THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS M PILFOLD**
MR I McLAUGHLIN

BETWEEN:

Mr J Wallace

Claimant

AND

Interserve Security (First) Ltd

Respondent

ON: **23, 24, 25, 26, 30 April and 1, 2, 3, 7, 8 and 9 May 2019**
(7, 8 and 9 May2019 In Chambers)

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms D Grennan, counsel**

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claims for claims health and safety detriment and dismissal, trade union detriment and race discrimination fail and are dismissed.
2. The claim for unfair dismissal which succeeds and proceeds to a remedy hearing.

REASONS

1. By a claim form presented on 19 March 2018 the claimant Mr Jeffrey Wallace claims health and safety detriment and dismissal, trade union detriment, unfair dismissal and direct race discrimination.

2. The claimant had continuous service from 6 February 2006 to 2 November 2017 as a Fire Security Officer. The claimant worked at BBC premises in London W1 on the respondent's BBC security contract for Central London. He was also a

union representative for BECTU.

The issues

3. The issues were identified at a case management hearing before Employment Judge Tayler on 4 September 2018 and were confirmed with the parties at the outset of this hearing as follows:

Health and Safety

4. Was the claimant an employee at a place where there was no representative of workers on matters of health and safety or a safety committee; or, alternatively, if there was such a representative or safety committee was it not reasonably practicable for the claimant to raise the matters by those means. In submissions the respondent accepted that there was no such representative or committee.

5. Did the claimant bring to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful, or potentially harmful, to health or safety as set out in paragraphs 3-6, 10, 12-14, 18, 19-22, 24-30, 32, 35-38 of the particulars attached to the Claim Form. In summary those issues were:

    a. On 26, 27, 28 and 29 May 2017 bringing to the attention of Mr Penson and Mr Gray lack of training, Assignment Instructions, internal security and risk assessments.
    b. On 7 June 2017 at an investigation meeting bringing to Mr Greyling Gaspar's attention issues regarding the lack of training, no PPE, Assignment Instructions, risk assessments and extreme weather conditions.
    c. On 19 and 20 June 2017 bringing to the attention of Mr Malcolm Kay, lack of training, risk assessments, Assignment Instructions, no PPE jacket, safety protection being a shelter and metal barriers.
    d. On 24 July 2017 at a disciplinary appeal hearing informing Mr Murphy of health and safety issues.
    e. On 7 August 2017 bringing to the attention of Mr Kempster, Mr Engelbrecht and Mr Havard - risk assessments, Assignment Instructions and evacuation issues. The claimant also said he did this at his disciplinary appeal hearing as reconvened on 8 August 2017.
    f. On 30 August 2017 bringing to Mr Havard's attention via email, the issue of Assignment Instructions and risk assessments. On 1 September 2017 to Mr Engelbrecht's attention regarding risk assessments and Assignment Instructions and to Mr Havard via email regarding fire evacuation. On 2 September 2017 to Mr Kempster via email on the evacuation concern and on 15 September 2017 to Mr Darren Gray regarding internal fire security and again on 16 September 2017 to Mr Darren Gray.

g. On 22 September 2017 to Mr Penson in an investigatory meeting regarding no shelter, no internal fire security and Assignment Instructions and documents.
h. On 13 October 2017 to Mr Terry Havard via email as to Assignment Instructions and risk assessments. He also mentioned the evacuation issue not being addressed. On 16 October 2017 at the disciplinary hearing with Mr Engelbrecht and Mr Havard and to the same people on 18 October 2017 by way of a summary email answering the allegations and highlighting his health and safety issues.

6. Was the claimant subject to detriment by being issued with a warning letter on 27 June 2017 because of any those matters set out in paragraph 5 above that occurred before the warning letter

7. Was the reason or principal reason for his dismissal that he had brought the matters to his employer's attention set out in paragraph 5 above

Trade Union

8. Did the claimant take part in the activities of an independent trade union at an appropriate time by acting as a trade union representative during a restructure in August 2017 and contending that the respondent was not engaging in proper consultation.

9. Was the claimant subject to detriment for the sole or principal reason of preventing or deterring him from taking part in trade union activities by those activities being brought up as an issue during the disciplinary process.

Unfair Dismissal

10. What was the reason for the dismissal of the claimant? The respondent relies on conduct being that the claimant allegedly failed to follow management instruction to carry out bag searches and used a mobile phone while on duty.

11. Did the respondent have a genuine belief that the claimant was guilty of the conduct found against him?

12. Was any such belief formed on reasonable grounds?

13. Did the respondent conduct a reasonable investigation? The claimant contends in particular that the respondent:

a. Failed to investigate all relevant witnesses.
b. Did not charge with, or question the claimant about, mobile phone use or bringing the respondent into disrepute in the investigation
c. Failed to investigate whether the claimant brought the company into disrepute.
d. Mr Walker failed to put forward in the investigation the evidence of Mr Gray that the claimant had breached no site rule.

e. Failed to give similar weight to evidence in favour of the claimant as to that against him.

14. Was dismissal within the band of reasonable responses?

Race discrimination

15. For the purposes of the race discrimination claim the claimant describes himself as Black.

16. Was the claimant subject to direct race discrimination by:

a. The manner in which his health and safety concerns were dealt with – the claimant contends that such concerns and grievances were treated less seriously when raised by black employees.

b. Failing to interview black witnesses in the investigation

c. By being dismissed

17. The claimant relies on Ms Marcela Hawryluk (on mobile phone use) and Paul Ellis (dismissal) as actual comparators or, if their situations were materially different, in the construction of hypothetical comparators. The named comparators were said to be White.

Remedy

18. If successful, to what remedy is the claimant entitled. The claimant stated at the preliminary hearing that he would be seeking re-engagement or reinstatement.

19. Should any award be reduced by reason of contributory conduct or on the basis that absent any unlawful treatment, the claimant would or might have been dismissed in any event.

Witnesses and documents

20. For the claimant the tribunal heard from the claimant and his union representative Mr Wilfred Christopher.

21. The claimant introduced a further witness statement on day 1 from Mr Paul Eghan. The respondent had not seen it. It was 4 paragraphs in length. The claimant said he had difficulty contacting Mr Eghan and sought permission to admit the evidence late. The respondent told us on day 2 that subject to being permitted to introduce new documents relating to that individual, they did not object to the late introduction of this witness. Ultimately the claimant chose not to call Mr Eghan.

22. For the respondent the tribunal heard from 9 witnesses:

a. Mr Ty Penson, Duty Security Manager (DSM) assigned to the BBC contract.
b. Mr Andreas Engelbrecht, former Cluster Manager for Central London and the dismissing officer. He left the respondent's employment on 5 January 2018.
c. Mr Terry Havard, National HR Manager at the material time.
d. Mr Darren Gray, a DSM.
e. Mr Malcolm Kay, an Account Manager who left the respondent's employment in July 2018. Mr Kay imposed the first written warning.
f. Mr Mark Murphy, an Account Director at the material time, and now an Operations Director. Mr Murphy was the appeal officer on the claimant's first written warning.
g. Mr Darren Walker, at the relevant time a Regional Account Manager for the South-East. Mr Walker left the respondent's employment on 31 December 2017. Mr Walker was the investigating officer on the second disciplinary charge.
h. Mr Jonny Kempster, a Security Manager who left the respondent's employment in February 2019.
i. Mr Paul Lotter, London Security Operations Director and appeal officer on the dismissal. Mr Lotter left the respondent's employment in June 2018.

23. The respondent's witness Mr Darren Walker now lives in Spain and his evidence was given by video link on day 5.

24. There was a bundle of documents running to over 800 pages. On day 2 the respondent introduced a further set of documents (about 25 pages) relating to issues concerning the claimant's new witness Mr Eghan. Once the claimant had an opportunity to read the documents and after lunch on day two, he objected to the introduction of those documents. At the end of day 4 the claimant told the tribunal that he had decided not to call Mr Eghan. As the documents had already been put in evidence to Mr Murphy and we considered them relevant, we told the claimant that we would accept these documents.

25. On day 5 the correct version of the disciplinary policy was introduced to the bundle at the tribunal's request.

26. We had an agreed chronology and cast list. There was a supplemental bundle from the claimant of 25 pages, to which the respondent did not object.

27. The respondent had 2 extracts of CCTV which were shown to the tribunal. The claimant saw the first just before his disciplinary hearing and the second, which became available for the appeal, just before his appeal hearing. We asked the respondent to make arrangements for the footage to be shown again to the claimant before it was shown to the tribunal. We viewed the footage after lunch on day 3. We were also given a document noting in neutral terms what it showed. The claimant was in agreement with this document.

28. We had written submissions from both parties to which they spoke. All submissions were fully considered, together with the cases referred to, even if

not expressly referred to below.

Findings of fact

29. The claimant was employed as a Fire Safety Officer (FSO). He was originally employed by Wilson James Ltd and transferred to the respondent under TUPE on 1 April 2014. He worked at the BBC's premises in London W1. The claimant is a union representative for BECTU.

30. The evidence from the National HR manager, Mr Terry Havard, was that the FSO's were essentially security officers with additional fire duties. There was no separate job description for the FSO. There was some information about their duties set out in the Assignment Instructions referred to below. We find that the FSO's were security officers with additional fire duties.

The 22 May security threat level increase

31. As a result of the terrorist bombing incident on 22 May 2017 at the Manchester Arena, the BBC raised its security threat level to critical consistent with the Government's security threat level. This is applied when there is an imminent or direct threat of an attack.

32. Immediately after the Manchester bombing incident, senior security managers at the respondent and their client the BBC had discussions as to how they should respond. They correctly anticipated that the Government would increase the national security level to critical and they had discussions as to what to do by way of response.

33. Mr Mark Murphy was the Account Director for the BBC account at the time and he had discussions with senior security managers at the BBC. They decided that they would deploy resources to the exterior of the building at which the claimant worked. The main entry point is known as the piazza. They decided to redeploy officers such as the claimant, away from prioritising his routine fire patrols to the front of building dealing with people entering the building.

34. They made a managerial decision that this was the way in which they wanted to prioritise their resource. As managers, this was a decision for them in the light of the heightened security threat. Mr Murphy rightly acknowledged that it was for them as managers to take responsibility for this decision. We agree and find that it was not for individual officers such as the claimant to decide that this was not the right way to prioritise resourcing. The claimant did not agree with the approach taken by management and the BBC.

35. On 25 May 2017 an email was sent by Ms Carol Ann Kinley-Smith the Head of SSR – Safety, Security and Resilience in Corporate Security and Investigations at the BBC to the respondent's Operations Managers (page 249). This stated that an instruction had been given by the Deputy Director General of the BBC that there should be searching of all visitors to all BBC buildings where they had guard capacity with immediate effect and until further notice. It was accepted that this would be challenging. On day 7 the claimant disputed that there had

been any such instruction from the BBC. We are satisfied and find that the email of 25 May 2017 was genuine and the BBC gave those instructions.

36. The respondent began to implement bag searches outside their London W1 sites.

The first disciplinary incident: night shift 28/29 May 2017

37. On 25 May 2017 on starting his next shift following some days off, the claimant was told by the Duty Security Manager (DSM) Mr Ty Penson that in response to the heightened security level, his normal duties were stood down and all FSO's had been reassigned to carry out bag searching duties. This was explained by Mr Penson at the daily briefing at the start of the shift. The claimant expressed his concerns to Mr Penson. Mr Penson and the claimant had worked together for about 11 years as Mr Penson also worked at Wilson James Ltd and transferred to the respondent.

