EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Selvamani Sivalingam	v	Securitas Security Services Limited

Heard at: Cambridge

On: 20 & 21 November 2017
22 & 23 January 2018 and
19 & 20 February 2018 (in chambers)

Before: Employment Judge K J Palmer

Members : Mr T N Williams
Mr M Reuby

Appearances:

For the Claimant: In person
For the Respondent: Mr J Campbell (Solicitor)

RESERVED JUDGMENT

It is the unanimous Judgment of this tribunal that:

1. The claimant's claim in direct race discrimination under Section 13 of the Equality Act 2010 fails and is dismissed.

2. The claimant's claim for unlawful deduction of wages under Section13 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

1. This matter came before this Tribunal and occupied four days of hearing time and two days in chambers.

2. The Claimant, who at the commencement of this hearing remained employed by the Respondent as a security officer/receptionist commenced work on 28 August 2012. He presented a variety of claims against the Respondent and against the

Respondent's client Vinci Construction UK Limited under cover of an ET1 presented to the Huntingdon Employment Tribunal on 21 February 2017.

3. The matter came before Judge Tynan in a Preliminary Hearing on 15 June 2017 and I do not propose to repeat the Judgment and Orders of Judge Tynan which were very detailed, comprehensive and clear. Essentially Judge Tynan struck out all claims against Vinci Construction UK Limited leaving only claims against the Respondent extant.

4. He made a series of Orders including an Order that the Claimant provide further and better particulars of the claims which survived.

5. Suffice to say that at the commencement of this hearing both parties agreed that the only claims surviving were as follows:

   1 A claim in direct race discrimination against the Respondent under Section 13 of the Equality Act 2010.

   2 A claim for unlawful deduction of wages against the Respondent under Section 13 of the Employment Rights Act 1996.

6. The Claimant provided the further and better particulars ordered by Judge Tynan under cover of a letter dated 7 July 2017.

7. The Tribunal had before it two bundles marked 'R1' and 'R2' and various other documents which were loosely handed up to us including written submissions from both parties and various authorities to go with the Claimant's Schedule of Loss. There was also a series of additional documents handed up which were simply clearer photographs of those already appearing in the bundle.

8. A further document marked 'R3' dealing with the Claimant's unlawful deduction claim and the payments made to him was also handed up during the course of the hearing.

9. During the course of the 4 day live hearing the Tribunal heard evidence from the Claimant and from a Mr Jean Brun, an employee of the Respondent called by the Claimant and appearing pursuant to a Witness Order. For the Respondent we heard from Mr Ben Johnson, Mr Michael Wilson, Ms Maria Minea, Mr Stewart Shand, Mr S Choudhary, Mr D Mason and Miss J Goosey. The Tribunal is most grateful to both parties for providing comprehensive written submissions setting out their cases.

FINDINGS OF FACT

10. The Claimant commenced working for the Respondent on 28 August 2012. He was employed as a Security Officer/Receptionist under the terms of a contract dated 1 February 2013 but indicating that the Claimant's continuity stretched back to 28 August 2012.

11. The Tribunal had a copy of this contract before it duly signed by both parties. The Claimant's place of work was specified as being DSV Road Limited but the place of work clause clearly specified:

> *"You are required to work at your normal place of work as set out at clause 1.6 or such other place within a reasonable distance as the Company may require".*

12. The Claimant's hours of work were set out as ten hours subject to variation. The clause clearly specifies that:

> *"Your hours of work may vary subject to a rostered shift pattern then you will only be paid for hours worked".*

13. It goes on to say:

> *"You will need to demonstrate considerable flexibility within these hours which may vary from time to time in accordance with the business or custom and needs. The Company may change the length of your daily shift to suit the customer's site requirements. Shift patterns are subject to variation and any such changes will be notified to you in advance where reasonably possible to do so".*

14. It goes on to say:

> *"If you do not work on any particular day or week you are not entitled to pay, apart from any holiday or sickness pay to which you are entitled for the period".*

15. Clause 18 states as follows:

> "***Customer removal requests***
>
> *Should you be assigned to a site and the customer requests your removal from that site for whatever reason the Company is obliged to act on the customer request and remove you.*
>
> *The Company will seek to find you alternative work and you must co-operate fully with the Company.*

If alternative work is not available, or you fail to co-operate fully with the Company in seeking to find your alternative work, this may result in the termination of your employment for 'some other substantial reason'".

16. The Respondent provides security services to customers around the UK. The Respondent has a number of different contracts on which security officers are engaged. This is in order to service its clients' needs adequately. These include permanent officers who are engaged on permanent contracts based permanently at an individual client site as well as guaranteed hours relief officers who are employees covering absences and holidays for officers on permanent contracts. These officers will move around to different client sites depending on needs. These officers are guaranteed a set portion of hours. If the officer is not provided with the requisite number of hours they will be paid for the hours they were guaranteed.

