THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr J Omotosho **v** **ISS Facility Services Limited**

Heard at: London Central **On**: 27 – 31 January 2020

Before: Employment Judge H Clark
Ms G Gillman
Mr D Kendall

Representation
Claimant: Mr Rogers - Counsel
Respondent: Mr Moon - Consultant

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims for unfair dismissal, breach of contract and race discrimination are not well founded.

Employment Judge Clark

Dated 24 February 2020

Judgment and Reasons sent to the parties on:

25/2/2020
…….....
For the Tribunal Office

REASONS

1 By a Claim Form presented on 9 January 2019 the Claimant brought claims of unfair dismissal and breach of contract, race discrimination and victimisation. He applied to amend his claim to add allegations of constructive dismissal and whistleblowing, which application was not opposed by the Respondent. The claims were all defended in a Response Form dated 10 April 2019.

The Issues

2. The issues for the Tribunal's determination were agreed at a closed preliminary hearing which took place on 2 April 2019, subject to an order that the Claimant provide a response to the Respondent's request for further particulars of his claim. They were as follows:

Unfair Dismissal

3.1 Was the principal reason for the Claimant's dismissal his misconduct (using his mobile phone on 2 occasions on 23 September 2018 even after he had been told it was a breach of company policy). This was accepted by the Claimant, subject to his public interest disclosure claim.

3.2 As the conduct was admitted, the Claimant conceded that the Respondent had a genuine belief in the Claimant's guilt following a reasonable investigation and that a fair procedure was followed.

3.3 Was the dismissal fair or unfair in accordance with the Employment Rights Act 1996 (ERA) section 98(4) and in particular, did the Respondent in all respects act in accordance with the band of reasonable responses (the Claimant suggests he was dealt with inconsistently with other employees who had used their mobile phones and that his personal circumstances were not given sufficient weight in considering penalty).

Wrongful Dismissal

3.4 Was the Claimant guilty of gross misconduct entitling the Respondent to dismiss him without notice.

Public Interest Disclosure

3.5 Did the Claimant make one or more protected disclosures.ie.

3.5.1 Did the Claimant disclose information which tended to show that a criminal offence had been committed or that a legal obligation had been breached or that health and safety had been breached. It was conceded by the Respondent that in relation to the report of an alleged violent incident in the workplace, these grounds were potentially engaged.

3.5.2 Did the Claimant have reasonable belief in the truth of the information.

3.5.3 Did the Claimant have a reasonable belief that the disclosure made was in the public interest.

3.6 What was the principal reason the Claimant was dismissed and was it that he had made a protected disclosure? (section 103A ERA)

Direct Discrimination s13 Equality Act 2010

3.7 Did the Respondent treat the Claimant less favourably in failing to promote the Claimant in 2017 and 2018? At the time of CPH, it was suggested that this allegation related to 2017 but the further particulars clarified that the alleged act continued throughout 2017 and 2018 until the Claimant's dismissal.

3.8 Was that because of the Claimant's race? The racial grounds relied on was his colour, which he described as black.

Time Limits

3.9 Was the Claimant's claim for race discrimination in time? (was it an act extending over a period up to his dismissal).

3.10 If not, would it be just and equitable to extend time.

Remedy

3.11 Subject to any reductions for contributory conduct under section 123(6) of the ERA, the compensation payable to the Claimant for unfair/automatically unfair dismissal was agreed between the parties. The Claimant did not pursue a claim for an uplift for breach of the ACAS Code.

