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EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr A Ogbonna	**AND**	**Seal Security UK Ltd**

HELD AT: **London Central** **ON:** 7-9 and 22 May 2019

BEFORE: Employment Judge Walker
Members: Ms C I Ihnatowicz
Ms E Ali

Representation:

For Claimant: In person
For Respondent: Miss K Eddy, of Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant was not discriminated against on the grounds of race and accordingly his claim fails.

REASONS

Background

1. The Claimant brought a claim of discrimination against the Respondent. In his ET1, the Claimant ticked the box to indicate that he was discriminated against on the grounds of race and that the was making another type of claim namely bullying in terms of threats i.e. “I’m in their black books and I’m being watched”.

2. His claim was set out at s.8.2 of the ET1 form and he described events on 3 May 2018 followed by a disciplinary meeting on 11 May 2018.

3. The Respondent served an ET3 and indicated in the Grounds of Resistance that they denied that they had discriminated against the Claimant directly because of race as alleged or at all. The Tribunal held a Preliminary Hearing on 19 December 2018. The order made records that, in relation to the issues the Tribunal identified the claim as one of race discrimination on the basis that the Claimant was treated less favourably as a non white. The Tribunal noted the Claimant had identified two comparators, Richard a past employee in a loading bay at the client's premises and Mohammad who had worked on reception with him. The Claimant confirmed that his claim was limited to the disciplinary action taken against him as a result of an altercation in the work place. Other issues referred to in the claim form were explored but it was confirmed that these were relied upon as background evidence of the discriminatory environment.

4. The order also noted "on account of a concern that the full detail of the background evidence and precise allegations of discrimination pursued were not crystal clear it was agreed that there would be consecutive production of witness statements". The Claimant was ordered to provide a witness statement to the Respondent by 14 March 2019. This was to detail all the background evidence of a discriminatory working environment which he seeks to present plus identifying precisely each element of the disciplinary and dismissal process which he says amounts to unlawful race discrimination.

5. The Claimant did provide a statement of remedy as required but did not provide the witness statement. When pressed for his witness statement, the Tribunal was told that the Claimant sent a copy of s.8.2 of his ET1. As a result, the Respondent produced witness statements late in the day which were given to the Claimant only a matter of a few days before this hearing.

Evidence

6. The evidence which the Tribunal had from the Claimant was the Claimant's statement at s.8.2 of the ET1, form plus a further witness statement in the form of an email from another former colleague of the Claimant, Mr Adewale Adeshina. From the Respondent, the Tribunal had statements from Duane Hurley, Loading Bay Manager, Thomas Pettiman, EMEA Security Operations Centre Manager and Darryn Robbins, formerly the Respondent's Security Director.

7. The Tribunal had a hearing bundle supplied by the Respondent.

8. The Tribunal was also shown two CCTV clips showing some of the events in question on the key day. Having been shown these clips, the Tribunal asked for them to be emailed so that we could watch them over again on further occasions, which we did. The Tribunal was told that the additional CCTV footage had been seen by the Respondent's Managers, but this did not belong to the Respondent, rather it belonged to the client who had only given the Respondent's two clips following their requests. The Tribunal was told

that the client took their obligations under the data protection legislation very seriously and would not provide CCTV where its own staff were also in view. No application had been made to the Tribunal for an order requiring full disclosure.

General matters

9. The Claimant is a litigant in person and as far as the Tribunal was aware, had not had any legal assistance. At the hearing before the Tribunal, when we explored the fact the Claimant had not submitted a separate witness statement, the Claimant confirmed that the witness information in the ET1 form at s.8.2 set the whole story out and he was happy to rely on that as his witness statement. When the Claimant gave evidence, the Tribunal gave him the opportunity to make a supplementary statement, but he chose not to do so.

10. In the course of the hearing the Claimant asked various questions of the Respondent's witnesses which involved him making statements about facts which had not been covered by his witness evidence. Additionally, he made further statements in the course of submissions. The Tribunal has made every effort to distinguish between evidence that it received and information received from the Claimant but not submitted as evidence and which should therefore be excluded from our reasons.

11. We are mindful that the Claimant was a litigant in person and we spent considerable time trying to explain the process to the Claimant. We have given the Claimant leeway on occasions in order to meet the standards indicated by the overriding objective in the Employment Tribunal's (Constitution & Rules of Procedure) Regulations 2013.

Facts

12. The Claimant was a security officer. The Respondent is a security firm. It is the UK subsidiary of an American security enterprise. It has only one client in the UK, which is a major company with several premises in and around the City of London. It is clear that the Respondent provides security to a high standard in line with the requirements of that client.