38. The claimant told Mr Penson that he had never conducted a bag search or received training, instructions or information on how to do it as he considered it outside his normal duties. The respondent's witnesses disputed this contention. They said that as the claimant has the necessary SIA licence (Security Industry Authority) as a security guard, he has been trained as a matter of course in bag searching. The claimant accepted that he did this training in about 2004/2005 but he could not recall if it included bag searches. All of the respondent's security officers have the SIA training; they are not employed without it. It was not in dispute that one of the key points in bag searching is that the officer should not put his or her hand into the bag.

39. Mr Kempster is an SIA trainer and his evidence was that bag searching was a module on the course. We find on a balance of probabilities that as the claimant could not recall, rather than denying it and on Mr Kempster's evidence as to being a trainer, that the claimant was trained on bag searching. We find it is a basic security practice which the claimant had been trained in. The claimant accepted in evidence and we find that it was reasonable for his employer to believe that he was capable of conducting a basic bag search.

40. Mr Penson asked the claimant to sign the daily briefing sheet (page 251). He declined to do so, instead setting out his points of dispute. Every day a briefing sheet is signed by the security officers at the start of the shift. The purpose of it is to explain to the team anything that they need to be aware of to undertake their duties at the start of the day. The staff are required to sign the sheet to confirm that they have understood the instructions. It is important to the respondent that the briefing is given and the sheet is signed by the security personnel.

41. The claimant noted on the sheet that he contested duties numbered 02 and 05. These were to do with ID checks and the requirement for FSO officers to man the piazza. The claimant also asked Mr Penson who was going to carry out his existing duties. The claimant asked whether there was a risk assessment for this change in his duties. The claimant was not given a written risk assessment with

this change of duty.

42. Mr Penson told the claimant that the reason for this instruction was because the client, the BBC, had requested it in the light of the increased threat level. The claimant asked Mr Penson for a copy of the Assignment Instructions. He was not given a copy by Mr Penson. We find this based on email comments from Mr Penson to Mr Kempster on 26 July 2017 (page 383) when he said he had no idea where the claimant got them from. The claimant went to a loading bay and found a copy. He then spent a significant amount of time sitting and reading this document whilst on duty.

43. The claimant asked who would be covering his normal duties inside the building. The claimant agreed that Mr Penson told him that the client was aware of this and said it was not a problem. The claimant carried out bag searching on his shift on 25 May but he said he was not confident that he was doing it to the best of his ability. On 25, 26 and 27 May he did what he was asked to do.

44. As per his contract of employment, the claimant's duties were set out in the Assignment Instructions. The claimant was also required to work such other duties required of him from time to time and was expected to demonstrate flexibility at all times (contract of employment page 63D clause 2.2).

45. The claimant complains that health and safety measures were not put in place to protect officers such that himself when reassigned to the bag searching. He also took the view that his other duties were compromised by the move to bag searches.

46. The claimant accepted that when he was on duty on 25, 26 and 27 May, he carried out bag searching. The critical threat level remained in place.

47. The claimant's case is that he raised health and safety concerns on 27 May 2017. He cannot recall with whom he raised them. He accepted that Mr Penson was not on duty that night.

<u>The first disciplinary incident on 28/29 May 2017</u>

48. The claimant was on duty on the night shift of 28/29 May 2017. Mr Darren Gray was the DSM. The claimant's colleagues all signed the daily briefing sheet but the claimant still had issues with it. He thought it was unreasonable for him to be asked to do bag searches. Mr Gray told the claimant it was a client request. The claimant said he had issues because he had not seen the AI's or the risk assessments and he did not want to go outside and do the duty without PPE, meaning his hi-vis jacket. He was concerned that he had not been told exactly what to look for when doing bag searches and what to do if he found anything.

49. It was raining heavily on the night shift of 28/29 May 2017. The claimant did not have his hi-vis jacket with him. The claimant went to the locker room to find it but it was not there. As he normally did indoor patrols we find that he did not normally require his hi-vis jacket whilst at work. We find Mr Gray offered to get hold of a jacket for the claimant but he declined.

50. Due to the rain and the issue the claimant legitimately raised about working in that weather, Mr Gray decided to move the bag search table under a sheltered area of the pizza adjacent to a Café Nero. It was about 50 metres from the place the table had been situated. Mr Gray accepted that it was not ideal as it meant that the security staff had to call over entrants to the piazza to have their bags searched but it was the best solution in the circumstances. The claimant did not carry out bag searches as required of him. Mr Gray took the claimant away from the piazza and put him back on indoor patrol.

51. The claimant agreed in evidence that it was the rain and the lack of his jacket that was the crux of the matter on the night of 28/29 May, rather than on 25, 26 and 27 May when he had carried out the bag searching.

The suspension and investigatory meeting

52. On 29 May 2017 at 02:50 hours, Mr Gray sent an email to the Cluster Manager Mr Engelbrecht and others stating that at approximately 01:30 hours on 29 May, the claimant decided he would not be going outside and doing bag searches as he did not believe it was reasonable (page 255). No other officers raised any issue about the bag searching. Mr Gray said he could not understand why the claimant had been able to do the duty for the last 4 days but it had now become a problem.

53. On page 256 we saw Mr Penson's email to Mr Engelbrecht at 08:05 hours on 29 May, dealing with 25 May, saying that the claimant "*begrudgingly manned the barrier outside……but seemed more interested in reading up on the AI's….than actually doing any work".*

54. On 2 June 2017 the claimant returned to work after his normal rest days. At the start of his shift Mr Gray asked him to sign the briefing sheet. The claimant asked if his issues regarding training, shelter (from the weather elements), the Assignment Instructions and so forth had been addressed. As the claimant was not given an answer he was happy with, he declined to sign the briefing sheet.

55. At about 08:30am on 2 June 2017 Mr Gray called the claimant to the office for a meeting with himself and Security Manager Mr Jonny Kempster. The claimant was asked why he would not sign the briefing sheet. The claimant said that he thought the duties required of him were unreasonable. Mr Kempster explained why it was necessary and told the claimant that other members of the security team were able to comply.

56. The claimant was suspended on full pay pending an investigation into failure to follow a reasonable management instruction in carrying out bag searches and the failure to sign the daily briefing sheet. He was sent an email confirming his suspension, dated 2 June 2017 (page 259).

57. Both Mr Kempster and Mr Gray told Mr Englebrecht that the claimant refused to carry out bag searches (statements at pages 261 and 263). In his subsequent investigatory meeting with Mr Gaspar, the claimant did not say he carried out

bag searches; he gave his reasons as to why he would not. He thought it was unreasonable.

58. Attached to the 2 June email was a letter confirming the suspension and giving the claimant a date of Monday 5 June 2017, for an investigatory meeting (page 260). The claimant was told that he did not have the right to be represented at the investigatory meeting and that whilst on suspension he could not contact his colleagues or the client or visit any of the respondent's managed sites. He was informed that he should not discuss the case with anyone other than the investigating officer or a chosen manager.

59. The claimant took advice from his union BECTU. The claimant is also a union representative. He did not attend an investigatory meeting on 5 June 2017 as there was a dispute with the union as to whether there was a right to be accompanied. His union representative Mr Wilfred Christopher informed Mr Engelbrecht that they had taken advice from their full time union official and they asked for a rescheduled date (page 268). They were given an alternative date.

60. The investigatory meeting took place on 7 June 2017. Mr Greyling Gaspar was the investigating officer and the claimant was accompanied by Mr Christopher. Notes were taken of that meeting - pages 275 – 279 and we also had a typed version at page 280.

61. When Mr Gaspar pressed the claimant for his reasons as to why he thought the instruction to do bag searching was unreasonable, the claimant said he did not think this was the right platform for this meeting (notes page 282). Mr Gaspar made it clear that he was not going to be the decision maker on any disciplinary issue. He was the investigating officer. He asked the claimant a number of times whether he would explain his concerns. The claimant referred in general to lack of training, instructions and risk assessments but he did not go into detail.

62. The claimant's case is that he was suspended for raising health and safety concerns and his own view was that Mr Gaspar was not interested in his concerns. We find from the notes of the investigatory meeting, Mr Gaspar tried hard to understand the claimant's concerns, using clear and short questions. We find that the reason he was suspended was for failing to carry out the essential duty of bag searches and not for raising health and safety concerns. At no stage during the investigatory process did the claimant assert that he had carried out the bag searches on 29 May 2017.

63. Mr Gaspar prepared an investigation summary - page 291. He commented that he did not do a "proper" investigation as the claimant did not wish to give reasons for his statements. We find that this is not the fault of Mr Gaspar. Although he did not say so in terms, we find that he recommended disciplinary action because this is what followed.

<u>The disciplinary hearing</u>

64. On 14 June 2017 Mr Malcolm Kay, an Account Manager, wrote to the claimant inviting him to a disciplinary hearing on 19 June 2017. The disciplinary charges

were a failure to follow a reasonable management instruction on the night shift of 28/29 May 2017 and a consistent failure to sign the daily briefing sheet issued by the DSM. The claimant was informed that it was a serious allegation which could be regarded as gross misconduct and could result in his dismissal.

65. The disciplinary officer was Mr Kay, who was outside the claimant's operational team. The claimant was represented by Mr Andrew Sturtevant, a full time union official.

66. Mr Kay asked whether the claimant felt he would have been able to carry out a bag search and the claimant replied that he would not have been comfortable. He said he was not told what to look for. Mr Kay suggested looking to see if someone had a knife in the bag, anything that would "*flag up on a common sense aspect*" and that he could then refer it to a DSM (notes page 317). It was put to the claimant in cross-examination that all Mr Kay was doing was saying that common sense should be used. The claimant took the view that he needed more training as to what to look for, in case someone brought through elements that could be used to make an explosive device and he needed to be told the signs to look for.

67. Mr Kay asked the claimant what questions he wished him to put to other people (page 319). The claimant put forward the names of Mr Engelbrecht, Mr Kempster and Mr Gray (320). He wanted Mr Kay to ask them what he should search for and upon finding something, what to do after that. We find that the claimant was given the opportunity to put forward the names of any witnesses he considered relevant and those he suggested were questioned.

The relevant version of the Assignment Instructions

68. The Assignment Instructions were at pages 123-235 of the bundle (referred to as the "AI"). There was a dispute as to what version was in place at the material time in May 2017. All pages of the document were marked "Issue number 3". There was also a number at the top of each page which was the electronic filing number. There was a table of amendments on page 130 referring to amendments and "Issue 6".

69. At page 229 we saw instructions on bag searching. It said: "*At no time is an Officer to place their hands in the bag being searched*." The claimant knew that he was not meant to put his hand in any bag he was searching. Mr Kempster described this sentence as a risk assessment. Mr Kay contradicted this and said it was not a risk assessment. The dismissing officer Mr Engelbrecht said it was an instruction. There was a lack of consistency between them on this point. We agree with Mr Englebrecht and find it was an instruction but for reasons we set out below, it was not part of the AI at the relevant time.

70. At 16:44 hours on 19 June 2017, following the disciplinary hearing, Mr Kay sent an email to Mr Engelbrecht (page 333) asking, amongst other things, whether there were any instructions *"as to what they should search "(bags/briefcases/people) and how?".* Mr Engelbrecht replied: "*No, not for the FSO role, but we have reinserted section 6.9…. in the current AI's that will be*

issued in June". Mr Engelbrecht's evidence to the tribunal was that he agreed that this could be understood as meaning that the instructions were not there, had been taken out and were being put back in for the June 2017 version; but this was not what he meant in the email to Mr Kay.