17. It is common ground between the parties that the Claimant originally worked at other sites but from about April 2014 the Claimant worked Monday to Friday at the site of the Respondent's contractor at Boeing in Milton Keynes and that on Saturdays he worked 10 hours at the DSV Road Limited site. That was the pattern of his employment from about that time through to August 2016 when the Respondent's client, Vinci Construction UK Limited ('Vinci'), demanded the removal of the Claimant from that site. His last day of working at the Boeing site was 16 August 2016.

18. It is accepted by both parties that the Claimant had a specific contract relating to his working at the Boeing site and on Saturdays at DSV. This was not in the bundle and neither party had been able to locate it. In their ET3 the Respondent accepts that this constituted a permanent contract for the Claimant with his permanent place of work being at the Boeing site and furtherance of the Respondent's contract with Vinci.

19. When questioned during the hearing the Claimant confirmed that the only differences between the contract he entered into on 1 February 2013 and the later Boeing contract was place of work, hours of work etc. Therefore the contract it is accepted would be in the same or similar format to that signed by the Claimant on 1 February 2013 save for the fact that it was a permanent contract for him to work at the Boeing site.

20. However, as emerged, the customer of the Respondent dictated that they no longer were prepared to accept the Claimant on site and sought to effect his removal under what is known as "Loss of Customer Approval" or "LOCA".

21. This is envisaged in the contract of employment as set out above at paragraph 18. The circumstances of LOCA took place over a period of time and essentially were

as a result of a significant falling out between the Claimant and the customer's on-site senior engineer Jon Myrtle.

22. We do not propose to set out here the detailed history of the Claimant's working at the Boeing site and his disagreements with Jon Myrtle. These were detailed both in witness evidence produced throughout the four day hearing and in the documents before us extending to over 570 pages.

23. In the summer of 2016 the Claimant raised complaints to the Respondent regarding what he deemed as poor treatment by one of Vinci's employees, Mr Jon Myrtle.

24. The Tribunal heard evidence from the Claimant's then line manager Ben Johnson who was at that time employed by the Respondent in the role of Area Manager. It fell to Mr Johnson to deal with the Claimant's complaints. Interestingly the Claimant in one of his complaints on 12 July 2016 makes it clear that he has no problem with Mr Johnson and in fact this he reiterated at great length during the Tribunal hearing. He felt that Mr Johnson had treated him very well and he regarded himself as having an excellent relationship with Mr Johnson.

25. As already specified above the Claimant continued to work at the Boeing site but only until 16 August 2016 as by that time Vinci had made it clear to Mr Johnson that they would not be prepared to have the Claimant back on site.

26. The documents before the Tribunal detailed a number of issues that Jon Myrtle of Vinci had raised throughout an 18 month period prior to July 2016 about the Claimant. In it Mr Myrtle expresses severe reservations about the performance of the Claimant. There is reference to there being no security officer at 06.45 one morning. John Hirst, Vinci's Boeing account manager, had an exchange concerning the lack of a guard at the appropriate time on 29 June 2015. It seems that both incidents occurred when the Claimant was expected to be on the reception.

27. Further email exchanges illustrate that there was a disconnect and a falling out between the Claimant and Jon Myrtle. More particularly an email of 23 May 2016 from Jon Myrtle to Phil Rudge and Ann Riley, colleagues at Vinci, explains in a series of numbered points the problems which Jon Myrtle sees as himself having with the Claimant in respect of the Claimant's performance. It specifies that he intends to have a meeting with the Claimant which it appears from the email he did as the bottom of the document appears to have been signed by both Jon Myrtle and the Claimant pursuant to a meeting on 23 May 2016 at 10.55 a.m. It was pursuant to that that the Claimant raised a formal complaint about Jon Myrtle in an email dated 23 May 2016. This email essentially denies the allegations of poor performance raised by Jon Myrtle in his email of the same date.

28. Ben Johnson gets involved at that stage and treats that complaint as a grievance.

29. Ben Johnson received that email on the evening of 23 May complaining about Jon Myrtle's behaviour towards him that day. The Claimant said that he had been abused by Jon Myrtle who had made false allegations about his work ethic and then refused to let him leave the office by locking the door. Interestingly, in that email the Claimant makes no mention that he had been assaulted by Jon Myrtle, a fact that he asserts later on. He also did not say that he considered any of Jon Myrtle's actions to be related to his race.

30. Ben Johnson escalated this into a grievance and accordingly invited the Claimant to a grievance meeting. Further email exchanges occurred but essentially that grievance meeting took place on 15 June. The Claimant provided a detailed document elaborating upon his original grievances running to some 7 pages. In that elaboration he for the first time alleged that he had been pushed by Jon Myrtle on 23 May. It was here that he then claimed he had been discriminated against by Jon Myrtle albeit the allegation was only a very general and vague one. Ben Johnson met with the Claimant on 15 June and afterwards met with Jon Myrtle to discuss the Claimant's grievance. The Tribunal heard evidence from Ben Johnson that Jon Myrtle had completely denied the allegations that the Claimant raised about assaulting the Claimant. He averred that he had done a great deal to support and assist the Claimant over the years but that there had been significant performance and reliability issues in relation to the Claimant. He denied that he had in any way treated the Claimant differently from other Securitas personnel working on that site. It is worth mentioning that many of those other personnel were also from ethic minority backgrounds.