13. The Claimant started work with the Respondent on 17 July 2017. On the day in question, 3 May 2018, he was due to start work at 6.45am. The working day commenced with a pre-meeting at which general matters concerning the work were discussed. That meeting was expected to end at 7am and the Claimant was then to go on duty in his first position. He was to be located at the main front door which the Respondent referred to as "front of house".

14. The Claimant had recently been told that his mother had died in hospital in Nigeria and he was still distressed about this. Additionally, on the day in question he was suffering from a stomach upset. When he was due to go on

duty at the front of the building, he needed to go to the toilet and he asked a colleague called Alfie to get someone to cover him while he did so.

15. The Claimant gave evidence and we accept, that the usual practice was for someone who was covering the luggage room (which was a less important area from a security perspective), to be asked to leave that post and go to cover the front door, as that was a more important security position. The Tribunal was told that the Respondent's standard operating procedure would be for this decision to have been made by a shift manager, although we were not shown any such procedure document. We understand that in practice, staff had been told to cover each other from the luggage room and regularly did so.

16. On that day, the person in the luggage room at that time was a Mr Sahi ("RS"). He did not normally work in that situation. He was usually in the control room.

17. RS probably expected the Claimant would be very brief in his absence but in fact, because of the Claimant's illness, he took some fifteen minutes before he returned. RS had gone outside without any overcoat and it was early morning on a cold day. By the time the Claimant returned to take on the post, RS was not at all happy. He later said he was probably cold and a bit sad. The CCTV suggests that he was frustrated and a little angry. In consequence RS remonstrated with the Claimant about the length of his absence. The remonstration can be seen clearly on the CCTV clip of the front of the building for the time in question.

18. The Tribunal viewed the CCTV clips carefully and they show that at first RS is protesting to the Claimant, presumably about the length of time he has taken. Both were quite animated in this engagement. The Claimant arrives without his coat properly on. He has put one arm in a sleeve but the other is out of the sleeve. He appears to be beginning to put it on properly but never finishes this because he becomes engaged in the conversation. It seems the Claimant was quieter at first but became more animated as time went on. The Tribunal noted that during the course of the hearing the Claimant tended to use his hands and arms and gesticulate when he was talking and he did this in the course of the conversation with RS.

19. RS turned to go but the conversation continued and he did not go immediately. When he did leave, the Claimant should have remained outside to cover the front of house post. The CCTV shows that when RS left the Claimant turned to and fro a bit and then followed RS. The CCTV cuts off at that point. The Claimant says in fact he stayed outside for the next fifteen minutes to finish off the thirty-minute time slot he was expected to be outside for. This was a new suggestion and not made in the course of either the disciplinary hearing or the appeal, despite the fact that the Respondent produced a document which was described as a transcript and was a timeline indicating what could be seen on the CCTV and that indicated the Claimant followed RS immediately.

20. The witness statements refer to the Claimant and RS moving through the main reception area and continuing their argument. The second CCTV clip is in the luggage room where RS goes to sit down. After he sat down, we could see that he reacts as he can see or hear somebody coming in. The Claimant then comes in followed by another security guard called Mager ("M"). There is further dialogue. RS is talking quite a lot. M is using his hands in a movement which indicates that they should bring it down and reduce the noise. The Claimant talks and finally another employee Alfie ("A") can be seen in the background. The second CCTV clip shows the Claimant wearing his coat half on and half off. That is the same as the situation when the Claimant followed RS away from the front door.

21. It is the Tribunal's conclusion that the Claimant did not turn around and remain at his post at the front of the building but rather went straight through reception as indicated by the witnesses and continued the argument with RS in the luggage room and never put his coat on properly.

22. In the first CCTV clip towards the end a person can be seen entering the building. The Tribunal were told that that person was the Respondent client's Head of Facilities. That individual sent an email about the incident to three people who were not part of the Respondent organisation and triggered a complaint to the Respondent. The email was sent at 7.35am and said that she had just witnessed a very disturbing security interaction around 7.15am. It says there were two guards who were shouting at each other. The email says that another guard had to step in between them to almost prevent from punches from being thrown. The email explains that the Head of Facilities had run into Hazel (who the Tribunal understand to be Hazel Cole, a member of the Respondent's management team) and mentioned it to her that it was actually a bit scary and an aggressive situation to witness and not very pleasant for the two people at the reception either.

