# EMPLOYMENT TRIBUNALS

| ***Claimant*** | | ***Respondents*** |
|---|---|---|
| Mr B Stevens | **AND** | Nuffield Health |

**Heard at**: London Central **On**: 27-29 November 2019

**Before:** Employment Judge Nicolle
**Members:** Mr I McLaughlin
Mrs M B Pilfold

**Representation**
**For the Claimant:** In person
**For the Respondent:** Ms C Hollins, Solicitor

## RESERVED JUDGMENT

1. The claim for direct race discrimination fails and is dismissed.
2. The claim for unfair dismissal fails and is dismissed.

## REASONS

Claims and Issues

1. The Claimant brings claims for unfair dismissal and direct race discrimination. The issues are as follows:

Unfair dismissal

1.1 Has the Respondent shown the reason for dismissal?

1.2 Was the reason a substantial reason of a kind which can justify dismissal?

1.3 Was the dismissal fair or unfair applying the band of reasonable responses? As part of that,

1.3.1 following the 3-stage test in *British Home Stores v Burchell* [1978] IRLR 379:

1.3.2
- did the Respondent genuinely believe the Claimant was guilty of misconduct?
- did they hold that belief on reasonable grounds?
- did they carry out a proper and adequate investigation?

1.3.3 was dismissal a fair sanction?

1.4 Was there a breach of the ACAS Code on Disciplinary and Grievance procedures?

1.5 If the dismissal was unfair on procedural grounds, what is the chance that the Respondent would have dismissed the Claimant even if they had followed fair procedures and on what date would the dismissal have taken place?

1.6 Should there be any deduction from the basic award for conduct prior to dismissal? Regarding the compensatory award, did the Claimant cause or contribute to his dismissal and if so, to what extent?

1.7 Should the Claimant succeed, remedy.

<u>Direct race discrimination - Equality Act 2010, s13</u>

2. Whether the Respondent treated the Claimant less favourably because the Claimant is not white than they treated or would treat a comparator.

3. At a case management hearing before Employment Judge Elliott on 29 May 2019 the Claimant described his racial group as Black African. The case management order sent to the parties on 15 October 2019 included a list of the treatment which the Claimant contends was less favourable treatment on account of his race. This comprises:

a. Failing to interview other personal trainers to establish his contention that much of his behaviour was custom and practice.

b. Not being given sufficient information on next steps and the possible consequences of failing to improve. This relates to informal meetings with his managers.

c. Failing to carry out a fair investigation.

d. "Trolling" through hours of CCTV to build a case against him.

e. Not explaining to his clients or other staff the reason for him leaving or warning the staff of the importance of complying with procedures.

f. Making him wait seven months for his paternity pay. He received it in August or September 2018.

g. No explanation being given to him about his grievance regarding his altercation with Ms Joanne Fossick, the General Manager (Ms Fossick). The Claimant's case is that it was not considered.

h. The appeal officer, Mr Adam Hanover (Mr Hanover) did not do a proper investigation for the appeal hearing.

i. Allowing an altercation that he had with Ms Fossick on 20 October 2018 to play a major role in his dismissal.

Findings of Fact

4. The hearing took place over three days. Evidence was heard over the first two days and submissions on the third day. The Tribunal then considered its decision.

5. The Tribunal heard evidence from the Claimant together with his witnesses, Martena David (Ms David) and Rhys Paul (Mr Paul), and for the Respondents, Rachelle Simpson (Ms Simpson), Front of House Manager at the Respondent's Ealing fitness club (the "Club"), Ms Fossick and Carrie Hobrough (Ms Hobrough), General Manager of the Respondent's fitness club in Taunton but at the time of the disciplinary hearing at the Respondent's Stockley Park club. There was an agreed trial bundle of 252 pages.

6. The Claimant started to work for the Respondent on 1 October 2016 and was employed as a personal trainer at the Club until his dismissal for gross misconduct on 15 November 2018.

7. About 50 employees work in the Club. This comprises approximately twelve personal trainers (PTs) together with office, maintenance and cleaning staff.