71. We saw at page 350 an email from Mr Kay to Mr Engelbrecht, sent after the disciplinary hearing and before the outcome on 23 June 2017. The subject of the email was the claimant, saying "*The NBH June AI's detailing bag searches. I just want to clarify, this is in the current AI's and not just been added now? If it is in current, do we have that copy and evidence that JW would have signed to say that he has read it?*"

72. The reply from Mr Engelbrecht was on page 351 saying "*It was not in the AIs and will be added*".

73. We find based on what Mr Engelbrecht said in those two emails, using the plain meaning of the words he used, that the section on searching, including bag searching, at section 6.9 was not in the version of the AI in place on 29 May 2017.

The first written warning

74. After the disciplinary hearing with the claimant, Mr Kay carried out further investigation with Mr Engelbrecht in an email exchange referred to above.

75. Paragraph 11.5.6 of the disciplinary policy at page 85 of the bundle says "*The Company may adjourn the disciplinary hearing if further investigations are necessary such as re-interviewing witnesses in the light of any new points raised at the hearing. Employees will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened or an outcome delivered*."

76. Mr Kay accepted that he did not give the claimant an opportunity to consider the new information he had obtained about the AI, prior to giving his disciplinary outcome. This contained the basic instructions on conducting a bag search. He took the view that he had given the claimant plenty of opportunity to ask questions and to put his case across and there was therefore no need to reconvene.

77. Mr Kay's evidence was that even if those instructions on bag searching were not in the AI's in late May 2017, it would not have affected his decision to impose a first written warning. He said that even if this section was not in the AI's at the time, it was reasonable to take the view that a security officer with 11 years experience could conduct a bag search in heightened security circumstances. Based on our findings above, we find this was a reasonable conclusion on Mr Kay's part.

78. Following the disciplinary hearing Mr Kay took the view that the claimant's suspension should be lifted and he sent an email to Mr Engelbrecht to this effect on 19 June 2017. He said: "*I would recommend that at this time, his duties be*

contained to those purely within the FSO role, should there be a requirement for him to do any duties not normally covered by the FSO, we ensure he is competently trained and that there is an auditable trail detailing the training and instructions" (page 329). He decided to lift the suspension prior to reaching a decision on the disciplinary. The claimant was pleased about this.

79. On 20 June 2017 the claimant sent Mr Kay his "summary on the allegations" (page 345). He set out the points he wanted Mr Kay to consider before making a decision.

80. The outcome of the disciplinary hearing was a first written warning sent to the claimant by letter dated 27 June 2017, page 354 setting out his decision. The duration of the warning was a period of 6 months. The reason for the warning was that the claimant had previously followed the instructions; the night of 28/29 May was the 4th night following the heightened security measures; the AI gave instructions on how to do bag searches – although our finding is that the relevant section was not in the AI at the time; the claimant had 11 years' experience with the respondent to know what was dangerous; he had signed the briefing sheet on a previous shift and he had been issued with a hi-vis jacket that he had not reported missing.

81. Mr Kay set out the information he had received in response to the questions to be followed up after the disciplinary hearing. The claimant was told in relation to risk assessments that Mr Engelbrecht, the DSM and the client had done a dynamic risk assessment in relation to bag searching. We were told by the respondent's witnesses that a dynamic risk assessment is a visual assessment carried out on the spot, it is not necessarily written down at the time. By way of a simple example, we were told that people do a dynamic risk assessment when they cross the road, by looking each way for risks.

82. In the outcome letter Mr Kay said (page 355) "…..*further misconduct on the identified issues are the possibility that further disciplinary action(s) may be taken against you which may include as one potential outcome, the decision to have you removed from your current site by way of invoking your mobility clause".*

83. The claimant was given a right of appeal against the first written warning.

84. The claimant's case is that the first written warning was imposed because he raised health and safety matters. His case is that the warning was imposed because he raised those concerns. Our finding above is that the reason the warning was imposed was because the claimant would not conduct the bag searches on 29 May 2017.

<u>The appeal against the first written warning</u>

85. On 5 July 2017 the claimant sent an email to the appeal officer Mr Mark Murphy setting out his appeal - page 363. His grounds of appeal were the heavy-handed treatment with regard to his concerns; procedural failings; the absence of facts; not being afforded the opportunity to dispute or respond to findings against him

and a conflict of interest. This was accompanied by an 8-page typed and detailed appeal document (starting at 364).

86. In the first point of his appeal the claimant said that "*the main dispute that night [29 May 2017] being the thunderstorm*". The claimant also thought the AI's were insufficient on the nature of explosive devices. The claimant agreed in evidence that his main concern on 29 May was the weather and not the issue of how to do a bag search.

87. On the issue of risk assessments, Mr Murphy told the tribunal and we find, that when he joined the respondent's employment in February 2017, one of his first questions as he did a tour of duty around the country, including to the BBC premises at Belfast and Cardiff, was to ask his managers "*where are your risk assessments*". He viewed these on screen. We find that Mr Murphy was familiar with the risk assessments in place and if he did not know the detail, he knew where to find it.

88. On 13 July 2017 Mr Murphy wrote to the claimant inviting him to an appeal hearing on 24 July 2017 (page 376). Mr Murphy was accompanied by Mr Havard as note-taker and HR adviser. The claimant was represented by Mr Christopher.

89. The claimant accepted in evidence that some of the time he felt that Mr Murphy was trying to understand his concerns and that sometimes he came across as genuinely trying to understand his issues.

90. Following the hearing on 24 July Mr Murphy made a further enquiry of Mr Penson (page 382-383). As with the further investigation carried out at the first stage, the claimant was not informed of this. Mr Murphy said that the email from Mr Penson backed up what had been said by Mr Gray so he thought it would not have assisted the claimant to see it. On our finding the email brought nothing new or helpful to the claimant. Amongst other things, it gave an example of a previous incident two years earlier where the claimant was found locked in a room on his phone when he should have been on duty. We find that this email was most unlikely to have helped the claimant's position and he suffered no prejudice.

Consultation meeting and proposed restructure

91. On 7 August 2017 there was a union consultation meeting attended by Mr Engelbrecht, Mr Kempster and Mr Havard with a number of union representatives including the claimant and Mr Christopher. The purpose of the meeting was to discuss a proposed restructure prior to a formal consultation process. The proposal was that the FSO role would change to that of Response Officer (RO), focussing more on security as opposed to fire safety.

92. The respondent accepted that at the 7 August 2017 meeting the claimant was acting as a trade union representative (submissions paragraph 56).

93. Mr Kempster worked closely with union representatives from BECTU and met with them regularly to ensure that working concerns were addressed. At the

meeting on 7 August 2017 a presentation was shown. The slides were at pages 397-404. The claimant attended the meeting in his capacity as a union representative and also as an FSO likely to be affected by the proposals. It was followed by a letter from Mr Kempster to the affected employees, including the claimant (page 420) confirming the proposals, the process and how this would affect him.

94. The letter was sent to the claimant in the ordinary post and he received it. Mr Gray also attempted to deliver it to the claimant by hand but he refused to accept it. The claimant thought that the consultation was not going to progress until there had been answers to questions he raised at the meeting. The claimant said he wanted to take union advice before accepting the letter. The claimant was aware that other FSO's had received similar letters.

95. Arrangements were made for one to one consultation meetings with all affected staff.

96. We found no evidence to suggest that the claimant asserted at any time that there had been a failure to engage in proper consultation. He did not assert this in his evidence. The issue that became clear from the evidence, related to his failure or refusal to sign for the letter confirming the proposals discussed at the 7 August meeting. This was a letter to the claimant as an FSO, an affected employee. It was not a letter sent to him in his capacity as a trade union representative.

97. The claimant's reason for not signing for the letter was because of a line in the letter (which he had already received in the post) saying if employees had any concerns they should take them to their BECTU rep (page 420). The claimant's position was that BECTU were not ready for this as they still had answers to questions outstanding.

<u>Reconvened appeal hearing</u>

98. The claimant's appeal hearing reconvened and finalised on 8 August 2017.

99. On 9 August 2017 the claimant sent Mr Murphy an email with his summary document (page 419) of his points of appeal. He continued to raise his health and safety concerns in this document.

100. On 24 August 2017 Mr Murphy wrote to the claimant with the appeal outcome. The appeal was not upheld and the first written warning remained in place (page 445 – 449). He took the view that the claimant's frequent raising of concerns bordered on the pedantic, but he also accepted some of the claimant's comments that communications in the site teams could be improved. He said he would take measures to address this.

101. On the final page of the letter (page 449) Mr Murphy said that he believed that as an experienced officer and a BECTU representative he expected him to set a good example. He said it was not a factor in his decision making but he thought the claimant was obstructive in not providing an email address for

training purposes and that he refused to accept the at risk letter. The claimant accepted in evidence that the letter he refused to accept (at page 420) was sent to him in his capacity as an FSO and not as a union representative.

102. In August 2017 the respondent tried to organise some on-line training for the claimant on bag searching. This was difficult because the claimant refused to provide an email address, which was necessary for him to embark on this training. The claimant took 2 – 3 weeks holiday in Jamaica in late August returning on about 5 September 2017.

Additional training

103. On 7 September 2017, his first day back at work from holiday, the claimant was given the training recommended by Mr Kay following the first disciplinary hearing. A report on the training was sent by email by Mr Kempster to Mr Havard with a copy to Mr Murphy on 7 September 2017 (page 472). Mr Penson gave him a tool box talk. We saw a copy of the tool box talk titled "Bag Searches" at page 469-470 which set out a list of prohibited items that might be found during a bag search and what to do if things became difficult. The claimant asked a large number of questions and Mr Kempster became involved. Mr Kempster's comment to Mr Havard was that it had taken 2 hours and 5 minutes of valuable time of three members of the management team. The training should have taken about 20 minutes.

The second incident on 15 September 2017

104. On 15 September 2017, about a week after the claimant was given the training, there was a terrorist security incident on the tube at Parson's Green. In response to this, on the evening of 15 September, the security threat level was once again raised to critical. The BBC again requested that bag searches take place on the piazza and the claimant was asked to search visitors' bags.

105. The claimant was on duty on the night of 15 September 2017. It was his first shift of a block of four and it was the first time he had been asked to do bag searching since the lifting of his suspension on 19 June 2017. The training had taken place 8 days earlier although the claimant did not accept that he had been properly trained when he still had questions outstanding.

106. At about 20:35 hours, Mr Gray asked the team to meet him on the piazza. The claimant was on patrol in another building and heard it on the radio. He made his way towards the piazza via Wogan House. Mr Gray met him at Wogan House and asked him to go to the piazza. Mr Gray told the claimant about the increase of the security level and the change of duties.

107. The claimant told Mr Gray he might have to go home but needed to make a phone call first. The claimant said he was not sure he was up to the task. It is in dispute as to whether the claimant told Mr Gray he was feeling unwell. He had a cough and a hoarse voice. All Mr Gray could recall was the claimant saying he might have to go home and he would let him know after he had made his phone call. The claimant phoned his union representative Mr Christopher,

who advised him if he was not well, to go home but if he was well then he should do the duty.