23. Although there is an offer in that email to provide more details, it does not appear that any further details were taken from the Head of Facilities by way of a statement. The email was not shown to the Claimant prior to these proceedings. However, that email coupled with the complaint to Hazel, clearly triggered an investigation. The Tribunal were told that the most senior member of the management team at the time was Darryn Robbins. He had been in place since 28 March 2018, so for only a few weeks. He was travelling to work when he was contacted by Hazel who informed him that she had been made aware of this incident. He immediately asked the team to begin an investigation. Mr Hurley, the Loading Bay Manager was asked to investigate the matter. In practice, although Mr Hurley interviewed the Claimant and RS, he did not appear to do any more investigation other than at some later point (which he could not recall), reviewing the CCTV. Further investigations were carried out by Mr Robbins and Ms Cole. Witness statements were obtained from people who had some knowledge of the incident, who included two receptionists from the client, both of whose names have been redacted but who described shouting. Additionally, a written statement was provided by one of the other security guards. We understand this to have been Alfie, who confirmed that the Claimant had asked him to

inform RS that he was need him to cover his position at the front door external as he was desperate to use the toilet. Alfie stated that the Claimant and RS were having a rather loud exchange of words and he asked them both to lower their tone of voice and stop, which they did while he was there, but he left for his next position shortly after that and did not know what happened next. The Tribunal noted from the CCTV that Alfie came into the luggage room but he does not mention that in his statement.

24. The final piece of information was an email sent by Mager whom we saw in the CCTV. His statement was sent to Hazel Cole by email, and said that he was going to the foyer when he saw George (as the Claimant was known) returning from the ground floor toilet complaining about having stomach pain and George told him that he was meant to be at the front door external but had asked for cover as he had to use the toilet. He then noticed the Claimant and RS walking to the foyer from the front door while having a loud discussion. He asked them to "slow their voice" and they were joined by Alfie at the luggage room where they both requested the Claimant and RS to slow their voice. We understand that this is reference to lower their voices.

25. The Tribunal understand that both RS and the Claimant were asked to wait and just before 10am RS was interviewed by Mr Hurley with Ms Cole as note taker. There was a brief interview in which RS said it was just talking and they were joking. At the end of the interview Mr Hurley escorted RS out of the building as he was being suspended. While he was doing that RS told Mr Hurley that the Claimant had actually threatened him but that he was trying to be nice and cover for him. Mr Hurley recorded that on the notes and noted the threat was made in the reception area. He carefully recorded this statement as having been made outside the interview. He informed the Tribunal that RS was very upset at being suspended and was being walked towards the tube station which was nearby and was crying and very upset. RS had been a long standing employee and had been working for the Respondent for a considerable number of years. Mr Hurley told us that as Nepali, RS would be humiliated by the suspension.

26. The Claimant was interviewed next. The interview started at about 10.38am and again notes were taken by Ms Cole. He also said that there was a misunderstanding and that he did not think there were loud voices and that his voice could be heard because of the echoes. He said there was no fight, they shook hands and hugged. He too was suspended.

27. Mr Robbins got more involved after he arrived at work. He talked to the client and encouraged them to provide the witness statements referred to above. He agreed that they should have the names redacted. He also reviewed the CCTV and produced a timed but incomplete transcript indicating what could be seen. Mr Robbins and Mr Pettman, who later conducted the disciplinary hearing, both had computer access to the CCTV system from their desks and were able to view any of the clips from any of the cameras in the building. The summary prepared by Mr Robbins starts with the first clip, which the Tribunal have seen but continues with a reference to the internal camera

in the reception area and then goes on to the clip of the position in the luggage room, which is the second clip seen by the Tribunal.

28. The transcript refers to the Claimant pointing his finger at RS in the luggage room. Having reviewed the CCTV, the Tribunal can see RS pointing at the Claimant but cannot see that the Claimant is pointing at RS. The clip ends before the parties have left the luggage room, although the transcript refers to the Claimant leaving and heading back to the position on the main reception. The CCTV transcript also says that in the luggage room the Claimant was "gesticulating in an aggressive manner, whist RS is sitting down". Again, on reviewing the CCTV there is little indication of this. In practice, although RS is sitting down, he appears to do a large amount of the talking for much of the clip, with Mager using his hand to indicate that they should be quieter, followed by Mager holding the Claimant by his elbow trying to encourage him to leave the luggage room, which he did.

29. Both RS and the Claimant were invited to disciplinary hearings. The invitation letters were identical and the charge, put to both of them, was the same. Both state:

> "The reason for this disciplinary hearing is that on 3rd May 2018, whilst on duty at [X] office, you were involved in an altercation with another member of the SEAL team within the view of [the client's] staff. An investigatory interview was held on 3rd May 2018 during which facts were established with regards to your conduct on the date in question. Further enquires were made with regards to this incident, with witness statements gathered and CCTV footage viewed. The investigation was full and detailed and supports the allegation of gross misconduct".