8. Ms Fossick gave evidence that that Club's employees are ethnically diverse with approximately 70% not being White British. The Claimant said he was discriminated against because he is not white.

9. The working week of the Claimant, together with that of the other PTs, splits between what are described as shifts and other days when the PT will engage directly with the clients for personal training sessions. Whilst the PT will establish a personal relationship with a client for training, payments are made via the Club with the training fees being included as part of the PT's salary. During shift days the PT is expected to undertake various tasks at the Club to include new member inductions, health MOTs for members, taking exercise classes and being responsible for general cleaning, maintenance and supervision of all elements of the Club's fitness equipment and activities.

10. The Claimant typically worked six days a week at the Club. On weekdays this would normally involve arriving at approximately 6:15am to assist in opening the Club and taking a spin class at 6:45.

11. The bundle included various emails regarding the importance of the PTs complying with the Club's policies regarding health and safety checks and the purchasing of food and beverages from the Club's café. The relevant emails are as follows:

An email that was sent by Ms Fossick to the Claimant on 17 March 2018 referring to points arising from a discussion the previous week. This included the following comment:

> "All health and safety checks that are your responsibility must be completed on the correct paperwork. If this is not done it is a breach of the company's health and safety requirements".

12. On 5 June 2018 Pia Juneja (Ms Juneja), fitness and wellbeing manager, sent an email to all PTs entitled "Health and Safety Gym Floor Check List". This included the following:

> "All gym equipment needs to be thoroughly inspected for safety <u>every week</u>. You have all been assigned specific tasks to complete on a weekly basis, which will continue as usual". The email provided that the Claimant (or Mr Paul in his absence) had responsibility for the monthly maintenance and safety checks of the spin studio bikes.

13. On 13 June 2018 an email was sent from Candace Morris to Ms Fossick. The Tribunal assumes that Ms Morris was a gym user and this email complained about the batteries in the spin studio pedometers being flat and needing to be replaced.

14. In an email on 14 June 2018 from Ms Fossick to Ms Juneja reference was made to "another complaint" about the spin bikes not being checked. The email

referred to booking an actual time for “him” to check the bikes each week. The Tribunal assumes that this represented a reference to the Claimant.

15. Ms Juneja replied to Ms Fossick’s email on 14 June 2018 saying that she had raised this issue with the Claimant in his one to one and that he had signed a training record stating that he understands his responsibilities for gym floor health and safety. She went on to say that the new check list was implemented that week and clearly states what needs to be checked for each piece of equipment, including monitors.

16. The Claimant attended a meeting with Ms Juneja regarding concerns with his performance on 23 July 2018. Whilst the Claimant acknowledges that this meeting took place, he says that he did not receive the resulting letter dated 24 July 2018. The Respondent’s position is that the letter was sent as a PDF attached to an email to the Claimant on 29 July 2018.

17. The PTs do not have their own office space and computer. Rather they log on to a non-specific computer in the Club and typically when undertaking fitness reviews or MOTs with members. They can then access their individual Nuffield email account. The evidence from Ms David and the Claimant is that emails are not regularly checked.

18. We find that it is entirely possible that the Claimant may not have read Ms Juneja’s letter dated 24 July 2018. Given that the letter referred to performance concerns and that a failure may result in a disciplinary action it would have been appropriate for this letter to be handed to him in person.

19. The letter referred to the following concerns with the Claimant’s conduct and performance:

- Eating and drinking on the gym floor;
- Failure to complete health and safety checks;
- Taking items without paying and breaching food & beverage regulations.

The Respondent's disciplinary procedure refers to first written warnings, final written warnings and dismissals as being a possible sanction. The letter made no reference to it constituting a warning in accordance with the Respondent's disciplinary procedure and as such the Tribunal regards it as a non-disciplinary sanction but nevertheless as evidence of concerns being raised with the Claimant regarding his performance.