3.12 In relation to the race discrimination claim, the Claimant confined his claim to an injury to feelings award.

4. The claims for victimisation and constructive dismissal were withdrawn by the Claimant.

The Proceedings

5. For the purposes of this claim, the Tribunal heard oral evidence from the Claimant and from the following witnesses on behalf of the Respondent: Mr Beveridge, Mr Ale (who gave evidence via an interpreter in the Nepalese

language), Mr Haque, Mr Whitehouse and Mr Parker. The parties provided a joint bundle of documents, which were added to by the Respondent in the course of the hearing, firstly, in relation to job applications received (which had been summarised in a list which the Claimant did not accept) and, secondly, concerning disciplinary action taken against an employee after the Claimant's dismissal. Also, at the Tribunal's request, an organogram was provided. The Respondent produced additional documents in relation to mitigation, which it was not necessary to consider as the Respondent conceded that the Claimant had properly mitigated his losses in the year after his dismissal.

6. Whilst the parties initially indicated that they would prefer the Tribunal to conduct a split hearing on liability and remedy, when it became clear that there would be insufficient time to deal with any remedy separately on the final day of the hearing, if necessary, the Tribunal heard brief evidence from the Claimant in relation to his potential injury to feelings claim. Apart from that and matters of principle, the compensation figures were helpfully agreed between the parties. The Tribunal is grateful to both representatives for their oral submissions, which concluded on the afternoon of the fourth day of the hearing, after which the Tribunal reserved its decision.

The Law

Unfair Dismissal

7. The Tribunal must decide whether there was a potentially fair reason for the Claimant's dismissal under section 98 of the Employment Rights Act 1996 (ERA). An employee's conduct is such a reason and the burden of proving the reason for dismissal lies with the Respondent.

8. If satisfied the Claimant was dismissed for a potentially fair reason, the Tribunal should then consider whether the Respondent's decision to dismiss the Claimant was fair in accordance with the test in section 98(4) of the ERA. Section 98(4) provides that the determination of whether the dismissal is fair or unfair:

> *(a) "depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee and*
> (b) *shall be determined in accordance with equity and the substantial merits of the case*."

9. In cases of misconduct, the Tribunal has regard to the guidance given in the case of *BHS v Birchell* [1980] ICR 303 that a dismissal for misconduct will not normally be fair unless the employer genuinely believes that the employee is guilty of the misconduct alleged and that that belief is a reasonable one based on a proper investigation. Subject to the whistleblowing claim, this was conceded. However, to be adjudged reasonable, the dismissal should fall within a band of reasonable responses available to the employer. It is the Claimant's case that a final written warning should have been given, so the Tribunal must consider

whether dismissal in all the circumstances was a penalty which no reasonable employer could have awarded.

Wrongful Dismissal

10. In a claim for wrongful dismissal the Tribunal is not looking at the reasonableness of the employer's decision to dismiss but whether the employee was in fact guilty of gross misconduct. There are no hard and fast rules defining what degree of misconduct will justify a summary dismissal, which is a question of fact for the Tribunal and will depend to some extent on the nature of the employee's work, their workplace and level of their seniority. However, the breach of contract on the part of the employee must be a fundamental or repudiatory one and the Tribunal will have regard to any contractual definition of gross misconduct in determining this question. It is not necessary that misconduct is intentional in order to amount to repudiatory breach of contract.

Public Interest Disclosure

11. The relevant statutory provisions are contained in section 43B as amended of the Employment Rights Act 1996:

43B (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

12. In *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979 Underhill LJ gave guidance to the Tribunal as to how to approach the public interest question. This was approved in *Ibrahim v HCA International* [2019] EWCA 2007. A Claimant's predominant motive in making the disclosures is not the same thing as his subjective belief and whether that is reasonable. The Tribunal should not substitute its own view for the worker's belief that a disclosure was in the public interest. The questions to ask is whether the Claimant believed (at the time he was making the disclosure) that the disclosure was in the public interest and then, whether that belief was reasonable. Underhill LJ considered the meaning of the phrase "in the public interest" at paragraph 36 and suggested that Employment Tribunals should be cautious about finding that the airing of private workplace contractual disputes are in the public interest, given the reasons for the

amendment to section 43B, but certainly did not rule out the fact that they could be, particularly if they affect a large number of employees

Discrimination

13. Section of 13 the Equality Act 2010 provides that a person discriminates against another if: "*because of a protected characteristic, A treats B less favourably than A treats or would treat others*". In common with other discrimination strands, unlawful direct race discrimination relies on a comparison being made between a Claimant's treatment with that of another who does not share his or her protected characteristic.