30. There was then a reference to the Respondent's security handbook and the category of misconduct identified was as follows:

> "Threats of violence against any employee, client, employee, manager, visitor or other individual in the work place, including but not limited to jokes, horse play, acts of intimidation or any other activity perceived as intent to do physical harm".

31. The Tribunal understands that there were two disciplinary hearings both held on 11 May. The Claimant was the first person to attend and the notes of the hearing were taken by Ms Cole. The decision maker was Mr Pettman. The Claimant was supported by his trade union representative, Janet Mcleod.

32. The hearing notes indicate the Claimant explained what had happened as follows:

> "After the briefing, I came to work at 6.27 hours, I have a stomach problem. I told A. We use the luggage room or vortex if we need relief. It wasn't busy.
> I asked A to pass the message to RS. I believe he did. I went to the toilet. I went to RS, he wasn't aware of my stomach problem and was

> upset. I tried to tell him I wasn't deliberately late. He thought I used him. He wasn't happy. If I had a chance, I would have apologized. I wanted to make him understand. We always sit at the luggage room. I suggested switching position. We could switch. M came in between us and told us to take position. Next week I am going to bury my mum, so I don't want anything on my shoulders. I honestly did not see the client. [X] the receptionist asked us to bring it down."

34 In the course of evidence the Claimant said he had been trying to suggest to RS that they could switch, by which we understood he meant that he would let RS stay in the luggage room over the time that the Claimant was rostered to be in there, presumably to make up for the time he had been outside.

35 It is clear that the trade union representative asked why this was a gross misconduct charge and said it felt ramped up. Mr Pettman said it was because

> "where the situation of raised voices and gesticulation, its perceived behaviour, damaging trust with the client and company. If in the back of house, I would agree misconduct, if it didn't appear threatening."

36. In the course of the meeting, Mr Pettman pointed to what was referred to as "the caveat" in RS's statement, which was a reference to the note that RS later told Mr Hurley that the Claimant had actually threatened him. After a further discussion about the disciplinary procedure, Mr Pettman said he understood it was:

> "your word against his".

37. In other words, it was clear to Mr Pettman that there was a dispute and the Claimant did not accept he had threatened RS. Mr Pettman said he would challenge RS on his words. The meeting ended at 11.28am and the same day RS came for his disciplinary hearing. He was also supported by the same trade union representative and Mr Pettman again was the decision maker with Ms Cole being the note taker.

38. The Tribunal was originally given a short piece of typescript which we were told was the note of this meeting but later we were told that there was a longer manuscript note that had not been disclosed and the Respondent then produced this for the Tribunal together with the invitation letter to RS.

39. We can tell from the manuscript notes that only the first part of the meeting was transcribed on the typed version. The Tribunal have therefore focussed on the manuscript notes which show that Mr Pettman asked RS several times to explain the extra note and what was meant by his explanation that he had been threatened. RS said that he was not saying they were threatening words but that C kept coming back to him. When he was pressed on the matter RS said again it was the fact that C came back inside after it was sorted outside. It is worth noting that both parties said that they had made up and the Claimant said they had hugged afterwards and this could be

seen on the CCTV and RS confirmed that they had shaken hands. It does appear from that and from one of the witness notes that the dispute was over relatively quickly after the luggage room discussions.

40. Having gone through the whole matter Mr Pettman referred to the fact that there had been three explanations from RS about the situation and they ranged from there having been a joke conversation to a threat then to a moderate argument. He asked which it is. RS and his union rep took a break and then the union rep said that RS had done his best to explain and they had not got any more to say. After that Mr Pettman said to RS:

> "from the CCTV it doesn't look like you did much wrong. My perception is that you want to protect [the Claimant]".

41. RS was asked by Mr Pettman about his length of service and he explained that he had long service with the Respondent and had a history with the Gurkhas and it concluded with Mr Pettman saying:

> "I agree with you, you are a strong officer who has demonstrated commitment. In regard to the incident I would say you were in the right in the first instance. And to tell him of process. He did follow you when you walked away. There were raised voices, it was inappropriate, came to the notice of the client – disappointing. I do think you have contradicted your original argument. I understand why but don't agree".

He then continued:

> "if you had been more honest you may not be here today. Although I do not agree with your behaviour either".

He then described the possible disciplinary sanctions. The notes end with Mr Pettman saying "what you have discussed with me today – I wouldn't consider GM. I will make the decision as soon as possible".

42. The outcome letters were sent to each of the individuals both dated 11 May. The Claimant says that on the Monday, which was 14 May. he was telephoned and asked why he was not at work by his colleagues and when he said that he was waiting to hear, he was told that RS was back at work. The Claimant then phoned to find out what had happened and was told that he had been dismissed.