31. One of the problems cited by Vinci was that the Claimant was prone to leaving site and leaving the security reception unattended. Philip Rudge, an account manager at Vinci, sent Ben Johnson an email dated 21 June 2016 where he says that if the Claimant continues to remove himself from the site without cover he will personally ask for the Claimant to be removed from the site. There are further emails in the same vein from Philip Rudge and email exchanges between Jon Myrtle and Philip Rudge, one of which set out that it had been brought to his attention that the Claimant had been attempting to adjust the position of the cctv camera set up which views the front desk.

32. Clearly both Philip Rudge and Jon Myrtle were very unhappy about the Claimant's performance and this mainly centred on him leaving the front desk unattended without telling anyone on various occasions. Complaints to Ben Johnson intensified and Ben Johnson was also accused of not gripping the situation properly.

33. This was an ongoing problem and it was clear that Ben Johnson was attempting to mediate as best he could and resolve the situation to the satisfaction of both the Claimant and Vinci.

34. At this point I think it is worth pointing out that it is really of no consequence whether Jon Myrtle and Philip Rudge were wholly justified in their views of the Claimant and his lack of performance or not. It is clear however that their motivation for their unhappiness has nothing to do with the Claimant's race. They felt, rightly or wrongly, that he was not providing a good service as a security guard. Whether there was a clash of personalities as indicated by the Claimant in his grievance meeting in January 2017 is difficult to say, however it is clear that not only Jon Myrtle was unhappy with the Claimant's performance but that so was Philip Rudge. In cross examination the Claimant admitted that in his initial complaints he did not mention anything which would suggest that Jon Myrtle's unhappiness with him was in any way connected with his race. The Claimant said that at the time he had no idea he was going to end up in a Tribunal. There is something of a pattern in the documentation before us during the course of the toing and froing of email exchanges with allegation and counter allegation but there is no mention at that time of the Claimant's belief that the supposed treatment of him was racially motivated.

35. Of course neither Jon Myrtle nor Philip Rudge are employees of the Respondent and the Claimant's claim in direct discrimination is against the Respondent so even if there was evidence that Jon Myrtle's unhappiness with the Claimant was in some way because of the Claimant's race then the issue is how the Respondent would have reacted to that and dealt with it pursuant to being directed to these issues by the Claimant.

36. It is worth remembering that at no stage in these proceedings does the Claimant raise any similar allegations of discrimination against Phil Rudge.

37. One of the difficulties with a claim such as this, of course, is that the Claimant is unrepresented and his pleadings and approach are unstructured and often multi-directional.

38. The final straw seemed to be the Claimant changing a security password on the security desk PC and failing to inform Jon Myrtle and the Claimant's colleague Michael Wilson sufficiently promptly to enable them to access the computer when he was not there. He did send an email but under cross examination accepted that sending an email at 15.17 had been rather later than what ideally would have been the case. Moreover, the Claimant accepts that he did not write anything in the log book and had not explained to the person taking over from him that he had changed the password.

39. The Claimant went on holiday after 16 August and that was the last time that he ever worked at the Boeing site.

40. Ben Johnson, whose evidence impressed the Tribunal, told us that throughout the Claimant's leave period he was attempting to arrange a further meeting with him for

the Claimant's return in early September. He accepts that there appears to be no grievance outcome letter in the Tribunal bundle of documents and cannot remember whether he sent a formal grievance outcome letter to the Claimant. We had text messages before us which illustrated the fact that he was in touch with the Claimant and of course the Claimant has been effusive in his praise of how Ben Johnson handled the matter.

41. John Myrtle sent a detailed email dated 3 November setting out criticisms of both the Claimant and of Mr Johnson's handling of their complaints.

42. Despite Mr Johnson's best efforts he was left in no doubt by Vinci that under no circumstances were they prepared to allow the Claimant back on site. This had been made clear to him in September 2016. Mr Johnson was then no longer involved as he left the Respondent company at the beginning of November and did not work from early October.

43. In his evidence he made it clear however that he did everything that he could to secure the Claimant's return to that site but that John Myrtle and Mark Edwards from Vinci would not have the Claimant back. This was explained to the Claimant by Ben Johnson on 15 September 2016 pursuant to the Claimant's return from holiday but the Claimant wrote a detailed letter to Mr Johnson dated 12 September expressing his surprise.

44. It became very clear to the Tribunal during the course of listening to the Claimant's evidence that he could simply not accept that his days of working at the Boeing site were at an end.

45. This became particularly clear during the Tribunal and during the Claimant's cross examination. Whilst his evidence was a little confused and unclear and he did on one occasion respond to a question indicating that had he been offered what he considered to be appropriate shifts after his exclusion from the Boeing site and that he would have been prepared to work elsewhere, he then contradicted himself and made it clear that he was only prepared to go back to his permanent place of work which he regarded as the Boeing site.