108. The claimant next saw Mr Gray at approximately 21:15 on the piazza. The claimant told Mr Gray he would be a security body at that location "*with concerns*". He said he did not recall the claimant agreeing to do the bag searches. The claimant's case is that he told Mr Gray and Mr Kempster that he would do the bag searches but "with concerns". Mr Gray's oral evidence was that the claimant did not confirm that he would do the bag searches. Mr Gray wanted a yes or no from the claimant as to whether he would do the bag searches.

109. Mr Gray typed out his own statement of events which we saw in an email of 16 September 2017 at pages 482-483 sent at 21:39 hours. In that statement Mr Gray said that he asked the claimant if he would do the bag searching and that the claimant said only that he would stand with the other officer as a security body and that he had concerns. Mr Gray's evidence was that the claimant would not confirm that he would do the bag searching. Mr Gray said in the email on page 482 "….*he avoided answering the question and said he would be at this location with the other Fire Officer".*

110. The claimant took us to the supplemental documents he introduced on day 1. We saw a document which purported to be an earlier email from Mr Gray to Mr Kempster setting out, by way of a witness statement, his version of events. Much of this email was the same, but there was a critical difference. This was shown on page 11 of the claimant's bundle. It said "*As Jeff Wallace decided he did not wish to convey his concerns with the bag searching verbally I then asked Jeff Wallace if he was willing to do bag searching on the piazza. Jeff said he would but with concerns."* The time of this email was 01:34 hours on 16 September 2017, some 20 hours earlier. The critical difference was that in the earlier email Mr Gray said that the claimant said that he was willing to do the bag searching.

111. The claimant obtained the earlier email, timed at 01:34 hours, through his Subject Access Request. We noted in the bundle at page 479 that at 02:56 hours on 16 September Mr Gray forwarded to Mr Kempster the statement from security officer Mr Mattu, which he had received at 02:53 hours; and at page 480 at 03:42 hours he forwarded a statement from Mr Frans van der Merwe, a BBC employee.

112. Mr Gray could not explain the discrepancy in the two emails under his own name. In evidence he said he could not think why he would have sent two separate emails. We do not know why Mr Gray sent two separate emails. We find based on the evidence and documents before us that the email that went before the investigatory officer and dismissing officer was the later email (timed at 21:39).

113. On 16 September 2017 at the start of the next shift, Mr Gray suspended the claimant from duty and confirmed this to Mr Kempster (page 484). This was confirmed to the claimant by letter dated 18 September 2017 (page 488). The reason for suspension was the failure to carry out a reasonable management instruction when the security threat level had been increased to its highest. The

claimant was invited to an investigatory meeting on 20 September 2017. As this was a scheduled rest today for the claimant the investigatory meeting took place on 22 September 2017.

The disciplinary investigation

114. Initially the investigating officer was Mr Penson. The investigatory meeting took place on 22 September 2017. The claimant was not accompanied at the meeting. A note-taker was present. The claimant began the meeting with a statement that he was present under protest as there was an ongoing dispute between HR and the union and the notes state that he implied that he was being treated unfavourably due to his trade union status. The claimant continually told Mr Penson that he had concerns but he did not give Mr Penson the precise details of those concerns.

115. As part of his investigation Mr Penson viewed the available CCTV footage of 15 September. He saw the claimant standing about 20 feet from the entry point when his colleague Mr Matthias was carrying out bag searches. The claimant stood by whilst Mr Matthias did the searches. The claimant was not dressed in hi-vis clothing. Most of the time he stood with his arms folded just watching what was going on. We also observed this from the CCTV footage shown to the tribunal.

116. Mr Penson wrote his part of the investigation summary (page 531A). He recommended disciplinary action because he considered there were so many contradictions in the claimant's version of events, there was no choice but to take the matter to a disciplinary.

117. During the investigatory meeting the claimant told Mr Penson that he had been on the phone to his union representative whilst he was on duty (notes page 529). The statement from the DSM Mr Gray confirmed that the claimant had been on the phone whilst on duty (page 482). Mr Gray said he told the claimant he was not paid to be on the phone.

118. The role of investigating officer was taken over by Mr Darren Walker because of difficulties with Mr Penson's shifts and annual leave. Mr Penson had previously collected the witness statements prepared by Mr Gray, CPO Mr Mohinder Mattu, Mr Kempster and Mr van der Merwe who were all on duty at the relevant time.

119. The investigation consisted of collecting the statements, speaking with the claimant and viewing the CCTV footage.

120. There was a full investigation summary at page 559 – 563 of the bundle. This was prepared Mr Walker incorporating the input of Mr Penson. The report referred to a "*concerning pattern of behaviour*" in which the claimant had been suspended twice within three months, both times for allegedly failing to carry out management instruction.

121. Mr Walker had evidence of the client's position from Mr Thomson's email of 21 September 2017 (page 503). This formed part of his investigation as set out in

his report (page 563). There was a recommendation for a disciplinary hearing.

122. Mr Walker investigated with Mr Gray the issue of the claimant being on his phone. Mr Gray covered this in his statement at paragraph 16 as to what he told Mr Walker. He said that he explained to Mr Walker that although the claimant was not using his phone on post, he had the impression that the calls were taking unnecessary precedence over his duties and this needed to be addressed. Mr Walker saw the CCTV footage as part of his investigation and he took the view (investigation summary at page 561 first bullet point) that the claimant was using his phone whilst on post at the time he should have been carrying out bag searches.

The disciplinary hearing

123. On 9 October 2017 Mr Engelbrecht wrote to the claimant inviting him to attend a disciplinary hearing on 11 October 2017 (page 565). The claimant was given the opportunity to view the CCTV prior to the disciplinary hearing (page 566). The claimant viewed it on the day of the disciplinary hearing, prior to the meeting itself.

124. The invite letter set out three disciplinary charges:

    a. Failure to comply with a reasonable management request – gross misconduct. This was that on 15 September 2017 the claimant failed to carry out bag searches.
    b. Using a mobile phone whilst on duty – misconduct. This was said to be a breach of site rules.
    c. Bringing the company into disrepute – gross misconduct. The respondent had received an email from their client Mr Jonathan Thomson, a Corporate Security Manager at the BBC, outlining their concerns about his actions (page 503 – 504).

The email from the BBC client

125. The background to this is that on 16 September 2017 Mr Kempster had a conversation with Mr Thomson. In the light of the increased security risk, Mr Thompson asked Mr Kempster whether all officers were complying with the new arrangements and Mr Kempster said all but one officer were complying. Mr Kempster said, rightly, that he was not going to lie to Mr Thomson about this. Mr Thomson asked who it was and Mr Kempster disclosed the claimant's name. This was accepted as a breach of confidentiality. The respondent accepts that they could have been more general simply stating that it was one officer and they were dealing with the matter.

126. The email from Mr Thomson said that were seeking some reassurance that the respondent had a documented, robust and timely process for dealing with poor performance and disciplinary matters. They had an expectation of the highest standard on their contract and they did not want internal staff matters adversely affecting this. They mentioned the challenging heightened security threat.

127. The claimant took the view that Mr Kempster encouraged Mr Thomson to complain about him so that they could use it as a reason to discipline or dismiss him. Mr Kempster's evidence was that initially Mr Thomson telephoned him seeking this reassurance and Mr Kempster asked Mr Thomson to put his request in writing. We find that Mr Kempster was not encouraging Mr Thomson to complain about the claimant but was asking Mr Thomson to put his concerns in writing. We find that Mr Kempster had no commercial interest in encouraging this prestigious client to complain and that he did not encourage a complaint about the claimant. We find that he wanted to document the client's concerns and record that he was dealing with them.

128. As 11 October was short notice for the claimant to obtain union representation for the disciplinary hearing, he asked for a postponement and was given a new date of 16 October 2017.

129. The disciplinary charges were threefold: (1) failure to comply with a reasonable management's request. This was the failure to undertake bag searches in response to the client instruction and the claimant's alleged refusal to provide any reason for this except that he wanted to raise concerns: (2) using his personal mobile phone whilst on duty in breach of site rules and (3) bringing the company into disrepute with the client. The first and third disciplinary charges were stated to have the potential to amount to gross misconduct.

130. Mr Penson reviewed witness statements from those present during the incident. He also carried out investigatory interviews by speaking with Mr Gray, Mr Kempster and Mr Van der Merwe. The written statements he reviewed were at pages 479 - 482 (Mr Penson's statement paragraph 16). They were witness accounts of 15 September 2017 from Mr Mattu, a CPO and a more qualified security officer, Mr Van der Merwe and Mr Gray. These individuals were all on duty on 15 September 2017.

131. Mr Walker reviewed the evidence collected by Mr Penson. Having done this, he considered that he needed further clarification on certain points. He contacted Mr Engelbrecht, Mr Kempster, Mr Gray and Mr Havard with questions (email pages 556-558). Mr Walker also reviewed the CCTV footage and said that the claimant did not search anyone's bags; he stood at the table with his arms crossed, regularly checking his phone.

132. Mr Walker's evidence was that he only requested evidence from those who were actual witnesses to the incident or on post at the time and he did not believe that he missed anyone.

133. It was not in dispute from the investigation that the claimant used his phone whilst on duty on 15 September. He admitted that he phoned Mr Christopher.

134. The claimant was represented at the disciplinary hearing by Ms Sarah Ward, BECTU National Secretary. The notes of the hearing commenced at page 604. Mr Christopher, who had represented the claimant at earlier disciplinary hearings, also attended the hearing part way through (notes page 617). Mr Engelbrecht did not have the disciplinary procedure in front of him for the

hearing, he said he was conversant with it. Mr Havard was present at the hearing as notetaker and HR adviser. The hearing lasted 3 hours. Mr Havard found the claimant's attitude "*unhelpful and obstructive*" (statement paragraph 22). Mr Havard thought the claimant gave long and drawn out answers and went off at tangents.

135. The claimant agreed that he was given an opportunity to state his case but felt at times that he was cut off.

136. The claimant's union representative Ms Ward said that the CCTV at 46 minutes in, showed the claimant conducting a proper bag search. Mr Englebrecht doubted this but as the claimant's back was to the camera, he decided to give the claimant the benefit of the doubt and found that the claimant conducted one bag search. He made this decision in the interests of reasonableness. We find this was a fair and reasonable decision on Mr Englebrecht's part, as we also saw the same footage and we could not see the claimant conducting a bag search.

The audio recording

137. The claimant told Mr Engelbrecht that he had an audio recording that proved that Mr Gray was lying. It was not clear what Mr Gray was said to have been lying about. Mr Engelbrecht asked to hear the recording. Ms Ward said that she had not heard it (notes page 626). The claimant said the battery had run out on his phone; Mr Engelbrecht offered him a charger but the claimant refused this, saying he wanted to send in a transcript. The claimant refused to play his recording. After the hearing Mr Engelbrecht asked for this recording in writing three times. It was not produced. Nor was a transcript.

138. The claimant was asked why he did not produce it. He said he did not know where he stood with it. He said it "*did not occur to him*" to seek advice from his trade union. He had Ms Ward, a senior union official with him at the hearing and we find he could easily have taken advice from his union. The claimant said he deleted the recording prior to the appeal hearing and this was confirmed by the notes of the appeal hearing on page 721.

139. On 18 October 2017 the claimant sent Mr Engelbrecht a disciplinary hearing summary setting out all the points he wanted Mr Engelbrecht to consider (page 647-651).