43. The outcome letter to RS showed that RS was given a verbal warning which was to remain live for twelve months. The outcome letter explained that as follows.

> "In reaching my decision I considered that your conduct during this incident fell short of the expectations the company has of its employees and in this instance, I am disappointed in the manner in which you conducted yourself. During the initial investigatory interview, you presented the case that the incident involving yourself and [the Claimant]

> was no more than a case of harmless joking and was not an argument. Thereafter you presented a different account, in which you stated that there was indeed an argument. I perceived that this represented a deliberate attempt to minimise any resultant disciplinary action and this warranted the above sanction".

44. In contrast, the Claimant's disciplinary outcome was dismissal. The letter to the Claimant recorded:

> "In reaching my decision I considered that your conduct during this incident and the manner in which it had drawn a complaint from the client could not be excused. I also considered that the mitigating circumstances presented by you and your representative did not sufficiently counter the severity of the incident. Our success as a service provider is reliant upon the level of trust our client has in us as an organisation and in this instance, your conduct was such as to potentially damage that level of trust".

45. In his witness evidence Mr Pettman said that he saw aggression primarily coming from the Claimant and also explained the dismissal was on the balance of probabilities that the Claimant had been inappropriate, intimidating and aggressive.

46. When asked about the reason for the different treatment, the Tribunal were told that RS got his verbal warning because essentially it was ok for RS to challenge the Claimant about being late, although he should have gone to the shift supervisor, but the verbal warning was because he was not completely honest and he shared responsibility for the altercation. The Tribunal were told that Mr Pettman apportioned more blame to the Claimant as he continued the argument and the client's perception factored into the decision. He placed significance on the fact that the Claimant had followed RS to the luggage room to continue the argument.

47. The Claimant was going away for three weeks to his mother's funeral and his trade union representative appealed on his behalf on 14 May. The Claimant returned and the appeal hearing was arranged for 19 June. Four grounds of appeal were proposed by the trade union representative and were each considered and dismissed by Mr Robbins who, despite having been involved in the investigation process, acted as the appeal officer. Mr Robbins informed the Tribunal that the senior management team was very small and there was no one else available to deal with it. None of the grounds of appeal were that there was a significant disparity of treatment between the Claimant and RS.

48. The Tribunal regarded it as important to note a few additional matters. In the Claimant's original witness statement as we have noted, limited to a repetition of s.8.2 of his ET1, the Claimant recorded the fact that he could not believe that he was being dismissed as he had only missed work once on the day his mother died and was never late or had any verbal or written warning.

49. He said he felt discriminated against as the Respondent failed to conduct a fair and impartial investigation and that the disagreement was between two people, one of whom was asked to return while he was dismissed. He said that RS worked predominantly in the control room and the initial hearing was conducted by his manager. The hearing was held on the Friday and by the Monday he was back at work.

50. He also said he felt bullied as the CCTV footage was used against him as if he was a criminal/suspect. He was told that he used threatening behaviour but this was never evidenced by RS or any of the witness statements which they sent to him. He said he gesticulated when he talked and he believed that this was used against him. He also said, "I have been vocal about procedures and management have said there was a black mark against my name".

51. In terms of more general evidence of discrimination the Claimant said, "several black staff have been suspended/sacked for following the company rules". One Caucasian man Richard called a black man a monkey and little was done. He then went on to steal, because management were aware the client knew they asked him to resign before the situation escalated". The Respondent's witnesses gave evidence that an employee called Richard had resigned after a disciplinary hearing before the decision had been reached but it had been over an entirely different matter and they did not know of any assertion that he had used racist language.

52. The Claimant also referred to another Caucasian man, who he said was caught sleeping but he did not pursue this as a comparative matter after that. The Claimant did say that he believed that if he was Caucasian, this matter would have been handled differently.

53. The only other evidence provided by the Claimant was from Mr Adewale Adeshina. Mr Adeshina referred to various incidents with other staff but as far the Tribunal can understand he never witnessed anything and was referring to information provided to him by other people, which was hearsay. Both Mr Pettman and Mr Robbins denied any knowledge of the incidents described by Mr Adeshina.

54. There was so little information and documentation about any other incidents, that the Tribunal were not in any position to assess whether the incidents described were potentially correct or what had actually happened. As regards the Claimant's situation, again Mr Adeshina referred only to matters which he had been told which were hearsay and he had no first hand knowledge.