20. On 29 July 2018 the Claimant attended a meeting with Lucas Novi, Deputy General Manager (Mr Novi). During this meeting reference was made to there having been two occasions where the Claimant had bought something from the café and not paid for it. The Claimant stated that if rushed he would pay later. The meeting notes also referred to Mr Novi saying that health and safety checks had not been done since 25 June 2018. The Claimant said that his back had been hurting and it would be easier for him if the serial numbers of the individual bikes were accessible without having to lift the bike. No action was taken to address the Claimant's concern in this respect.

21. On 1 September 2018 Ms Juneja sent an email to all PTs entitled "Health and Safety Gym Floor Checks". She opened the email by apologising for another one regarding "paperwork chores". The email then contained a reminder about the need to sign off the health and safety fitness checks after each shift together with your assigned weekly/monthly tasks. She stated that this was of upmost importance for safe operation of the Club and failure to do so may result in further action. Once again, the Claimant (or Hamid in his absence) had responsibility for the spin studio bikes.

22. There was a suggestion by the Claimant and Ms David that the reference to "paperwork chores" meant that the message was not of particular importance. There was also a suggestion from the Claimant and Ms David that the PTs would not necessarily receive and read all emails. We find that the Claimant and PTs would have been aware of the importance of safety checks given that there were repeated emails regarding the importance of this issue together with oral communications from Ms Fossick, Mr Juneja, Mr Novi and others.

23. On 12 September 2018 Ms Juneja sent the Claimant an email about his not having worn the correct uniform again today and saying that this was third time in the last 10 days despite warnings. She said that this was unacceptable. Later that day Ms Fossick also sent an email to the Claimant asking him to ensure that he wears the Club uniform as per the company guidelines. She requested that if cold he should wear the fleece allocated to him on 5 February 2018.

24. A further email was sent by Ms Juneja to the PTs on 26 September 2018. Once again this emphasised the importance of undertaking health and safety paperwork sign off. The email referenced an unfortunate incident earlier that month, in which we understand, a gym user died in the sauna. It is apparent that there was heightened emphasis on the importance on health and safety procedures and checks following this incident.

25. In her email of 26 September Ms Juneja stated that all staff were required to read and understand all policies, risk assessments and emergency procedures by Monday 1 October 2018. She stated that she had blocked off time on Bookingbug during each of the PT's shifts that week to enable them to do this. Once again, the email referred to the Claimant having specific responsibility for the weekly and monthly maintenance and safety checks for the spin studio bikes.

26. An email was sent by Miss Fossick to Ms Juneja on 1 October 2018 referring to some of the weekly equipment checks being missing. The email also referred to no weekly spin bike checks having been completed at all for September and that this had put the Club at risk. Ms Fossick asked Ms Juneja to ensure that this did not happen again.

27. A further email was sent by Ms Juneja to the PTs on 12 October 2018. Once again, she emphasised the importance of health and safety checks and that this was crucial for the safe running of the Club. She stated that Karena would be monitoring on a weekly basis to ensure that all checks are completed whilst she was away.

28. Ms Fossick sent an email to all PTs on 15 October 2018 including a reference to no hot drinks being taken on the gym floor and that all health and

safety checks and open and closed sheets must be completed in full. She stated that she will be checking these each week and that non-compliance would be taken very seriously.

29. The Claimant completed a safety check form for the spin bikes dated 15 October 2018. The form contained a list of 46 bikes with their individual serial numbers. The Claimant placed his initials against each bike. The form stated that each box should be initialled when safety checks had been completed.

30. It is agreed that the Claimant had not undertaken the checks at the time the form was completed and filed.

31. 15 October 2018 was a Wednesday and the Claimant's shift day. He started at 6:15 and took a spin class at 6:45am and he did not have the time to undertake the checks prior to the spin class. He said that he would take approximately 30 minutes to complete the checks with about a minute per bike.