140. Mr Engelbrecht carried out further investigation. He gathered further information from Mr Gray and Mr Kempster. He also raised questions with Mr Brendan Matthais, a security officer with whom the claimant was working on 15 September. We saw a statement from Mr Matthias dated 20 October 2017 (page 660). Mr Matthias said that the claimant did not want do the bag searches and he went to a reception area to phone someone on his mobile.

141. Mr Englebrecht did not tell the claimant about this further investigation, before making his decision to dismiss. We find that he carried out this investigation in response to the claimant's points made in his summary of 18 October 2017 and

at the hearing itself. Mr Engelbrecht agreed in cross-examination that he had not complied with paragraph 11.5.6 of the disciplinary policy (set out above). Mr Havard's oral evidence as the HR adviser was that all that Mr Englebrecht had done was to obtain some clarification. This did not line up with Mr Englebrecht's evidence or paragraph 23 of Mr Havard's own witness statement in which he said: "*Andreas Englebrecht further investigated matters*…".

142. The version of the disciplinary policy in the bundle was a 2018 version. Mr Engelbrecht could not be sure if paragraph 11.5.6 was in the disciplinary policy when he carried out the hearing. On day 5 when the correct version of the disciplinary procedure was introduced into the bundle, we saw and find that clause 11.5.6 was present.

143. We find that Mr Englebrecht did not comply with this section of the policy. We find that he knew or ought reasonably to have known about this provision. He told us he was conversant with the policy, he chose not to have it in front of him for the disciplinary and he had access to HR advice from Mr Havard.

The disciplinary outcome

144. On 2 November 2017 Mr Engelbrecht wrote to the claimant with the disciplinary outcome letter. It was a detailed 10-page letter commencing at page 675. On charges 1 and 3 the claimant was given a final written warning and on charge 2, regarding use of his mobile phone, the claimant was given a first written warning.

145. The claimant's case is that all the managers including Mr Engelbrecht colluded and set out to dismiss him. The claimant also claimed that Mr Greyling Gaspar who was the investigating officer on his first disciplinary and Mr Thomson of the BBC were part of this collusion.

146. Mr Englebrecht found all the disciplinary charges proven. He took the view that the claimant repeatedly refused to undertake bag searches (statement paragraph 24) and that there had been an escalation of his misconduct. As it had happened before, he rightly formed the view that the claimant did not have an unblemished record. He said that the claimant did not accept that he had done anything wrong and would not alter his behaviour or show any remorse. He took the view that the claimant had refused to follow management instructions at a highly critical time when terrorist activity was anticipated. He also found that the claimant had used his phone whilst on post and that this had affected the respondent's relationship with their client, the BBC, at a time when they should have been providing a heightened security service to that client.

147. We find that these were Mr Englebrecht's genuine reasons for dismissal coupled with his views on procedural escalation which we set out below. Mr Englebrecht had the benefit of CCTV footage to assist him in forming his decision. We find that he did not dismiss the claimant because the claimant had raised health and safety concerns. He was keen to give the claimant the benefit of the doubt where he could and did so in relation to his lack of certainty as to whether the claimant had carried out one bag search. Mr Engelbrecht's view having seen the CCTV was that the claimant may have conducted one bag search so he gave the

claimant the benefit of the doubt on this. Otherwise, his view was that the claimant did not conduct any bag searches. We find that the reason for dismissal was misconduct.

148. The claimant was told (outcome letter page 683) that because he had an active first written warning, the decision to issue final written warnings on two counts resulted in his dismissal "*by procedural escalation*" – with notice. The claimant was dismissed with effect from 2 November 2017 with payment for 11 weeks' notice based on 11 years' service. He was given a right of appeal.

149. The respondent's disciplinary policy provides at paragraph 11.4.1 at page 83 of the bundle, said:

> *The company may decide to dismiss an employee in the following circumstances…..*
> *(b) progressive misconduct where there is an active final written warning on an employee's record, or*
> *(c) gross misconduct regardless of whether an employee has received any previous warnings.*

150. Mr Engelbrecth's evidence (statement paragraph 24) was that he could have dismissed the claimant for gross misconduct but did not. He dismissed him for progressive misconduct. This was supported by Mr Havard's evidence (statement paragraph 30) where he denied that the claimant was dismissed for gross misconduct. Mr Engelbrecht took HR advice from Mr Havard as to the options open to him. Both witnesses confirmed and we find that it was Mr Engelbrecht's decision.

151. The claimant's case is that management used his trade union status or activities as part of the justification for his dismissal. The claimant relied in his witness statement at paragraph 266 on a quote from the disciplinary outcome letter. The claimant did not give a page reference and we could not find the precise quote he relied upon. In the dismissal outcome letter at page 684 Mr Engelbrecht made reference to the claimant's trade union status saying "*I would like to finally conclude that this decision and all of the steps taken so far has no bearing on your trade union position despite the assertions of your representative at the meeting. [The respondent] have excellent working relationships with the majority of the BECTU union representatives including your regular negotiating officer for the W1 estate, Andrew Sturtevant. We have found all other representatives are able to communicate clearly with the business and are able to raise their concerns in a professional and timely manner. I do not believe your actions were for the benefit of your colleagues or BECTU and therefore any insinuation that this is an attack on BECTU is completely without foundation and false."*

152. The claimant submitted that he was subjected to a detriment the sole or main purpose of which was to prevent or deter him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so. The claimant also relied upon an email from Mr Kempster to Mr Gray on 29 June 2017 saying: "*we should start to use the sensible union reps to our*

advantage when dealing with difficult staff" (page 358). The detriment relied upon, as per the issues set out above, was that his trade union activities in the consultation process of August 2017 was brought up during the disciplinary process.

153. We saw in Mr Murphy's appeal outcome on the first written warning (letter dated 24 August 2017, page 449) he commented that the claimant was a BECTU representative and Mr Murphy expected the claimant to set a good example. He said it was not a factor in his decision making. He took account of the fact that that the claimant would not give an email address for the on-site training and he found him obstructive. He also said (page 449) "*…more recently you refused to sign for an 'at risk' letter as part of the current restructure – all of your other colleagues have signed and accepted these without fuss".*

154. We have found above that the letter of 9 August 2017 was sent to the claimant in his capacity as an FSO and not as a trade union member or representative.

155. We find that the mention by Mr Murphy of these matters were as illustrations of what he saw as the claimant's uncooperative behaviour. Mr Murphy made clear that this did not form part of his reasoning for not upholding the appeal against the first written warning. Furthermore this issue did not feature in the disciplinary process for the second incident on 15 September 2017. We find that the claimant was not subjected to a detriment the sole or main purpose of which was preventing or deterring him from taking part in the activities of an independent trade union or penalising him from doing so.

The appeal against dismissal

156. On 10 November 2017 (page 707) the claimant appealed against his dismissal. He set out a list of seven points of appeal without any further detail. The points of appeal were: unfair investigations; unfair disciplinary; the disciplinary managers failure to administer a fair open-minded process; non-disclosure of evidence; the investigations failure to the facts; new evidence and witnesses and failure of natural justice. The claimant requested some documents and CCTV footage.

The appeal hearing

157. By a letter from Mr Paul Lotter, London Operations Director, dated 16 November 2017 (page 716), the claimant was invited to an appeal hearing on 23 November 2017. The claimant was represented by Mr Sturtevant. The claimant had not met Mr Lotter prior to the appeal hearing.

158. The detailed appeal letter was very long, pages 726 – 761. Page 754 had a sub-heading "*My case*". The claimant set out his issues about Risk Assessments under the Management of Health and Safety at Work Regulations 1999 (page 756). He said there was a weather hazard, but Mr Lotter's view was that as it was not raining on 15 September 2017 and there were clear skies, it was not a weather hazard. The CCTV footage showed that it was not raining.

159. We find it was reasonable for Mr Lotter to form the view that there was no weather hazard on 15 September. The claimant also suggested that he was acclimatising from being on holiday in Jamaica. By 15 September he had been back from Jamaica for about 10 days and it was mid September with no weather hazard. We find it was reasonable for Mr Lotter to reject this suggestion.

160. Mr Lotter had a meeting with Mr Engelbrecht and Mr Havard in November prior to the appeal hearing. Mr Lotter asked to see all the relevant evidence and at that meeting with Mr Engelbrecht and Mr Havard, he viewed the CCTV footage that had been seen at the disciplinary hearing and the second clip that had come to light and the claimant had not yet seen. It is not in dispute that the second CCTV clip was not seen by the claimant until the appeal hearing. The new CCTV footage was from a different camera angle and showed that the claimant did not conduct a bag search at the point when Mr Englebrecht had given him the benefit of the doubt. The new footage showed a front view and it was clear to Mr Lotter that the claimant did not carry out a search. This was a reasonable view based on the footage which we also saw. It was therefore reasonable for Mr Lotter to form the view that the claimant failed to comply with the management request to conduct bag searching.

161. The claimant questioned why no witness statement was taken from Mr Christopher. It is not in dispute that Mr Christopher was not present on 15 September 2017, the claimant had been on the phone to him. We saw at page 765 that Mr Lotter asked about this in the appeal hearing. Mr Lotter did not doubt the claimant's evidence about his phone call to Mr Christopher and for this reason he did not need a statement from Mr Christopher. We agree that where there was no dispute on this issue, it was not necessary to take a statement.

162. At the end of the appeal hearing, Mr Lotter gave the claimant the opportunity to email him anything further he wished Mr Lotter to consider before reaching a decision. The claimant sent a 72-point document (over 30 pages). Mr Lotter spoke to Mr Englebrecht and Mr Kempster to follow up on the claimant's additional points and obtained some clarification. He revisited the CCTV footage. We find that Mr Lotter did not conduct any new investigation. He considered the points the claimant wished him to consider.

The appeal outcome

163. The appeal outcome letter was sent to the claimant on 12 January 2018. It was 33 pages long, from pages 785-818 of the bundle. The ultimate conclusion of the appeal was that it was not upheld and the claimant remained dismissed.

164. Mr Lotter explained his reasoning in oral evidence to the tribunal. He said he looked at the issues raised by the claimant with regard to risk assessments. He said there was nothing to stop the claimant from carrying out the bag searching tasks, he had carried them out before.

165. On the issue of bringing the respondent into disrepute, Mr Lotter agreed that there had been a breach of confidentiality by Mr Kempster in telling the BBC that there had been a problem with the claimant, by name. Mr Lotter said that the

reason he did not uphold the claimant's appeal, based on the facts of 15 September 2017, was the failure to comply with the request to do the bag searches.

166. Mr Lotter was asked about the disciplinary procedure at paragraph 11.4.1(b) (set out above) and the issue of "progressive misconduct". He was very clear that he did not regard the matter as falling within the definition of "*progressive misconduct*" in the disciplinary procedure. He said that this was because the claimant did not have an active final written warning. The respondent also accepted in submission that this was not a dismissal for progressive misconduct. This was not a question of activating a final written warning because there was no live final written warning. The claimant only had a first written warning.

167. Mr Lotter said that it was clear on the evidence before him that the claimant's actions amounted to gross misconduct and that is why he did not uphold the claimant's appeal.

168. The disciplinary policy at clause 12.3 (page 73ZB) said:

> *The decision at appeal will be final. Following the appeal hearing the Company may:*
> *a) confirm the original decision; or*
> *b) revoke (overturn) the original decision; or*
> *c) substitute a different penalty.*

169. The policy did not say expressly that in substituting a different penalty, whether it could or could not increase the penalty. The respondent said and we find that the disciplinary policy was not contractual. It also expressly states at clause 4 that the respondent is committed to dealing with matters in accordance with its policy and the ACAS Code.