55. Another matter which the Tribunal regarded as noteworthy was that in the course of giving evidence, Mr Hurley, who conducted the investigation, referred to the Nepalese staff and characterised them as a group in a stereotypical manner. The Tribunal understands that significant percentage of the work force is Nepalese and Mr Hurley said that as a group their response

to a disciplinary matter was more extreme and he described their attitude of honour towards their work.

Submissions

56. The Respondent made submissions about the law and reminded the Tribunal that in order for a claim to succeed there had to be a comparator who met the requirements of s.23 of the Equality Act. In other words, there should be no material difference of circumstance relating to each of the comparators. An alternative person might still serve as evidence of how the hypothetical comparator would have been treated.

57. In relation to the burden of proof the Tribunal was reminded of the approach of **Igen v Wong** and the question of whether the burden of proof shifts. The Tribunal were told it was open to us to be satisfied by the evidence and to recognise that the evidence was sufficient to indicate that race had nothing to do with the decision.

58. Thirdly, the Tribunal were referred to the case of **Ladele** which was a decision at the EAT level which pointed out that even if the Tribunal were to find the treatment unreasonable it did not mean it justified an inference that it was discriminatory.

59. The Respondent referred the Tribunal to the facts and said that the situation was such that three people had asked the Claimant to lower his voice these being a receptionist, A and M.

60. The Respondent had concluded that the Claimant had been the aggressor, supported by the Claimant's body language and his pursuing of RS into the luggage room and RS being in the seated position.

61. It was submitted the reason why RS was treated differently was that C was the aggressor. There was no basis and no facts to show that the decision was motivated by the Claimant's race. The Claimant's case was that he would not have been dismissed if he was white, but that necessitated the Tribunal considering how the hypothetical white employee would have been treated. There was nothing to show there was an indication of race in the matter and there was a diverse work force. The other employee was of Nepalese heritage. The Claimant did not complain about any racial discrimination until this claim was brought. What he did say was that he felt that he had been targeted and this was because he had been vocal about procedures. Even if that was proven, it was not evidence of race discrimination. There was nothing to show any detriment because of his race.

62. The Respondent dealt with the Claimant's arguments saying that the Claimant had also said his treatment was because he did not work in the control room or because he had not been employed as long as RS. The only actual comparator he referred to was Richard, who was a white employee who had resigned. Richard had resigned before he could be dismissed as the witnesses had said. The Claimant said that Richard had called another black

employee “monkey”, but that was not the reason for the disciplinary against him and none of the Respondent’s managers involved in the dismissal were aware of this and the Claimant did not advance any more information in relation to this allegation. The circumstances were not similar and could not give rise to either an actual or helpful evidential comparator.

63. Additionally, the Respondent submitted that Mr Adeshina referred to incidents involving other staff, but the decision makers were not employed when the incidents which were referred to by Adeshina took place.

The Claimant’s Submissions

64. The Claimant submitted that there were questions to be asked as to why Mr Hurley took a report from RS outside the investigation meeting. So far as the CCTV footage was concerned he thought that the Tribunal had not been shown the whole picture in that there were some missing footage. He said he thought this was confirmed by the email at 7.35am which was five minutes after he had gone inside.

65. He said his next position was the foyer and he thought that the CCTV camera in there would show he did not follow RS inside, but would show that later on RS came out and hugged him.

66. The Claimant said that the interpretation of the CCTV was unfair and he was offering to switch posts with RS in order that RS had more time inside rather than having to go outside again. He also said he thought that he had been targeted because he asked to speak to two managers concerning the individual, Richard, calling people monkey and indeed had gone so far as to send a message to the CEO. This part related to information which was not before the Tribunal and we had no evidence from the Claimant in his witness evidence or indeed any documents about it although the Claimant did repeatedly tell us this as we have noted, outside the evidential parts of the case.

67. The Claimant was convinced that if he had been white he would not be treated like this. The Claimant also considered that they had chosen RS over him and it took two to argue. He also referred to the fact the RS worked in the control room and had they had chosen their own staff in preference to him.

The Law

68. Section 13 of the Equality Act provides; “a person discriminates against another if, because of a protected characteristic, the person A treats the employee less favourably than A treats or would treat others.”

69. S.23 provides that on a comparison of cases for the purposes of s.13, 14 or 19, there must be no material difference between the circumstances relating to each case. This is taken to mean that the comparator must be not materially different to the Claimant, except for the protected characteristic in question.

70. Section 39 provides that an employer must not discriminate against the employee by dismissing the employee or subjecting the employee to any other detriment.

71. Section 136 addresses the burden of proof and subsection 1 provides: "This section applies to any proceedings relating to a contravention of this Act.