46. What happened was that Ben Johnson left essentially in early October 2016. The Respondent continued to pay the Claimant throughout August, September, October and the majority of November in the hope that they could, firstly persuade Vinci to take him back which fairly early on was clearly something that Vinci would not contemplate, but more particularly in the hope that they could find him work elsewhere with which he would be satisfied.

47. However, the Claimant steadfastly refused the offer of other work and was determined to return only to the Boeing site.

48. The Claimant by virtue of the customer's intervention could no longer perform his role at Boeing yet had been offered work elsewhere but refused to do it. However, the Respondent continued to pay him as if he had continued to work at Boeing in the hope of finding a resolution.

49. It is worth mentioning the evidence we heard from the employee Jean Brun called by the Claimant pursuant to a Witness Order. Mr Brum works at the Boeing site and his supervisor is John Myrtle. It was clear that the reason that the Claimant called Mr Brun was that he wished to seek his support in his allegations of conspiracy/maltreatment on the grounds of his race at the hands of John Myrtle. Mr Brun in fact gave very clear and understandable evidence very much to the contrary. He said that John Myrtle was a fair supervisor, he rubbished the suggestion that John Myrtle had adjusted the CCTV cameras to "spy" on the Claimant when he was sitting at the security desk, no doubt the reason why the Claimant was seeking to adjust those cameras. He confirmed that those working at the Boeing site were a very diverse racial and ethnic mix and that all worked well. He provided no support for the Claimant's conspiracy theories. He also made a point of telling the Tribunal that he felt that the Respondent did everything they could to persuade Vinci to retain the Claimant on site.

50. Once Ben Johnson had left the Respondent it was the responsibility of Stuart Shand to take over the management of the Claimant. The Respondent accepts that with Ben Johnson leaving the Claimant's situation rather fell into a void and that when Stuart Shand picked up matters the Claimant had been sitting at home for two months being paid for doing nothing. Stuart Shand resolved that the matter should be gripped and he spoke to John Myrtle. He was also left in no doubt that Vinci would not have the Claimant back on site in that there had been a variety of issues with the Claimant's performance which had made it impossible for Vinci to agree for the Claimant to go back to the Boeing site. This was confirmed in an email of 3 November to which we have previously referred. Tellingly, at the end of that email John Myrtle says:

> *"we are very pleased with the performance and reliability of Officer Mike Wilson, Officer Allah Ditta and Officer Mohammed Naveed but for all the reasons above we do not think it suitable for Officer Jack (the nickname often used for the Claimant) to be returned to this site."*

51. This email followed a meeting that Stuart Shand had had with John Myrtle. It then fell to Stuart Shand to deal with the LOCA matter and he felt it was appropriate for another officer to be appointed to deal with the Claimant's ongoing grievance. It was clear to Mr Shand having spoken to the Claimant that the Claimant was still very much of the mind that he would not work elsewhere other than at the Boeing site. Mr Shand felt it necessary to write to the Claimant on 17 November explaining the

position. He made it very clear that the Respondent had tried all they could to discuss the matter with Vinci and secure the Claimant's return to the Boeing site but that this simply was not going to happen and that they were insisting that the Claimant do not return. He explained that the Claimant's outstanding grievances would be dealt with by another manager and subsequently these were assigned to Mr S Choudhary. He arranged a meeting with the Claimant. This meeting took place on 23 November 2016. The Tribunal has seen the detailed notes of this meeting. This was not a grievance meeting but a LOCA meeting and an attempt to essentially get the Claimant back into work as he had been doing nothing and been paid since he left the Boeing site on 16 August 2016. The notes of the meeting would suggest that it was relatively affable and that the Claimant agreed quite happily to start working at another site in Milton Keynes as the hours in question suited him. It was also made clear to him that there was no prospect of him returning to the Boeing site. The notes of the meeting which had been signed by Stuart Shand and by the Claimant make it clear that the Claimant understood and accepted this. However, shortly after that meeting the Claimant emailed HR resiling from this and criticizing Mr Shand and the nature of the meeting.

52. The Claimant made it clear that he was not prepared to work anywhere else other than at Boeing. In essence the Claimant refused the work that was available to him. Nevertheless, on 29 November HR sent the Claimant a new contract in respect of the agreement which it thought had been reached at the meeting on 23 November confirming that his hours were an average of 36 hours subject to variation. It made it clear that if he was not available for work he would not be paid. Mr Shand wrote to the Claimant on 29 November reminding him of the meeting and his agreement to work elsewhere.

53. The Claimant continued to refuse to work and the Respondent ultimately felt they had no alternative but to cease paying the Claimant as he was refusing to work. The Claimant pulled out of all the shifts that had been offered to him pursuant to the meeting of 22 November. He refused to work as a relief officer and refused all the shifts that were offered to him in December 2016.

54. It was at this point that the Respondent stopped paying the Claimant. Thereafter, it was Mr Choudhary who dealt with the Claimant's grievance. The Tribunal heard evidence from Mr Choudhary.