170. The claimant was asked by the tribunal what he would have done, had Mr Engelbrecht not dismissed him, if a couple of weeks later the security level was again raised to critical and he was asked to do bag searching. He said it would have been to do the duty "with concerns" and express the fact that he had concerns. From this answer we understood and find that he would have adopted exactly the same position as he did on 15 September 2017.

171. We have considered the claimant's contention that 11 managers (the 9 respondent witnesses at this hearing plus Mr Gaspar and Mr Thomson of the BBC) colluded to dismiss him. We find that managers were frustrated with the claimant because he would not carry out the bag searching when we find that he was trained to do so. They had a prestigious client and the highest level of security risk – an attack was deemed imminent. Other colleagues had carried out the bag searching. The claimant did not accept the training on 7 September 2017 as being sufficient. We find that in the light of those circumstances it is understandable that there was some frustration. We saw no evidence of collusion to dismiss the claimant. We can see no reason why Mr Thomson of the client would be drawn in to any such collusion. There were a number of managers involved who were not in the same business unit. It would have required a great deal of organisation for 11 individuals to collude to dismiss the claimant. We find that the suggestion of collusion is fanciful and we find that

there was no such collusion.

Race discrimination/union status and dismissal

172. We asked the claimant to make sure that he put to both the dismissing officer and the appeal officer the reasons why he (the claimant) thought he had been dismissed. He did not put to them that they acted as they did because of his race or his union status. His focus was on the risk assessments and the AI and his views of the health and safety issues. The case was not put in any event as dismissal on union grounds. It was a detriment case.

173. We accepted the respondent's evidence from Mr Kempster corroborated by Mr Havard and find that the respondent has an ethnically diverse workforce and that the respondent has a good relationship with the union. We saw and heard nothing to contradict this.

The complaints of race discrimination

174. Out of the respondent's witnesses, the claimant does not complain of race discrimination against Mr Kay and Mr Walker. His case is that all the other witnesses, who are all white, discriminated against him. The claimant's case is that none of them did so consciously. The claimant's case is that they did so unconsciously.

Comparator Ms Hawryluk

175. The claimant complained that his white colleague Ms Marcela Hawryluk was on her mobile phone whilst at work but that this did not warrant a formal investigation or an allegation of bringing the company into disrepute (claimant's witness statement paragraph 271). Mr Murphy was asked about this but he told the tribunal that he could not recall any detail. He knew there was a complaint about Ms Hawryluk using the phone whilst on duty and he was able to remember that he spoke to the client about it.

176. Although he told the tribunal that he could not recall the matter, he had referred to it in his grievance appeal outcome letter to Mr Paul Eghan at page 837 of the bundle. This said that Marcela Hawryluk had been caught on her mobile phone for an extended period and the result was no disciplinary action. Mr Murphy's letter said that the client was happy for it to be dealt with on an informal basis.

177. It is agreed that Ms Hawryluk worked as a Close Protection Officer, "CPO". The claimant also agreed that CPO's have work mobile phones. The claimant does not know what mobile phone she was using on the day she was "caught". The claimant was told that an issue was raised and it was dealt with informally. His view was that a formal process should have been followed for her, as it was for him. He accepted in cross-examination that a simple conversation could take place to satisfy management that nothing further needed to be done.

178. On 8 June 2017 a memo was sent out reminding staff that they should not use their mobile phones at work (claimant's statement paragraph 271). The claimant

understood that this memo was sent out as a result of Ms Hawryluk's matter.

179. On 27 June 2017 management included in the security briefing for that day a reminder not to use electronic devices on post (page 356).

180. We find that the claimant and Ms Hawryluk were not in materially similar circumstances, there were material differences. Ms Hawryluk was a CPO, a more senior role to the claimant and she was issued with a work mobile phone. The claimant accepted that management could deal with a matter with a simple conversation which could resolve matters. The claimant's view was that she should have been treated in the same way as himself. The claimant had a number of disciplinary charges warranting his suspension, not just phone use. The allegations against him were wider.

181. Our finding is supported by Mr Murphy's grievance outcome letter to Mr Eghan dated 15 December 2017 at page 837 where he said that the client was happy for Ms Hawryluk's matter to be dealt with informally and that the same action would have been taken for any other employee. This was after the conversation and email correspondence between Mr Kempster and Mr Thomson of the client, when the BBC was assured that appropriate disciplinary action would be taken to maintain standards.

182. The claimant's case on race discrimination was that the manner in which health and safety concerns were dealt with was to treat it less seriously when raised by black employees. This was not supported by his witness Mr Christopher who is also black. In cross-examination Mr Christopher said he had experience of managers meeting his health and safety concerns. We had no other examples given to us to support the claimant's contention. We find that health and safety concerns were not treated less seriously when raised by black employees.

183. We find that there was no less favourable treatment of the claimant because of his race. The difference in treatment was because of the different circumstances.

Comparator Mr Ellis

184. The claimant also complained that his white colleague Mr Paul Ellis was accused of bullying and harassment by a black colleague Mr Paul Eghan, but Mr Ellis was not suspended. The claimant also contends that Mr Ellis failed to carry out a reasonable management instruction and had no action taken against him.

185. The background to this matter is that Mr Eghan complained of bullying and harassment by Mr Ellis. We were told that Mr Eghan is black and Mr Ellis is white. Mr Murphy dealt with the grievance raised by Mr Eghan. The claimant acted as Mr Eghan's union representative.

186. Mr Ellis and Mr Eghan worked on different shifts and only overlapped for about 5 minutes per day on changeover. Mr Murphy initially thought this would not be a problem, but as Mr Eghan said he was still having problems with Mr Ellis, it was agreed that on changeover, one would leave 10 minutes early and the other

would start 10 minutes late. The aim was to create a 20 minute window by which they would not have to see each other. Mr Eghan complained that despite this, Mr Ellis waited for him in his car around the corner. This led Mr Murphy to the decision to suspend Mr Ellis while the investigation continued.

187. At pages 825-842 we saw Mr Murphy's grievance outcome letter to Mr Eghan. We find from the outcome letter that there had been an extensive investigation. The claimant agreed that the two men had been in dispute about overtime allocation. Mr Murphy found no evidence to support the claim that Mr Ellis threatened, bullied or intimidated Mr Eghan. Mr Murphy told Mr Eghan that he was prepared to have facilitated meetings between Mr Ellis and Mr Eghan to seek to resolve matters amicably.

188. We find that it is not the case that nothing was done in relation to Mr Eghan's complaint. Mr Ellis was suspended for 13 weeks. The matter was investigated and there was an outcome. It may not have been the outcome that Mr Eghan hoped for but we find the matter was investigated and the claimant is not correct in asserting that nothing was done.

189. The claimant's case is that Mr Ellis disregarded the management instruction to keep away from Mr Eghan. The claimant's case is that Mr Ellis "*turned up on site"* on 3 occasions and as a result Mr Eghan and Mr Ellis "*crossed paths*". For the reasons we have set out above, it is not correct for the claimant to say that the respondent took no action.

190. Mr Murphy thought initially that the 20 minute window would be sufficient to keep the two men apart and able to continue working without difficulty. As soon as he knew that the arrangement was not working, he suspended Mr Ellis and the complaints were fully investigated. Mr Havard was the HR officer involved with the matter. He said that initially there had been a misunderstanding between the site managers involved when imposing the 20 minute window at handover. He also said that the respondent does not operate a knee jerk reaction to suspension if it can be avoided.

191. It is right for the respondent to seek to avoid suspension where they can. Once they understood that the 20 minute window had not worked, perhaps because of poor communication by site managers and there were ongoing issues, Mr Murphy suspended Mr Ellis and the matter was fully investigated. Mr Havard said management messages were not being passed adequately by site managers.

192. We find that the claimant was not less favourably treated because of his race in his suspension and investigation leading to disciplinary action. There were relevant material differences as we have found above.

<u>The allegation of race discrimination in the disciplinary investigation</u>

193. The claimant also complained that the respondent "*chose to ignore"* witness evidence from black witnesses. The investigating officers for the disciplinary hearing were Mr Penson and Mr Walker. The claimant made clear that he did

not complain about race discrimination on the part of Mr Walker.

194. The claimant said in his witness statement at paragraph 274 that there was a failure to interview Mr Oluwagbemi Ogundolle, Mr Neville McNichol, Mr Sualimon Muritala, Mr Joseph and Mr Christopher. It is not in dispute that Mr Christopher was not present on duty on 15 September 2017 and his relevance to the factual issue was that the claimant phoned him at the time. This was not disputed.

195. Three of these individuals were not present at the time of the incident on the night shift on 15 September 2017. They came in on handover for the next shift. They were Mr Muritala, Mr Joseph and Mr McNichol. We find that there was no less favourable treatment of the claimant because of his race in the failure to interview Mr Muritala, Mr Joseph and Mr McNichol who were not present at the time of the incident. The claimant said in his statement that they were relevant because they saw that he "*manned the post by himself*" at handover. The claimant's evidence was that the next shift was 10 minutes late and he stayed on. The issue was not whether he manned the post by himself or stayed 10 minutes late to handover. The issue under investigation was bag searching. We find that there was no good reason to conduct an investigation with Mr Muritala, Mr Joseph and Mr McNichol because they did not witness the events under consideration.

196. The claimant said that Mr Christopher should have been interviewed because (statement paragraph 274) he was a "*first hand witness"* to the conversation with Mr Gray, the DSM. We disagree for the following reasons (i) there was no dispute that the claimant was on the phone to Mr Christopher, (ii) we find that Mr Christopher was not a "first hand witness" to any conversation. He was not present and it is not sensible to suggest that he heard clearly a conversation between the claimant and Mr Gray via his phone and (iii) if the claimant really wanted to show the respondent the detail of his conversation with Mr Gray we find that he would have played them his recording, rather than deleting it, or shown them the transcript. We were not told what Mr Christopher would have said in the investigation that might have assisted the claimant. Mr Christopher was a witness for the claimant at this hearing and he did not give any evidence about this.

197. Mr Ogundolle was on duty elsewhere on site on 15 September 2017 and the claimant had concerns about relieving him from breaks when asked to do bag searching on the piazza. We find that Mr Ogundolle was not a witness to any material facts.

198. We find that the respondent had good reasons for not interviewing the individuals mentioned above. It had nothing to do with their race and everything to do with whether they had any relevant evidence to give. Our finding is that they did not.

199. We suggested to the claimant that he put to the HR witness Mr Havard the names of those he thought should have been interviewed as part of the investigation and were not. He did not put any names to any of the witnesses.

200. The claimant said in evidence on the afternoon of day 7 that he was not saying that he was dismissed because of his race. He felt that the whole issue of the process of him raising health and safety concerns and the escalation of the disciplinary matter would not have been the same if he had not been black. He confirmed that he was not saying that if he had been white he would not have been dismissed. In relation to the appeal the claimant said he could not say that Mr Lotter was influenced by his race. He relied on unconscious bias.

The health and safety claim

201. The respondent accepts that there were no worker representatives and there was no relevant safety committee for the purposes of sections 44(1)(c) and 100(1)(c) of the ERA (submissions paragraph 86).

202. The issue for the tribunal was therefore whether the claimant brought to the respondent's attention by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. If so, we had to consider whether he was dismissed or subjected to a detriment for doing so.