32. The Claimant's evidence, and that of his witnesses, was that the safety check forms are often completed prior to the checks being undertaken. There was some suggestion that this was so that they could be returned to the duty manager prior to their leaving for the day. The Claimant also stated that there would not always be time to undertake the checks. However, the record for 15 October 2018 shows that the Claimant only had three booked appointments comprising an HMOT at 10am, an induction at 11am and a further HMOT at 12:15. Given that he was on an eight-hour shift there clearly would have been plenty of time for the spin bike checks to have been undertaken. We find that the checks were not undertaken on 15 October 2018.

33. The bundle contained a further document in which Nasreen checked the spin bikes on 17 October 2018. Faults were identified on three of the bikes.

34. An incident then took place in the cafeteria on 17 October 2018 where Ms Fossick observed the Claimant acquiring a pre-workout shot between 11:15-11:25am without in her opinion making payment. She was at the other end of the bar area undertaking a one to one.

35. The Respondent's policy is that all purchases from the cafeteria should be paid for at the time of purchase. It was accepted by the Respondent that the policy had been laxer prior to Nuffield's acquisition of the Club from Virgin Active. However, there are various documents referring to the Respondent's policy regarding the importance of payments being made contemporaneously with purchase. This includes training records for the food and beverage policy signed by the Claimant on 25 January 2018. This includes the following:

- Only the management team and food and beverage team are permitted in the food and beverage area
- All food needs to be paid for at point of sale, bar tabs are not permitted.

36. We find that the policy regarding food and beverage purchases was clearly stated and known to the Claimant and other employees. The Claimant's evidence was that he would often not make immediate payment either because he was rushed, did not have cash, phone or payment card in his possession or that he had an arrangement with his bank discouraging him from making non-cash payments below £5. The Claimant's position being that he would always make payment and any delay would be with the knowledge of the cafeteria staff.

37. Ms David and Mr Paul gave evidence that this also represented their practice. They were of the opinion that whilst the policy was known it was not fully observed. Indeed, Mr Paul gave evidence that he would occasionally run up a tab of as much as £50 which he would settle at the end of the month.

38. The Tribunal took the opportunity to view the CCTV recording between 11:14 and 11:25am on 17 October 2018. This evidenced the Claimant in casual conversation with Marta, a white Polish employee and responsible for running the cafeteria. The cafeteria was quiet. We observed that towards the end of the recording the Claimant had in his possession a small drink which he was shaking and making no obvious attempt to conceal. We saw no evidence that payment had been made and this position is, in any event, accepted by the Claimant.

39. Ms Fossick was concerned about what she had observed. Her presence was not known to the Claimant. As a result of this concern she scrolled through the CCTV footage for the duration of the rest of the Claimant's shift on 17 October 2018 to see whether there was any evidence of his returning to the cafeteria to make a payment. She saw none. She was therefore concerned that the Claimant had taken the pre-workout shot without intending to pay for it.

40. Ms Fossick also said that she viewed the CCTV footage from the spin bike studio for 15 October 2018. She cannot recall when she did this, but it was prior to the Claimant's suspension on 22 October 2018. The reason for her viewing the CCTV recording for the spin bike studio was to see whether there was any evidence of the Claimant having undertaken the checks of the spin bikes given that he had completed the safety check form and returned it that day. She saw no evidence of any checks being undertaken.

41. On 20 October the Claimant was reprimanded by Ms Fossick when she observed him in the kitchen. Employees without F&B certification are not permitted to enter the kitchen. Ms Fossick said to the Claimant "get out of my kitchen". Her evidence was that she would have said the same, in the same manner, to any other employee and it was no way personal to the Claimant. The Claimant had entered the kitchen as he was concerned that eggs, he had purchased from the cafeteria were uncooked. He said there was no one available at the cafeteria so he entered the kitchen. Ms Fossick denied that this act was in a trigger for the Claimant's suspension. We find that this incident was not a relevant factor to the disciplinary process.

42. As a result of the various concerns regarding the Claimant's conduct he was suspended with effect from 22 October 2018 and this was confirmed in a letter from Mr Novi of that date. The letter stated that he was suspended on full pay pending the outcome of an investigation into allegations of:

- Taking an item from the food and beverage department
- Falsifying health and safety documents
- Ongoing issues with not following conduct standards when on shift.