72. Subsection 2 provides: "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".

73. Subsection (3) provides "But sub section (2) does not apply if A shows that A did not contravene the provision".

74. The case of **Igen v Wong [2005] ICR 931** is authority for the approach to be taken towards determining the burden of proof. It also notes that although an Employment Tribunal should not be too ready to infer unlawful discrimination for unreasonable conduct in the absence of evidence of other discriminatory behaviour, it was not wrong in law to do so. The case of **Igen v Wong** considered what was referred to in the past as "the Barton guidance" and revised that guidance, setting out in an annex, its revised version. Over the course of time that had been considered several times and in the case **Ayodele v City Link and another [2017] EWCA Civ 1193** it was held that although the wording of s.136 is different from the predecessor provisions, that difference should be regarded in context as no more than a legislative "tidying up" exercise. It was not intended to change the law in substance and certainly not in the fundamental way held in Efoba, of no longer imposing a burden on a Claimant at the first stage of enquiry. Accordingly, previous decisions of the Court such as Igen, as approved by the Supreme Court in Hewage, remain a good law and should continue to be followed by the Courts and Tribunals.

75. The case of **Islington London Borough Council v Ladele [2009] ICR** refers to specifically to the decision of the Court of Appeal in **King v Great Britain – China Centre [1992] ICR 516**. The explanation of the less favourable treatment does not have to be a reasonable one. It may be that the employer has treated the Claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sex orientation of the employee. It explained that the mere fact that the Claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. "Lord Brown Wilkinson stating, "it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances".

76. That case goes on to say in the circumstances of the particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation; see the Judgment of Peter Gibson in **LJ**

Bahl v Law Society [2004] IRLR 799. "If the employer fails to provide a non discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. The inference is then drawn, not from the unreasonable treatment itself – or at least not simply from the fact – but from the failure to provide a non discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment."

77. The case of **Maddarassy v Nomura International [2007] EWCA Civ 33** is authority for the meaning of "could" in the section 136. That case makes clear that to establish a *prima facie* case, there needs to be something more than a set of circumstances where the Tribunal "could" conclude discrimination – mere differences in status or treatment are not sufficient.

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

Issues

78. The issues identified by the Tribunal in this case were whether the Respondent had treated the Claimant less favourably then it treats or would treat others not of his race by dismissing him.

79. In order to determine that the Tribunal concluded that it first needed to consider whether the Claimant had shown something from which the Tribunal could conclude that there had been discrimination on the grounds of race in relation to his dismissal.

80. If we decided that there was something from which we could conclude that there had been discrimination, the burden of proof would move to the Respondent and the question would then be whether the Respondent had shown that there was a reason for dismissal and that it was a non-discriminatory reason.

81. There was generally the question of whether a white person would have been dismissed if they were the same in all material respects as the Claimant but not of his race.

Conclusions

82. In relation to the first question the Tribunal considered whether there was anything from which the Tribunal could conclude there had been discrimination in relation to the Claimant's dismissal.

83. The Claimant's evidence in relation to any overt discrimination on the grounds of race was so vague that we were unable to reach any conclusions

on it. As we have explained, the Claimant had failed to submit a separate witness statement as required by the preliminary hearing order. He had been given the opportunity to put in supplemental information at the outset of the hearing, but had chosen not to do so. The Claimant had made various statements in the course of the hearing, several of which were outside the ambit of the evidence, but that was all.

84. However, we bore in mind the fact that it is rare for anyone to be overt in discrimination and that discrimination could also be unconscious. We recognise that we are entitled to draw influences from the Respondent's manager's conduct in appropriate circumstances.

85. This may be a claim about dismissal and the Claimant is certainly saying that his treatment was not fair, but this is not an unfair dismissal claim as the Claimant has insufficient service to bring such a claim. Therefore, the tests that apply to such a claim are not applicable to this situation.

86. We took account of the authorities that made it clear that unreasonable treatment by itself is not sufficient to indicate that the burden of proof is moved to the Respondent.

87. However, in this case the Respondent had two employees both of whom raised their voices in public and within the hearing of one of the Respondent's clients. In particular the facilities manager had overhead the raised voices and took the incident seriously as her email indicates.

88. The Respondent's references to trust in them as a service organisation, which had been recited in the facts, applied to both employees. One employee was given a verbal warning while the other was summarily dismissed. The discrepancy of outcome was so great that the Tribunal concluded that this was something more than unreasonable behaviour. It was not a question of unreasonable behaviour where one could not just assume that that would not happen to another employee. This was a situation where two employees, closely involved in the same incident, had been treated in very different ways. This was coupled with some concern on our part when Mr Hurley referred to Nepalese staff in a stereotypical manner in relation to their approach to their work. We also note that both Mr Pettman and Mr Robbins took the view that the Claimant was more of the aggressor from the CCTV images. Having viewed the CCTV on several occasions, it was clear to us that the Claimant has a habit of gesticulating which might appear at first instance to be more aggressive, but when watched closely, RS had also been quite angry. In the luggage room, it appeared that it was RS, and not the Claimant, who was the person pointing the finger and doing most of the talking for much of the time.