55. Mr Choudhary picked up the grievance shortly after joining the Respondent on 25 November 2016. The purpose of him doing so was to deal with any outstanding points pursuant to the grievances raised by the Claimant throughout the summer of 2016. The grievance meeting took place on 13 January 2017. The Claimant provided an extensive document running to some 18 pages at the outset of the

grievance meeting. The Tribunal had the notes of the grievance meeting in the bundle.

56. The Tribunal regard it as significant that during the grievance meeting the Claimant made no reference in his complaints about John Myrtle to the issue of his race. Interestingly, in those notes in describing his relationship with John Myrtle, the Claimant said "*I think just a clash of personalities. He was angry as I questioned his wife (about where she parked). He was also not happy as he asked me to change shifts and I told him to speak to Ben Johnson*". Once again no suggestion of race.

57. In many ways this comment in the Tribunal's view sums up the position. There was a clash of personalities between the Claimant and John Myrtle. John Myrtle may have had concerns about the Claimant's performance and his preponderance for leaving the security desk unmanned. There is not a single scintilla of evidence that we have heard before this Tribunal during the four days of live hearing to support the suggestion that John Myrtle's ire with the Claimant or his treatment of the Claimant was in any way motivated by the Claimant's race.

58. It must be remembered that this is the only claim, save for the unlawful deduction of wages claim, which the Claimant pursues in these proceedings. There is no unfair dismissal claim here.

59. It is the Tribunal's view that the Claimant's arguments that John Myrtle's behaviour towards him was racially motivated is no more than an afterthought. There is simply no evidence to support any assertion that this was the case.

60. We will deal later in this Judgment with the Claimant's widening of his claim in his Further and Better Particulars to attempt to include Michael Wilson or indeed anybody else.

61. We find no fault with Mr Choudhary or the way in which he conducted the grievance process.

62. It is worth remembering that Mr Choudhary also dealt with the Claimant's rather unparticularized and unstructured claim concerning wages.

63. Mr Choudhary made it clear to the Claimant that if he did not accept work he was offered he would not be paid.

64. Mr Choudhary went to the Boeing site and met with John Myrtle concerning the Claimant's grievance. He asked him about the Claimant's allegation that John Myrtle had pushed him and once again, not for the first time, John Myrtle denied it vehemently.

65. On this occasion he prepared a written denial which was before the Tribunal. It is worth mentioning that Mr Choudhary also spoke to Mike Wilson about the Claimant's allegation.

66. Mr Choudhary sent the Claimant a formal outcome pursuant to his grievance on 2 February 2017. He did not uphold his grievance and the complaints raised in them, nor did he uphold his claim for wages for December. He made it clear that with respect to the removal of the Claimant from the Boeing site, this happened due to Vinci's concerns about Jack's performance and for no other reason. It was clear that the Respondent had received from Vinci a loss of customer approval (LOCA) request for the Claimant to be taken off the Boeing site. Stuart Shand had spoken with Vinci on a number of occasions about this as had Mr Choudhary as part of the grievance process and it was abundantly clear that Vinci were not for turning.

67. The Respondent is aware that customers can request the removal of security officers from their sites. This is in the Respondent’s contracts of employment and is also set out in the Securitas Employee Handbook. Mr Choudhary could not find sufficient evidence of the Claimant's allegations that he was pushed by John Myrtle.

68. The Claimant had also complained about Stuart Shand’s meeting in November but as previously set out it was abundantly clear that at the time the Claimant had no complaint. He signed the note.

69. The Claimant appealed the outcome of the grievance and the appeal was heard by David Mason.

70. Mr Choudhary’s position on the Claimant’s claim for wages in December was that it was clear that as he was only prepared to work on the Boeing site and had refused work elsewhere he was refusing to work and would not be paid. That was the position after the period of grace the Respondent allowed the Claimant between August and the end of November and would remain the position until such time as the Claimant took up work.

71. Of course he eventually did so in May of 2017.

72. David Mason conducted an appeal from the Claimant’s grievance before Mr Choudhary. Despite initiating this appeal the Claimant then refused to continue with it and refused to continue to engage with Mr Mason. The Claimant said that he would only continue with the grievance appeal hearing if the Respondent paid him the wages that he said he was due for which the Respondent had, to that date, concluded he was not.

73. Ultimately no formal meeting took place. There was however an exchange of correspondence between Mr Mason and the Claimant.

74. The Claimant finally returned to work in May 2017 and at the commencement of this hearing was still employed by the Respondent. The hearing was of course part heard and at the reconvened date it emerged that the Claimant was no longer employed by the Respondent. That is of no concern to this Tribunal.

The Claimant's claims and the law

The Unlawful Deduction claim

75. The Claimant's claims for unlawful deduction of wages under Section 13 of the Employment Rights Act 1996. Section 13 states as follows:

"Right not to suffer unauthorised deductions

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

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

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

The question of a deduction can only arise in respect of wages which are properly payable. Section 13(3) states:

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

76. Thus, an individual can only pursue successfully a claim under this Section if wages were properly payable and were not paid or where a deduction from those wages was made in a circumstance not covered under Section 13(1).