43. Angela Garland (Ms Garland) from the Stockley Park Club, was appointed to undertake an investigation. This was to ensure that independence existed from those employees at the Club directly involved.

44. The Claimant attended a meeting 2018 at Stockley Park with Ms Garland on 29 October. When asked by Ms Garland as at to what time on 15 October 2018 he had checked the bikes the Claimant responded by saying "I can't tell you a time". He went on to say that he was sure he would have undertaken the check. He then said that if it's signed off on the checks it was "likely" that he would have done them.

45. The Claimant was also questioned regarding the incident in the cafeteria on 17 October 2018. He said that he went to the cafeteria six or seven times a day and would normally pay by cash or on his phone but there were occasions when he would say he would return with cash when he could.

46. The Claimant acknowledged that he may genuinely have forgotten to pay. The Claimant said that he felt like he was being "singled out". He referred to an incident with Ms Fossick when she reprimanded him for entering the kitchen on 20 October 2018 and speaking to him in what he felt was a confrontational way.

47. The Claimant made no reference to his race.

48. As a result of continuing concerns regarding the Claimant's conduct he was invited to attend a disciplinary hearing. This was to be conducted by Ms Hobrough. She sent a letter to the Claimant dated 1 November 2018 asking him to attend a disciplinary hearing on 8 November 2018 at Stockley Park. The letter stated that the purpose of the hearing was to discuss allegations of:

- Taking an item from the food and beverage department
- Falsifying health and safety documents
- Ongoing issues with not following conduct standards when on shift.

49. The letter enclosed relevant documents to include the letter of concern dated 24 July 2018, minutes from the meeting of 23 July 2018 and CCTV footage for 15 October and 17 October 2018 respectively.

50. The letter stated possible sanctions from the disciplinary procedure included dismissal.

51. As the result of the incident in the cafeteria on 17 October 2018, Marta was also suspended and required to attend an investigatory meeting. Ms Simpson had responsibility for this, but Ms Juneja also attended the meeting in a note taking capacity.

52. Marta was sent a letter dated 3 November 2018 inviting her to attend a meeting at the Club on 6 November 2018. The purpose of the investigation was stated to be an allegation of "facilitating the theft of an item from the food and beverage department". The Claimant considered that the reference to "facilitating theft" prior to his disciplinary hearing indicated that his guilt of theft was predetermined. The Respondent's position was that, at this stage, it was merely investigating given the suspicions arising from Ms Fossick's observations on 17 October 2018. We do not consider that the use of this terminology points to a predetermined decision having been made in relation to the Claimant's culpability.

53. At the meeting with Ms Simpson, Marta stated that she was aware that people needed to pay on making a purchase. She denied any knowledge of the Claimant having purchased the pre-workout shot. She signed the note of the meeting.

54. There were some delays in the Claimant's disciplinary hearing which took place on 14 November 2018. He was not accompanied. He had been given the opportunity of having an accompanying representative but originally requested that a lawyer should attend, and this was refused by the Respondent.

55. The meeting lasted from 15:25 to 16:36. Fatou Jaye attended as a note taker.

56. In relation to the bike checks the Claimant said that he had done them. However, when reference was made to the CCTV recording, he was somewhat less certain stating “I’m sure I would have done it”. The Claimant referred to an injury to his knee making it difficult for him to lift the bikes and to carry out the full check.

57. In relation to the failure to make payment for the pre-workout shot the Claimant said that it was “human error”. He repeated this on several occasions.

58. In a letter of 15 November 2018, Ms Hobrough advised the Claimant that she had decided to summarily dismiss him for gross misconduct. Her letter was very short and set out the allegations without any explanation as to her thought process as to why he was guilty of the allegations. When giving evidence she was unable to provide any explanation as to the deficiency in the letter in this respect.

59. She did, however, give evidence that the two most serious incidents were theft and the falsifying of a health and safety check document. The performance issues as allegation three in respect of not wearing correct uniform and drinking coffee on the gym floor were less important and would not in themselves have been sufficient to justify dismissal.

