars as setting out the narrative, with the exception of No 7. This alleges that Saad never communicated any outcome on the appeal. This appears to be a claim of victimisation, ie the nature of the grievance (and the appeal) which raised race discrimination was the reason (or a contributory reason) for never deciding the appeal and informing the Claimant of that decision. We refer to paragraphs 44 and 45 above. The burden of proof again passes under stage 1 of Igen and the Respondent fails to discharge it. Moreover, Saad was clearly of the view that the Claimant had lied and, in the circumstances, that must have been a view he held with some conviction. He had lied about an allegation of racism. We infer that this was a significant factor that explains why Saad did not communicate the appeal outcome to him. The victimisation claim accordingly succeeds.

Remedy

62 A one day remedy hearing is required and the tribunal will be writing soon to the parties with a notice of hearing. Once received, directions should be agreed speedily and, if this is not possible, we would ask the parties forthwith to seek a telephone hearing for directions with the Employment Judge.

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Employment Judge Pearl

Date 5 October 2018

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 October 2018

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FOR THE TRIBUNAL OFFICE