77. Section 23 of the ERA 1996 specifies that a Tribunal should not consider a complaint under Section 13 unless it is presented before the end of the period of three months beginning with the date of the payment of the wages from which the deduction was made, Section 23(2)(a). In the case of a total non-payment of wages, time runs from the point when the wages should have been paid.

78. In this case the Claimant did accept in evidence that his claim could not cover the period for August, September and October 2016. He accepted that he had been paid what he would have been paid had he continued to work at Boeing. He

maintained that he had been underpaid for November 2016 and also argued that he should have been paid for December and January.

79. The Claimant presented his claim to the Tribunal on 21 February 2017 and therefore the Tribunal cannot be concerned with any claims for wages after that date.

80. Section 23 also allows for circumstances where a series of deductions have taken place. Time will not run against the Claimant pursuing a claim in the Tribunal until the last of those series of deductions or to the last of the payments so received. Section 23(3).

The Claimant's claim in direct race discrimination

The Law

"13 Direct discrimination

(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."

81. The concept of treating someone "less favourably" requires some form of comparison. In order to claim direct race discrimination a claimant must have been treated less favourably than a comparator who was in the same or not materially different circumstances as that claimant. Section 23(1) Equality Act 2010. A successful direct discrimination claim depends on a Tribunal being satisfied that the Claimant was treated less favourably than a comparator because of a protected characteristic.

82. There are provisions concerning the burden of proof which are sometimes relevant. These are governed by Section 136. Section 136 (2) and (3) specify as follows:

"136 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."

83. It is worth remembering that it is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude in the absence of an adequate explanation from the Respondent that the Respondent has committed an act of discrimination. If the Claimant does not prove such facts the claim will fail. The Claimant has to prove facts from which inferences can be drawn before the burden shifts. It is not enough for a Claimant to be of different race and for there to be

different treatment, there has to be some connection between the treatment and the different race. There has to be an 'X' factor which connects the two. This is supported by the relevant case law **Ayodele v Citylink Ltd & Anor [2017] EWCA Civ 1913, Igen Ltd v Wong [2005] ICR 931,** approved by **Hewage v Grampian Health Board [2012] ICR 1054.** It is not enough for a Claimant to show there is a difference in race and a difference in treatment. Something more than that would be required before a Respondent is required to provide the non-discriminatory explanation.

84. Equally, unfair or unreasonable treatment does not of itself establish a race claim. **Zafar v Glasgow City Council.** The Tribunal is directed by the Respondent to the case of **Amnesty International v Ahmed[2009] ICR 1450.** Where the treatment about which the Claimant complains is not overtly because of race, the key question is the reason why the decision or action of the Respondent was taken. What was the Respondent's conscious or sub-conscious reason for the treatment? This involves consideration of the mental processes of the individuals responsible. Where there is no overt evidence of race discrimination the Tribunal may have to consider proceeding by way of inference from primary facts. It is important to look at all the relevant facts. Events must be seen in their proper context, bearing in mind that unfair or unreasonable treatment does not equate of itself to discriminatory treatment.

85. We are directed to the case of **Royal Bank of Scotland Plc v Mr M Morris UK EAT 0436/10.** This concerned whether the employer's unreasonable handling of an employee's race discrimination grievance was itself an act of discrimination. This case held that an incompetently investigated grievance does not of itself find discrimination.

86. As previously set out the Claimant's claim is homemade and is voluminous and largely unstructured. The original ET1 was perfunctory in terms of the discrimination claim. Judge Tynan sought Orders of further and better particulars of each act or omission that the Claimant claimed amounted to less favourable treatment of him by the Respondent including dates. In each case the Claimant was asked to state with whom he compared his treatment. He can of course rely upon a hypothetical comparator.

87. In his further and better particulars the Claimant continues to advance his principal claim set out in the ET1 that the treatment meted out to him by John Myrtle was discriminatory and forms the basis of his claim in discrimination.

88. However, he appears to introduce fresh claims about Michael Wilson, another employee of the Respondent. No such claims appear in the ET1. This Tribunal is asked by the Respondent to consider that such claims should not form part of this claim before this Tribunal. No claims in respect of Michael Wilson have previously

been made by the Claimant in these proceedings. When asked why he had not included them in his original ET1 during the course of his cross-examination he said that he had overlooked Mr Wilson's name.

89. In the Respondent's submissions they argue that any claims relating to the actions of Michael Wilson are out of time. The ET1 was presented on 21 February 2017 and no mention of Michael Wilson was made until 6 July 2017 in the further and better particulars. No mention was made at the Preliminary Hearing of Michael Wilson.

90. Claims in discrimination must be made and submitted before " the end of the period of 3 months starting with the date of the act to which the complaint relates" (Section 123(1) Equality Act 2010).

91. Acts occurring more than three months before a claim is brought may still form the basis of a claim if they are part of conduct existing over a period and the claim is brought within three months of the end of that period (Section 123)(3)).

92. The Respondent argues that any complaints against Michael Wilson are out of time and clearly on the facts could not amount to conduct extending over a period of time.