203. We find that the claimant continually raised health and safety concerns and that he raised those concerns on the dates and times relied upon, as set out in the issues above. The respondent did not suggest that he did not raise health and safety concerns. We also find that the claimant believed he was raising matters which were harmful or potentially harmful to health or safety.

204. We have gone on to consider whether his belief was reasonable and whether he brought those matters to the respondent's attention by reasonable means.

205. We find that the claimant was often concerned about his own health and safety. There is nothing wrong with this. He was concerned about his PPE (his jacket), working in bad weather conditions and as to whether he would be able to go home at the end of the day if there was a terrorist incident. We find that he was also concerned about the health and safety of others, such as who would cover his fire duties while he was bag searching, whether he might make a mistake in identifying items in a bag that could be used as an explosive device and evacuation procedures.

206. We find that the claimant's belief was reasonable. These were heightened security circumstances. It was the highest level of security risk, namely critical, in which an attack is considered imminent. These are highly worrying circumstances in which the claimant was working on the front line. We find that he had a reasonable belief in the concerns he raised.

207. The respondent accepted (submissions paragraph 92) that speaking to the DSM was a reasonable means of raising a health and safety concern.

208. We find that in the investigatory meeting with Mr Gaspar on 7 June 2017 the claimant did not raise his concerns by reasonable means because he failed to

give the detail of his concerns. We have found that Mr Gaspar made efforts to understand the claimant's concerns.

209. We find that in all other circumstances he raised the concerns by reasonable means. The separate issue for us was whether he was dismissed or suffered detriment for raising those concerns.

Was the claimant subjected to a detriment for raising his health and safety concerns?

210. The detriment relied upon by the claimant was being issued with a warning letter by Mr Kay on 27 June 2017. We have considered whether Mr Kay issued that warning letter because the claimant raised those concerns.

211. We have made findings above as to Mr Kay's reasons for issuing the warning. These were that the claimant had previously followed the instructions to do bag searches on 25, 26 and 27 May; the night of 28/29 May was the 4th night following the heightened security measures; the AI gave instructions on how to do bag searches – although our finding is that the relevant section was not in the AI at the time; he had 11 years' experience with the respondent to know what was dangerous; he had signed the briefing sheet on a previous shift and he had been issued with a hi-vis jacket that he had not reported missing.

212. We find that Mr Kay's reasons were genuine and that he treated the claimant fairly. It was Mr Kay who lifted the claimant's suspension on 19 June 2017 pending the disciplinary outcome and placed him back on his fire safety duties. It was Mr Kay who requested that the claimant be given further training and that it be recorded. Mr Kay was independent of the BBC contract. We find that Mr Kay's reason for imposing the warning was because the claimant refused to carry out the duties required of him in the most heightened of security circumstances. It was not because the claimant had raised his health and safety concerns.

213. The claimant accepted in cross-examination that in those heightened security circumstances, it was reasonable to expect all members of the team to pull together and to go the extra mile. He accepted that whilst he might not like being taken off his normal duties it was necessary to do what was required to keep people safe. He also accepted that he was not being asked to change his duties on a permanent basis. He also accepted that the decision of management and the BBC to push resources to the front (ie to the exterior of the building) was not a decision to be taken at his level.

The relevant law

214. Section 98(4) of the Employment Rights Act 1996 (ERA) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and (b) shall be

determined in accordance with equity and the substantial merits of the case.

215. The tests in ***British Home Stores Ltd v Burchell 1980 ICR 303*** as restated in ***Graham v Secretary of State for Work and Pensions (JobCentre Plus) 2012 IRLR 759 (CA)*** are first, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; second, did the employer believe that the employee was guilty of the misconduct complained of; and third, did the employer have reasonable grounds for that belief.

216. Even if the procedure which might normally be expected is not strictly complied with, a dismissal may nonetheless be fair. In ***Fuller v Lloyd's Bank plc 1991 IRLR 336*** the EAT held that this may well be the case where a tribunal finds both that the specific procedural defect is not intrinsically unfair and that the procedures overall are fair. The Court of Appeal in ***Taylor v OCS Group Ltd 2006 IRLR 613*** stressed that tribunals should not consider procedural fairness separately from other issues arising. The task of the tribunal is to apply the statutory test, stand back and ask itself whether the dismissal, taken as a whole, was fair. Defects in the disciplinary procedure can be corrected on appeal, even if the appeal is a review and not a rehearing. The tribunal must look at the disciplinary process as a whole.

217. ***Taylor v OCS*** was followed in ***Adeshina v St George's University Hospitals NHS Foundation Trust 2015 IRLR 704*** where the EAT emphasised that the question is whether the process is fair overall notwithstanding any deficiencies at the early stage, rather than looking at whether the appeal can be categorised as a rehearing or review. It is not necessary for the appeal process to be procedurally perfect for the appeal to have the effect of curing earlier defects.

218. In ***Whitbread & Co Plc v Mills 1998 IRLR 501,*** it was noted that where new evidence has come to light at the appeal stage, it might be appropriate for the employer to conduct a new investigation and hold a full re-hearing. Similarly, it may, on the facts, be sufficient for the employer to arrange for the relevant decision to be reviewed. It will depend on the degree of unfairness at the initial hearing (judgment paragraph 55).

219. In ***McMillan v Airedale NHS Foundation Trust 2014 IRLR 803*** the Court of Appeal made observations that the general understanding among both employers and employees is that an employee's right to appeal against a disciplinary sanction is conferred for his or her protection, so that its exercise will not leave them worse off and that view is strongly reinforced by the ACAS Guide. The Guide, which tribunals are not obliged to take into account, says under the heading "Provide employees with an opportunity to appeal":

> *"The opportunity to appeal against a disciplinary decision is essential to natural justice, and appeals may be raised by employees on any number of grounds, for instance new evidence, undue severity or inconsistency of the penalty. The appeal may either be a review of the disciplinary sanction or a rehearing depending on the grounds of the appeal. An appeal must never be used as an opportunity to punish the employee for appealing the decision, and it should not result in any increase in penalty as this may deter individuals from appealing."*

220. The claimant relied upon the decision of the Court of Appeal in ***Way v Spectrum***

Property Care Ltd 2015 IRLR 657 which held that a warning given in bad faith is not, in circumstances such as in that particular case, to be taken into account in deciding whether there is, or was, sufficient reason for dismissing an employee. An employer would not be acting reasonably in taking into account such a warning when deciding whether the employee's conduct was sufficient reason for dismissing him; and it would not be in accordance with equity or the substantial merits of the case to do so.

221. Section 100 ERA deals with automatically unfair dismissal in health and safety cases. It sets out the reasons for dismissal which are regarded as automatically unfair in such circumstances. Section 100(1)(b) and (c) provide as follows:

> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
>
> (i) in accordance with arrangements established under or by virtue of any enactment, or
>
> (ii) by reason of being acknowledged as such by the employer,
>
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
>
> (c) being an employee at a place where—
>
> (i) there was no such [safety] representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

222. Section 44 ERA gives protection from detriment on the same grounds (section 44(1)(c)).

223. The decision of the EAT in ***Oudahar v Esporta Group Ltd 2011 IRLR 730*** gives guidance to tribunals on the application of section 100 ERA. On its facts it is a case brought under section 100(1)(e) but it gives guidance on the application of section 100(1)(c) to (e). In that case the claimant was a chef employed in a health club. When maintenance work was being carried out in the kitchen, he was asked by his manager to mop behind the fryers. He refused to carry out that instruction on health and safety grounds. He said that there were wires coming out of the wall that had become exposed during the maintenance work and for that reason he would not do the mopping work. He was dismissed in part for failing to carry out a reasonable management instruction. The EAT gave the following guidance (starting at judgment paragraph 25):

> *Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to*

communicate these circumstances to his employer by appropriate means? If these criteria are not satisfied, s.100(1)(e) is not engaged.

Secondly, if the criteria are made out, the tribunal should then ask whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within s.100(1)(e).

……..it seems to us to be the natural way to read s.100(1)(c)–(e). Each subsection is directed to some activity on the part of the employee: the bringing of matters to the attention of the employer (s.100(1)(c)), leaving or proposing to leave or refusing to return (s.100(1)(d)), or taking or proposing to take steps (s.100(1)(e)). In each case the statutory provision directs the tribunal to consider the employee's state of mind when he engaged in the activity in question. In no case does it direct the tribunal to consider whether the employer agreed with the employee.

……..Section 100(1)(c)–(e) do not protect an employee unless he behaves honestly and reasonably in respect of matters concerned with health and safety. It serves the interests of health and safety that his employment should be protected so long as he acts honestly and reasonably in the specific circumstances covered by the statutory provisions. If an employee was liable to dismissal merely because an employer disagreed with his account of the facts or his opinion as to the action required, the statutory provisions would give the employee little protection.

224. A worker has the right not to be subjected to detriment by his employer if it is for the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so – section 146(1)(b) of the Trade Union & Labour Relations (Consolidation) Act 1992.

225. Section 148 provides that it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act. The sole or main purpose must be shown otherwise there is no contravention, even if the employer's acts had the foreseeable effect of discouraging union activities - see ***Serco Ltd v Dahou 2015 IRLR 30 EAT*** (upheld on other grounds at ***2017 IRLR 81***).

226. Section 147 sets out the time limit (before the end of 3 months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them). The power to extend time is subject to the "not reasonably practicable" test.

227. Direct discrimination is defined in section 13 of the Equality Act 2010 which 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.

228. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

229. Section 136 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

230. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

231. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

232. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

233. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

234. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in **Hewage** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

235. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

236. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

Conclusions

237. We give our conclusions in the order set out in the issues above.

Health and safety

238. We have found that other than at the investigatory meeting of 7 June 2017, the claimant raised his health and safety concerns with the respondent by reasonable means and with a reasonable belief that these were circumstances which were harmful or potentially harmful to the health and safety of either himself or others. It was conceded by the respondent that there was no safety representative or safety committee.

239. We have found as a fact that the claimant did not suffer the detriment of the 27 June 2017 warning because he raised those concerns. Our finding is that the warning was imposed because the claimant refused to carry out the duties required of him in the most heightened of security circumstances.

240. Similarly, we have made a finding as to Mr Englebrecht's reason for dismissal and that this was because of the claimant's misconduct, amongst other things, for failing to carry out bag searches on 29 May and not because the claimant had raised health and safety concerns. It is one thing, on our finding, to raise the concerns. It was not the raising of the concerns that led to the warning or dismissal. It was the claimant's actions in refusing to carry out bag searches that was the causative reason for the warning and the dismissal.

241. For these reasons the health and safety claima under sections 44 and 100 ERA fail and are dismissed.

Trade union detriment

242. The trade union case was put as a detriment case and not a dismissal case. Our finding above is that the claimant did not contend that the respondent was not engaging in proper consultation in August 2017. The claimant did not contend this during this tribunal hearing. The issue for the claimant was in relation to the 9 August 2017 at risk letter which we have found was sent to him as an affected employee and not in his capacity as a trade union member or representative.

243. The detriment relied upon was the bringing up as an issue in his disciplinary proceedings his trade union status or activities. We have found that mentioning his trade union status in the outcome letters was not with the sole or main purpose of preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him from doing so. These were no more than illustrative matters in the letters explaining why the respondent thought the claimant should have known that his actions amounted to misconduct. For example, Mr Murphy thought that the claimant should set a good example to his colleagues. The respondent had a good relationship with the union and acknowledged the importance of the role of union representatives.