89. In all the circumstances, taking the error in the transcript as to who was pointing the finger, and the considerable discrepancy in outcome, we concluded that there was sufficient to shift the burden of proof.

90. The second question we considered was whether the Respondent had shown that it had not contravened the provision. In other words, we considered whether there was a non discriminatory reason for the dismissal and this required us to consider dismissal and the reason for it.

91. We decided the reason for the dismissal was that the Respondent's client had witnessed an incident where the Respondent's security staff were behaving inappropriately and with raised voices in the public area of their building. That incident had been prolonged by the Claimant who had followed RS back to the luggage room, going through the main reception area on the way, when he was supposed to remain outside to undertake his allocated duties.

92. Mr Pettman's analysis of the situation was, while both played a part, the Claimant was more responsible because of his action in prolonging the arguments. In his witness statement we noted Mr Pettman says

> "the evidence pointed to the Claimant being the primary instigator of the incident escalating and was the primary aggressor. The CCTV which I had viewed prior to the disciplinary meeting clearly showed the Claimant acting aggressively towards RS in a public forum and pursuing him to continue the argument."

93. In all the circumstances we were satisfied that the Respondent's conclusion was that the Claimant had a higher level of responsibility for the incident than RS. We further recognise that the Respondent took very seriously the implications for its relationship with the client of an incident happening in the public area. It was clear that the client would expect some action to be taken, and the Respondent was keen that it should be shown to have dealt with the matter firmly and decisively.

94. We noted that the Respondent appeared to think it was reasonable for RS to have complained because of the Claimant's absence being lengthy. While it may seem unfair that the Claimant, when suffering an illness at that nature, would be expected to find his shift supervisor, nevertheless, technically that was what the Respondent's process normally expected. While they did not make much of this and did not challenge the fact that the local management had given some general directions to the staff to operate in the manner they did, they believed it was reasonable for RS to have felt aggrieved about the position.

95. In contrast, the Claimant appeared to have taken issue with RS complaining about the situation. The Claimant could have stayed in post outside but did not. We are satisfied that the Respondent's managers believed that C followed RS immediately, leaving his post and prolonging the argument. There was considerable evidence to support this view and the Claimant had not suggested he stayed outside for a period until this hearing.

96. Additionally, although Mr Pettman, in the course of being questioned, accepted that there was no evidence as to who had made the threatening

remark or indeed if there actually was one, he had, in his witness statement, recorded his assumption that the email account given by the facilities manager that she had overheard a threatening comment was likely to be correct and the Claimant was the person who said it, based on the comment made by RS when he was walking with Mr Hurley. While no one else supported that, it did appear the Mr Pettman had at the time regarded that as being the truth of the matter and he thought that everyone else was trying to reduce the severity of the impact on the Claimant.

97. The Tribunal then went on to consider whether a white man who was the same as the Claimant in all other respects, would have been dismissed. This required us to consider whether a white man would have been dismissed had he continued the argument from the front door into the luggage room and whether the Respondent would have also been this concerned in this situation about the response of the client. Our conclusion was that that would have been the case.

98. We could not consider the Claimant's assertion that his dismissal was because he had contacted a senior manager over Richard's alleged comments, because as noted, the Claimant had referred to this outside the evidence. We had given him full opportunity to present his evidence. Insofar as the Claimant suggested that the Respondent had chosen RS over him because he was closer to the management as he worked in the control room, this was also raised by the Claimant in questioning rather than evidence, but was in any event, a non-discriminatory reason for the differential treatment.

99. In all the circumstances, our conclusion was that this was not race discrimination.

100. We do of course recognise the stress caused to the Claimant in the matter and the fact that he regards himself and good and loyal employee who has had his career interrupted by reason of a dismissal which he believes he was unfair because he not treated in a reasonable way when compared with the other employee involved. Had this been an unfair dismissal case, different considerations would have arisen and the treatment of the two individuals would have been relevant in terms of deciding fairness. A discrepancy of that nature might have been relevant to the determination of fairness in a different way. We understand the Claimant's concerns about his treatment, but our conclusion, on applying the law in relation to race discrimination, is that there was no race discrimination.

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Employment Judge Walker

Dated: 29 May 2019

Judgment and Reasons sent to the parties on:

3 June 2019
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For the Tribunal Office