60. The Claimant was notified of his right to appeal the decision to Adam Hanover (Mr Hanover), Senior General Manager. It was not until a letter dated 11 December 2018 that the Claimant appealed.

61. In summary he referred to the following grounds of appeal:

- Unfair and inconsistent practice
- Failure to comply fully with the ACAS disciplinary code and practice
- The severity of the decision wholly out of proportion of the alleged events.

62. The Claimant did not, however, give names of other PTs who had behaved in a similar way. He merely stated that no other PTs had been interviewed to establish his contention that much of his behaviour was custom and practice.

63. For the first occasion the Claimant questioned whether his "unfair treatment" may be connected to his race. He provided no particulars to support this concern.

64. The Claimant's appeal was heard by Mr Hanover on 18 December 2018 at the City Club. Ms Hollins stated that it constituted a rehearing and not merely a review. Mr Hanover did not attend the Tribunal hearing as a witness.

65. Mr Hanover asked the Claimant whether he had any evidence to support his contention that it was standard practice for food and drinks to be purchased without payment and he responded that he did not. He went on to state that everyone needed to be interviewed to establish whether they had taken things from the cafeteria without payment.

66. It was not until page 27 of the notes of the appeal that the Claimant referred to being singled out for treatment as a result of the incident with Ms Fossick in the kitchen on 20 October 2018 and not until page 32 that he referred to his race, but again provided no specifics.

67. The appeal hearing was adjourned at 15:10 having commenced at 11:36am.

68. The appeal was reconvened on 21 January 2019. It appeared that Mr Hanover had undertaken some further investigation in the intervening period. He referred to the meeting with Marta on 6 November 2018 and provided a copy of the note of that meeting to the Claimant too. It had not previously been provided to him.

69. It would clearly have been appropriate for the Claimant to have been provided with a copy of the note of Marta's investigatory meeting prior to the disciplinary hearing on 14 November 2018. However, having considered this position we do not consider that this, in itself, makes the Claimant's dismissal unfair. First, he had the opportunity to comment on this at the appeal and was not able to add anything beyond surprise at Marta's version of events. Further, the evidence of Marta did not assist the Claimant's position as it was contrary to

his previous account that Marta had been aware of his taking the pre-workout shot and his intention to pay later. Her statement was that she had no awareness of it at all. We therefore do not consider that the Claimant suffered any prejudice in this respect.

70. Mr Hanover advised the Claimant of his decision. Whilst he personally would have taken a more lenient view regarding the health and safety checks which he considered to justify a first or second written warning, he was of the opinion that the issue of theft was sufficiently serious to justify dismissal.

71. Mr Hanover set out his decision in a relatively detailed letter to the Claimant dated 31 January 2019.

Law

Unfair dismissal

72. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

73. Under s98(4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.

74. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, Tribunals have been given guidance by the

EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:

(1) did the respondent genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

75. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondent (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

76. Finally, Tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason.

77. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for the tribunal to substitute its own decision.

78. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

79. In relation to dismissal for gross misconduct, ultimately the question is whether the employer had a reasonable belief that the employee committed that level of misconduct and deserved instant dismissal. Just because the claimant has committed gross misconduct, does not mean the dismissal was fair. The

usual approach under s98(4) must be followed. The fact of summary dismissal is a factor to be considered along with all the other circumstances.

ACAS Code

80. In reaching their decision, Tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the Tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

81. The ACAS Code includes with underlining added for emphasis:

5*. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

*8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.*

*9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.*

*11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.*

Race

82. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race

than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

83. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was.

84. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

85. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.*)

86. The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. race) and a difference in treatment. LJ Mummery stated at paragraph 56:

"Those bare facts 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."

87. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in *Hewage v Grampian Health Board [2012] IRLR870:*

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other".

Conclusions

88. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interest of keeping these Reasons to a manageable length.