244. The claim for trade union detriment fails and is dismissed.

Unfair dismissal

245. We have found as a fact above that the reason for the dismissal was misconduct. It was the failure to carry out the bag searches and bringing the respondent into disrepute with their client. The mobile phone issue was considered at a lesser level, meriting only a first written warning. We find that the reason Mr Englebrecht decided that the claimant brought the respondent into disrepute with the client, was because of the failure to carry out bag searches, so it was part and parcel of the same matter.

246. As we have also found above, Mr Englebrecht wrongly took the view that the dismissal was by way of "procedural escalation". He treated the matter as if the claimant had a final written warning when he did not.

247. We find that the respondent had a genuine belief that the claimant was guilty of the conduct found against him. In addition to the witness evidence, Mr Englebrecht had viewed CCTV, which we as the tribunal also saw. Based on this footage, which showed the claimant standing around and not carrying out bag searches (save for one occasion on which Mr Englebrecht gave the claimant the benefit of the doubt because he was not sure) it was reasonable for him to form the view that the claimant was guilty of the misconduct.

248. We find that it was a belief formed on reasonable grounds for the reasons set out above.

249. We have considered whether the respondent conducted a reasonable investigation.

250. We find that the respondent investigated with all relevant witnesses. The key word for us was "relevant". We have made findings as to why the black colleagues the claimant said should have been interviewed (this was part of his race discrimination claim) were not relevant because they were not witnesses of fact to any material issue.

251. On the issue of using his mobile phone, we have found that during the investigatory meeting with Mr Penson on 22 September 2017, the claimant admitted that he had been on the phone to Mr Christopher. This was confirmed by the statement from Mr Gray within the investigation. The claimant did not deny that he had been on his phone. We find that this matter was properly covered within the investigation and there was nothing further that needed to be investigated.

252. We have found that what the respondent considered brought them into disrepute with the client was the failure to carry out the bag searches. We find that there was a reasonable investigation into this matter. It was part and parcel of the same matter and a consequence of failing to follow the instruction to carry out bag searches. The respondent had evidence of the client's position from Mr Thomson's email of 21 September 2017 (page 503). This formed part of Mr

Walker's investigation as set out in his report (page 563). The claimant could not have added within the investigation, to the issue of what the client thought about it. We conclude that the respondent carried out a reasonable investigation into the issue of bringing the company into disrepute.

253. We find that there was a reasonable investigation into the point about the phone use. In addition to evidence from Mr Gray, Mr Walker viewed the CCTV footage and considered that there was enough evidence to suggest that the claimant was using his phone whilst on post at the time he should have been carrying out bag searches. Mr Walker was not the disciplinary officer. He investigated the matter. He decided that there was enough there to warrant consideration at a disciplinary hearing. We find that there was a reasonable investigation into this issue.

254. The claimant's case was that the respondent failed to give similar weight to evidence in favour of himself as to that against him. The claimant did not give evidence or make submissions to show us where he thought the respondent had failed to give sufficient weight to evidence in his favour, within the investigation. We find that there was a reasonable investigation. Weighing up the evidence was a matter for the disciplinary officer.

255. We conclude that the respondent carried out a reasonable investigation.

Was the dismissal within the band of reasonable responses

256. We have also considered the respondent's failure to comply with paragraph 11.5.6 of the disciplinary policy. The dismissing officer conducted further investigation prior to making his decision and admits that he did not inform the claimant of the outcome of that further investigations as per the policy. Our finding above is that Mr Lotter did not conduct a further investigation after the appeal hearing.

257. By the time of the appeal hearing, the claimant had before him all the information that led to Mr Englebrecht's decision. The outcome letter was incredibly detailed, 10 pages in length. Nearly three pages of this letter (pages 678-680) told the claimant all the information he had collected since the date of the hearing on 16 October 2017. To the extent that Mr Englebrecht was procedurally deficient, this was corrected on appeal. The claimant had a reasonable opportunity on appeal consider that information and make any representations to Mr Lotter.

258. We have found that Mr Lotter did not obtain any new information before making his decision and therefore he was not in breach of paragraph 11.5.6. He took account of points that the claimant asked him to consider and we find that he was reviewing the points that the claimant wished him to review.

259. We have considered the claimant's reliance on the case of ***Way v Spectrum Property Care Ltd 2015 IRLR 657.*** This held that a warning given in bad faith should not be taken into account in deciding whether there was sufficient reason for dismissal. Our finding is that Mr Kay did not impose a warning in bad faith.

He had reasonable grounds for applying the warning as we have set out above.

260. The key consideration for us as to whether the dismissal fell within the band of reasonable responses, was in the application of ***McMillan v Airedale*** (above). This is because of the concession by the respondent that this was not "progressive misconduct" under the terms of their policy.

261. There is of course an argument that the appeal did not leave the claimant worse off. He remained dismissed. However, as the appeal officer took the view that the dismissing officer was wrong in regarding it as "progressive misconduct" we have to consider whether the result of that was that the claimant should not have been dismissed.

262. We are not saying there should have been no penalty. Mr Engelbrecht and Mr Lotter reasonably formed the view that the claimant had committed misconduct.

263. It was misconduct that the dismissing officer viewed as serious but not gross misconduct meriting dismissal.

264. The claimant appealed his sanction and the appeal officer rightly took the view that this was not a case of progressive misconduct because the claimant did not have a live final written warning. What the appeal officer did was to take his own view of the misconduct and decide that it amounted to gross misconduct in its own right. We find that this is in effect imposing a higher penalty as it could have resulted in dismissal without notice. At no time did the respondent seek to recover the claimant's notice pay.

265. We have considered the judgment of Underhill LJ in the ***McMillan*** case. We raised this case with the parties, as we considered it had potential relevance and we asked them to deal with it (and we provided the claimant with a copy). We make the point that in the case before us, the disciplinary procedure is not contractual, whereas in ***McMillan*** it was. Also ***McMillan*** was a breach of contract and injunction case in the High Court and not a claim for unfair dismissal.

266. Underhill LJ made the point at paragraph 72 that it would lead to inconvenient results if on appeal an employer was "*absolutely precluded*" from dismissing an employee who the first time round had been given a warning. He gave the example of an employee found guilty of misconduct followed by a rehearing on appeal which considered new evidence, such as further witnesses or documents. In this case there was new evidence, the new CCTV footage which had not been available to Mr Englebrecht and on the point upon which the claimant had been given the benefit of the doubt. The new footage showed Mr Lotter that the claimant should not have been given the benefit of the doubt.

267. Underhill LJ also commented (paragraph 73) that the fact that an employer has not followed the terms of a contractual disciplinary policy does not mean that the dismissal is automatically unfair within the meaning of section 98 ERA. What is different in this case is that the policy is not contractual and we must consider fairness under the section 98(4) test. We are looking at the practical realities of

the employment relationship and not ritual, as Underhill LJ commented at the end of paragraph 72.

268. ***Taylor v OCS*** stressed that tribunals should not consider procedural fairness separately from other issues arising. Our task is to apply the statutory test, stand back and ask whether the dismissal, taken as a whole, was fair. Defects in the disciplinary procedure can be corrected on appeal, even if the appeal is a review and not a rehearing. We must look at the disciplinary process as a whole.

269. We have considered the key point in the ***McMillan*** case that the general understanding among both employers and employees is that an employee's right to appeal against a disciplinary sanction is conferred for his or her protection, so that its exercise should not leave them worse off, a view which is strongly reinforced by the ACAS Guide.

270. It is right that Mr Lotter saw new evidence that showed him that the claimant did not conduct a bag search on 15 September. This was the same misconduct that Mr Kay and Mr Murphy considered in relation to 29 May and resulted in a first written warning and not a final written warning. Mr Englebrecht's view was that on this second occasion it merited a final written warning and not dismissal but he wrongly invoked "progressive misconduct". Mr Lotter therefore substituted his own view of the seriousness of that misconduct and left the claimant worse off as a result. In addition the indication given to the claimant by Mr Kay in his outcome letter was that further misconduct of the same nature could result in further disciplinary action including the invoking of his mobility clause. It did not mention dismissal for gross misconduct.

271. For these reasons, standing back and looking at the whole process, we find that the dismissal fell outside the band of reasonable responses and we find that the dismissal was unfair.

Contributory fault

272. We have considered whether the claimant contributed to his dismissal by culpable or blameworthy conduct. He was dismissed for misconduct. We find that he did contribute to his dismissal by culpable or blameworthy conduct. He failed to conduct bag searches when reasonably required by management to do so when the threat level was at its highest, critical, meaning an attack was considered imminent. His role was to protect the staff and visitors at the BBC. His contract required flexibility. He accepted in evidence that this was a time when the security officers needed to pull together, yet he was the only one who refused to comply. He accepted that it was a time when they needed to go the extra mile. He did not. It caused understandable concern for the client who was paying for a security service in those difficult circumstances.

273. We agree with the respondent's submission that the claimant could and should have said he would do the bag searches but he had some concerns he would like to raise at an appropriate time. His response in failing to carry out bag searches was to create risk to the staff and visitors at the BBC.

274. He had received appropriate training only 8 days earlier. He knew that the failure to conduct bag searches was a disciplinary offence because of his experience in May and June 2017.

275. We find that he contributed to his dismissal by 80%. Our reasons for this are that the claimant knew this was misconduct, he had just received relevant training and he refused to do the bag searching at the most critical time, when he accepted everyone needed to pull together. The reason we have not found it at 100% as the respondent submitted, is that we find that given the claimant's very high concerns, the respondent could have produced for him a short risk assessment – this would not have taken long – and a copy of the up to date Assignment Instructions. We are supported in this view by Mr Murphy's evidence as to the importance he put on risk assessments.

Polkey

276. Our finding above is that the claimant's position was that if he was again required to do the bag searching in similar circumstances, he would have done the same as he had done on 15 September 2017. Our finding therefore is that he would not have done the bag searching, he would have been content to stand there as a "security body" but he would not have actually carried out the searching. As a result of this we find that there is a 100% chance that he would have been dismissed on the next occasion when the client required exterior bag searching and the moving of security resources to the exterior of the buildings. We have not had evidence of fact as to if and when this has occurred subsequent to the claimant's dismissal.

Race discrimination

277. The claimant's case on race discrimination was that the manner in which health and safety concerns were dealt with was to treat it less seriously when raised by black employees. We have found above that the respondent did not treat less seriously concerns raised by black employees.

278. We have also made findings above that there was no failure to interview witnesses because of race. The decisions on who to interview were based on relevance. We have also found that the reason for dismissal was misconduct. The claimant was not dismissed because of his race.

279. We have made findings that the actual comparators were not treated more favourable because of their race. As we have made findings as to actual comparators we have not found it necessary to consider the question of hypothetical comparators.

280. The claim for direct race discrimination fails and is dismissed.

281. In conclusion we find that all claims other than the claim for ordinary unfair dismissal fail and are dismissed. The claimant succeeds on the claim for ordinary unfair dismissal with a reduction for contributory fault of 80% and with the potential for a Polkey reduction subject to further factual evidence as to if

and when the client required further exterior bag searching.

282. At the end of the hearing we thanked the parties for the respect and cooperation they had shown each other and the cooperative way in which they had conducted themselves in the hearing.

283. The parties are encouraged to explore settlement to avoid the time and cost of a remedy hearing.

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Employment Judge Elliott
Date: 9 May 2019

Judgment sent to the parties and entered in the Register on: 10 May 2019
_____ for the Tribunals