93. They also point out that out of time issues have already been considered by the Tribunal in respect of the Claimant's claims against Vinci by Judge Tynan at the Preliminary Hearing on 15 June 2017.

94. The Tribunal has a discretion to extend time where it considers it just and equitable to do so.

Submissions

95. The Tribunal has detailed submissions from both parties for which the Tribunal is most grateful. The Respondent's descended into great detail dealing with each and every claim in the Claimant's further and better particulars.

96. The Claimant's submissions are not legally structured as the Claimant is not a lawyer but the Tribunal has considered and read them in detail nonetheless.

Conclusions

The Claimant's claim in Unlawful Deduction of Wages

97. The Claimant worked at the Boeing site from Monday to Friday for a number of years until such time as the Respondent's customer Vinci demanded that the Claimant be removed from that site pursuant to the falling out between the Claimant and John Mytle, but also as a result of concerns raised by other employees of the Respondent's client, Vinci. This resulted in a LOCA request from Vinci in respect of

the Claimant. The Claimant left to go on annual leave on 16 August 2016 and that was the last time he worked at the Boeing site. Vinci, despite Herculean attempts by the Respondent to persuade them to take the Claimant back refused to do so.

98. Between 16 August 2016 and the end of November 2016 the Claimant did not work. He was on annual leave until early September but nevertheless the Respondent decided to continue to pay him as if he had continued to work at the Boeing site. The reason for this was that they wished to attempt to resolve the situation regarding the Claimant's in limbo status without loss to the Claimant. There was certainly a loss of focus on behalf of the Respondent after Ben Johnson left in early October but Stuart Shand picked up the mantle in November.

99. It was only after the meeting with Mr Shand and the Claimant on 22 November 2016 at which the Claimant agreed to start working at another site in Milton Keynes that he was sent a fresh contract of employment and the Respondent agreed to pay him only if and when he worked in respect of shifts offered to him. He was offered innumerable shifts but refused to do them resiling from his agreement at that meeting on 22 November and reverting to his long held argument that he would only return to work if he could work at the Boeing site.

100. The Respondent therefore stopped paying him from the beginning of December right through to May 2017 when ultimately he did agree to work elsewhere.

101. The contractual position is as accepted by the Respondent that the Claimant was employed as a permanent employee on the Boeing site. That was the case until, following a loss of customer approval (LOCA) he ceased to work there. His last shift being 16 August 2016.

102. Whilst no contract was before the Tribunal which related to the Claimant's work at the Boeing site we had sight of the previous contract he signed in 2013 and the Company Handbook. Both make it clear that in the event that there is a loss of customer approval (LOCA) an employee cannot continue to work at that site and must cooperate with the Respondent in seeking to be placed in work elsewhere. It is abundantly clear from the evidence that we have heard that the Respondent bent over backwards to attempt to reverse the loss of approval in that Ben Johnson, Stuart Shand and S Choudhary approached Vinci in this respect. They could not possibly have done more in this respect. The Respondent then did everything they could to find the Claimant suitable work at another site yet he refused to do it. The Tribunal considers that contractually the Claimant was not entitled to be paid when he chose not to work. In fact, it is the Tribunal's conclusion and Judgment that the Respondent could have stopped paying the Claimant's salary after his return from holiday in early September. They chose not to do so and partially through inactivity but partially due to wishing to seek a resolution to the difficulties they were facing with the Claimant they continued to pay him until the end of November. After the

meeting with Stuart Shand when the Claimant had agreed to go elsewhere and then subsequently refused to do so, he had no contractual entitlement to be paid. He was offered shifts but refused them. That refusal disentitled him to payment. Therefore it is this Tribunal's Judgment that the Claimant was not entitled to be paid for December, January or February.

103. There was much discussion in the Tribunal about the wages which the Claimant was paid in November. There was much analysis of November payments but the Tribunal was entirely satisfied having heard evidence from Maria Minea and from the explanation put forward by Mr Campbell on behalf of the Respondent that the Claimant was paid properly and appropriately for November even though he was not actually entitled to be so paid.

104. There is no justification for the Claimant's claim for unlawful deduction of wages and accordingly it must fail. The Claimant was prevented from working at the Boeing site entirely legitimately and refused to work elsewhere.

The Claimant's claim in direct race discrimination

The jurisdictional point and the introduction of Michael Wilson into the Claimant's pleadings by virtue of his further and better particulars

105. The Tribunal considers that at no stage in the proceedings in the ET1 or indeed at the Preliminary Hearing and the submissions the Claimant put before Judge Tynan was any issue raised concerning the alleged discriminatory treatment meted out to the Claimant by Michael Wilson. This was an entirely new claim ventured during and within the Claimant's further and better particulars under cover of his letter of 6 July 2017.

106. The Claimant left the Boeing site where Michael Wilson worked on 16 August 2016. His claims enveloping Michael Wilson in his allegations were not seen until 6 July 2017. On any analysis those claims are manifestly out of time. No mention of Michael Wilson is made in the Claimant's ET1. There was only mention of John Myrtle.