Race Discrimination

89. In reaching our conclusions, we will apply the burden of proof under the Equality Act 2010. Next, we have considered each alleged incident of discrimination separately and we have also considered them collectively. Referring to the matters that are relied on as agreed at the case management hearing:

a. *Failing to interview other personal trainers to establish the Claimant's contention that much of his behaviour was custom and practice*

At no stage did the Claimant refer to any specific incidents involving named PTs he considered should be interviewed. We do not consider it was necessary for the Respondent to interview all PTs given that specific evidence had come to the attention of Ms Fossick pertaining to the Claimant relating to the respective incidents on 15 and 17 October 2018. Further, we find it understandable that the Respondent considered these concerns in the context of the significant number of occasions where he had been reminded of his responsibilities in respect of these matters, and

further had received a letter of concern (albeit not read by him) dated 24 July 2018, but following a meeting which the Claimant acknowledged had taken place with Ms Juneja on 23 July 2018. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

b. *Not being given sufficient information on next steps and the possible consequences of failing to improve. This relates to informal meetings with his managers.*

We consider that this allegation is contrary to the significant evidence, to include the various emails referred to, and the meeting with Ms Juneja on 23 July 2018. We also consider that the Claimant was advised that dismissal was a possible outcome of the disciplinary process. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

c. *Failure to carry out a fair investigation*

We consider that overall the investigation was fair. In any event we do not consider that any basis exists to infer that any differences would have existed in the investigation undertaken for an equivalent employee who was not black African.

d. *"Trolling" through hours of CCTV to build a case against the Claimant.*

We do not consider that the Respondent viewed CCTV with a view to finding fault with the Claimant but rather used it as a means of investigating suspicions based on observations that he may have breached the Respondent's policies and procedures. Further, we consider the Respondent was acting correctly in undertaking an investigation to support its concerns, and that viewing the CCTV footage for the relevant areas on 15 and 17 October 2018 respectively, was

appropriate. Had the Respondent not done so it would have been open to criticism that its investigation was inadequate. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

e. *Not explaining to his clients or other staff the reason for him leaving or warning the staff of the importance of complying with procedures.*

We do not consider that it would have been appropriate for the Respondent to have advised the Claimant's clients regarding the fact, or reasons, for his suspension and ultimate dismissal. As previously stated, we consider that the Claimant was provided with numerous reminders of the importance of complying with the Respondent's policies regarding food and beverage purchases and the importance of carrying out health and safety checks. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

f. *Making him wait seven months for his paternity pay which was not paid until August or September 2018.*

First, we accept the Respondent's position that this claim would have been out of time. In any event this sum has now been paid. There was a significant delay in making payment. The Respondent acknowledges that this was unacceptable. The Respondent's position is that at least two other employees were similarly affected. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

g. *No explanation being given to the Claimant about his grievance about his altercation with Ms Fossick and this matter not being considered*

We accept the Respondent's position that the so called "kitchen altercation" had no bearing on the Claimant's suspension and dismissal. Whilst we understand why the Claimant may have perceived a connection, we do not find this was the case. Further, we accept the evidence of Ms

Fossick that she would have spoken in the same manner and terms to any other employee and do not consider that any evidence exists to create an influence her tone and content of communication to the Claimant on this issue was in any way on account of his race.

h. *The appeal officer Mr Hanover not doing a proper investigation for the appeal hearing*

We consider that Mr Hanover undertook a careful consideration of the appeal which clearly went beyond a mere review. We do not necessarily consider it constituted a rehearing but do find that Mr Hanover would have spent many hours both during the appeal hearing, the intervening period and at the reconvened hearing considering the matter. Further, it is apparent that he brought a degree of objectivity to the process in that he did not automatically uphold all of Ms Hobrough's findings but rather expressed a view that the health and safety issue would not, in itself, justifiy dismissal for gross misconduct. Therefore, we find no evidence to infer that he was treated less favourably on account of his race.

i. *Allowing an altercation that he had with Ms Fossick to play a major role in his dismissal*

We do not consider that the "altercation" with Ms Fossick had any bearing on the dismissal and therefore find no evidence to infer that he was treated less favourably on account of his race.