107. The facts simply do not support any assertion that there was a continuing act and therefore any claim involving allegations against Michael Wilson should have been included in the Claimant's ET1. It was not. It is therefore out of time.

108. The Tribunal does not consider in the circumstances that it is appropriate for it to exercise its discretion and extend time on the just and equitable principle having mind to the appropriate authorities. The Claimant has not proffered any explanation as to why he introduced Michael Wilson at this late stage other than that it was an oversight. He also mentioned that he was claiming against the whole of the

Respondent. The Tribunal does not consider that an adequate of appropriate explanation. He has not convinced us that it is just and equitable to extend time. Therefore no part of his further and better particulars which relate to any allegations against Michael Wilson can form part of the Tribunal's deliberations. It has no jurisdiction to hear such claims.

109. Dealing with the Claimant's claims for race discrimination centring on the treatment that the Claimant alleges was meted out to him by John Myrtle of Vinci. His claim against the Respondent can only be that they failed to deal adequately with that treatment and failed to deal appropriately with complaints raised by the Claimant about that treatment.

110. John Myrtle raised several concerns about the Claimant's performance and/or behaviour in conducting his job. Those concerns were mirrored and endorsed by Phil Rudge and other employees of the Respondent's customer Vinci.

111. This Tribunal does not have to conclude that those concerns were justified. They may have been unreasonable. They may have been wholly justified. What is clear is that there was a falling out between the Claimant and John Myrtle, a fact confirmed by the Claimant in his own evidence. There was a clash of personalities as he put it, in his grievance meeting with Mr Choudhary.

112. John Myrtle appeared to co-exist perfectly happily with a range of other employees with whom he came into contact both at Vinci and the Respondent who were from ethnic minority backgrounds.

113. Based upon the authorities set out this Tribunal has to be convinced that the treatment meted out to the Claimant by John Myrtle was because it was connected with the Claimant's race.

114. The Tribunal is not concerned with whether ultimately John Myrtle did push the Claimant on 23 May or did not. John Myrtle denied that, others supported his denial and the Claimant's evidence was at best shaky as when he first complained about the incident no mention was made of pushing.

115. What is relevant is the motivation behind John Myrtle and his treatment of the Claimant in initiating essentially the Claimant's removal from the Boeing site.

116. Over the four days of live evidence in this Tribunal the Tribunal concludes that it has not heard one scintilla of evidence which supports the Claimant's claims that the motivation was in any way connected to the Claimant's race. John Myrtle clearly believed the Claimant was not performing the job sufficiently satisfactorily and sought his removal. He was happy with other security guards, some of whom were

from ethnic minority backgrounds with whom Vinci had been provided by the Respondent. He was not happy with the Claimant.

117. The Claimant has throughout these proceedings taken the view that because he is of different race and he suffered the treatment alleged, namely the removal from the Boeing site, the two must be connected. There is nothing that we have heard that could possibly make that connection. Different race and different treatment are not sufficient. There must be something more.

118. The burden of proof here cannot shift the Respondent.

119. The Tribunal is bound to deal with the fact that there was some delay in the proper management and dealing of the Claimant's grievances. Ben Johnson certainly conducted meetings with the Claimant, albeit there appears to be no formal grievance outcome. He then left and there was clearly a hiatus before the matter was properly dealt with again. Stuart Shand stepped into the breach and dealt with not the Claimant's grievances but attempts to get him back to work and the LOCA situation. Mr Choudhary then took up the cudgels and dealt with the Claimant's grievance, albeit in January of 2017.

120. Clearly the Respondent's procedures in this respect were not entirely perfect. It can be excused because Mr Johnson left rather suddenly and there clearly was a hiatus. However, the Tribunal finds there is nothing sinister in this and based on the authority set out above incompetent or inadequate investigation does not of itself find an act of discrimination.

121. In fact we feel we are bound to say that despite those procedural failings and the delay, those at the Respondent who were charged with managing the Claimant's predicament could not possibly have tried harder to find an appropriate resolution. Mr Johnson, upon whom the Claimant himself lavishes praise, did his best. The Respondent continued to pay the Claimant throughout a period of time where contractually they were not bound to do so. Mr Shand when he came onto the scene did everything he could to resolve the matter and get the Claimant back to work. In fact, he thought he had done just that pursuant to the meeting of 22 November and the fresh contract sent to the Claimant on 29 November. However, the Claimant resiled from his agreement reached at the meeting on 22 November and subsequently refused to work under the new terms agreed.

122. Mr Choudhary, when charged with dealing with the grievance in this Tribunal's judgment dealt with that grievance sympathetically, appropriately and with some distinction.

123. The Respondent bent over backwards to help the Claimant. They continued to pay him when they did not need to. They found him alternative work and offered him shifts which he refused to do.

124. There are no grounds for the Claimant's claims in direct discrimination to succeed.

125. For the reasons set out above the Claimant's claims fail and are dismissed.

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Employment Judge K J Palmer

Date: 7 March 2018…….

Sent to the parties on: .....

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For the Tribunal Office