90. We consider it significant that it was not until after his dismissal that the Claimant first raised the issue of race discrimination. We do not consider that he pursued the matter either at the appeal hearing or before the Tribunal in more than very general terms. He gave no specific examples of comparators who were treated, or would have been treated, more favourably. Whilst there was a reference to a GDPR breach, regarding a member, involving another PT this was on a no names basis. We therefore do not consider that this represented an

appropriate comparator. In any event we consider that the two issues are entirely separate.

91. The Claimant gave evidence that very few of the Club's PTs are black. However, the Tribunal heard evidence from Mr Paul, who is black, and had been a PT at the Club for a year until August 2018. The Tribunal also heard evidence of a wide ethnic mix at the Club and consider that no evidence exists that the Respondent's recruitment and retention policy is discriminatory on account of race.

92. Whilst Ms David gave evidence of some racist language being used in the office this was be isolated and unrelated to the Claimant. We therefore do not consider that any inference of less favourable treatment of the Claimant on account of his race can be drawn and that burden of proof does not therefore transfer to the Respondent.

Unfair Dismissal

93. The first issue is whether the Respondent has shown the reason why the Claimant was dismissed. We find that they have. The Claimant was dismissed for gross misconduct i.e. for theft, falsification of documents and performance issues.

94. This reason was a substantial reason of a kind which can justify dismissal.

95. We now have to decide whether it was fair for the Respondent to dismiss the Claimant for that reason and whether they followed a fair procedure. We must apply the band of reasonable responses.

96. First, we will go through the three stages of the case of BHS v Burchell.

**Stage one**: did the Respondent generally believe the Claimant was guilty of the misconduct? We find that they did.

**Stage two**: did the Respondent hold that believe on reasonable grounds? We find that they did. The Respondent already had concerns regarding the Claimant's conduct as set out in Ms Juneja's meeting with him on 23 July 2019. It is apparent these concerns were not resolved but were exacerbated by the incidents on 15 and 17 October 2018.

**Stage three**: did the Respondent carry out a reasonable investigation? We find that whilst there were some shortfalls in the investigation undertaken that overall if fell within the range of reasonableness. It would have been open for the Respondent to make further enquiries of the PTs regarding the custom and practice of making purchases in the cafeteria. There is some evidence from the repeated emails regarding this matter, and the importance of undertaking health and safety checks, that these policies were not being complied with. Nevertheless, absent any named individuals being referred to at any time by the Claimant, we consider that it was reasonable for the Respondent to confine its investigation to matters specific to him rather than seeking to carry out a time consuming investigation, potentially involving viewing many days' worth of CCTV footage, in respect of the other PTs.

Fair Procedure and the ACAS Code

97. Whilst we have identified minor shortcomings in the procedure followed, we consider overall that the procedure was fair. The shortcomings we have identified, such as not hand delivering the 24 July 2018 letter to the Claimant, not making it clear whether that letter formed part of the disciplinary process, and not providing the Claimant with a copy of the note from the investigatory meeting with Marta on 6 November 2018 were not of sufficient materiality to render the process overall unfair. We also consider that the Respondent dealt with the matter with reasonable expediency, given the Claimant's suspension on full pay, and that he was informed that dismissal was a potential outcome.

Overview

98. Whilst we consider that the decision to allege that the Claimant was guilty of theft of the pre-workout shot was harsh, we do not consider it outside the range of reasonable responses. It would have been possible for the Respondent to have adopted a more generous interpretation in confining the allegation to a breach of its policy on payment being made contemporaneously with purchases in the cafeteria. However, we consider that it was open to the Respondent to adopt the approach it did and its decision to dismiss the Claimant for theft and falsification was one open to it on the evidence given the Respondent's reasonable suspicions following a reasonable investigation.

Employment Judge Nicolle

Dated: **30 December 2019**

Sent to the parties on:

30/12/2019.....

…….....
For the Tribunal Office