14. It is not always helpful to start with an inquiry as to whether the Claimant was treated less favourably than a comparator, but to focus on the reason why the Claimant was treated as he was. The use of a comparator can be a helpful way to cross check the reason for the treatment.

15. In recognition of the difficulties in proving unlawful discrimination cases, particular provisions are made in section 136 of the 2010 Act. The Tribunal notes the guidance concerning the operation of the burden of proof from cases such as *Igen v Wong [2005] IRLR 258* and *Madarassy v Nomura [2007] EWCA Civ 33* to the effect that it is unusual to find direct evidence of discrimination, which can depend on what inferences it is proper to draw from primary facts found by the Tribunal. Where the Claimant has proved facts from which conclusions could be drawn that an employer has treated the Claimant less favourably because of race, then the burden of proof moves to the employer. It is then for the employer to prove that he did not commit that act. In order to do so it is necessary for the employer to prove on the balance of probabilities that the treatment was not because of race. It requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a reason for the treatment in question.

16. Simply acting unfairly or unreasonably is not sufficient to raise an inference of discrimination. Although, where an alleged discriminator has acted unreasonably or unfairly the Tribunal will want to know why he or she has acted in that way. Even if a cogent explanation is given, the Tribunal must be astute to the possibility that the alleged discriminator has been subconsciously influenced by unlawful discrimination.

17. Unlawful discrimination may not be the only or even the main cause of a Claimant's less favourable treatment. Whilst there needs to be a causative link to the less favourable treatment, it does not need to be the only or even the main

reason for it (see the Equality and Human Rights Commission Employment Code paragraph 3.11).

Time Limits

18. The substantive law concerning discrimination time limits is contained in section 123 of the Equality Act 2010. The relevant parts of the section provides that:

> (1) *"Subject to sections 140(A) and 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of three months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> (1) *….*
>
> (2) *For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;"*

19. The "just and equitable" extension in section 123(1)(b), however, gives the Tribunal a broad discretion to extend time, albeit there is no presumption in favour of granting an extension. It falls to the Claimant to prove that there are grounds to extend. The factors set out in section 33 of the Limitation Act 1980 are likely to be relevant to the exercise of the Tribunal's discretion, but there may be other factors. The length and reason for the delay will clearly be relevant, as may be whether the Claimant has had access to legal advice and what prejudice might be caused to either party by the grant or refusal of an extension. The fact that a Claimant is pursuing an internal grievance could be material, but is not necessarily so.

20. In most cases, a failure to promote is a single act of discrimination, albeit the consequences of such an act continue (see *Amies v ILEA* [1977] ICR 308). There are, however, circumstances where an employer applies a discriminatory policy which would amount to an act extending over a period. Thus, if an employer was applying an informal practice or policy of only promoting white members of staff, that would amount to an act of continuing discrimination against non-white employees. The case of *Police of the Metropolis v Hendricks* [2003] ICR 530 gives guidance as to the matters to take into account in determining whether a series of apparently individual actions could amount to a series, it involves looking at the substance of the complaints rather than the strict existence of a policy in considering whether, for instance, the same staff members are involved in deciding if is a connection between them.

Factual Background

21. The Claimant's employment started on 24 March 2006 with a predecessor of the Respondent. He worked as a security officer at the offices of an investment

bank in London. The Respondent is a large facilities management company, which provides security services, amongst other things. Security staff on this particular contract were relatively well paid in the industry, which meant that it was not uncommon for staff to be long serving like the Claimant. At the time of his dismissal the Claimant was employed in a customer and client facing role as a Front of House Officer at a rate of £16.09 per hour.

22. It is common ground that the version of the ISS Security Employment Handbook which governed the Claimant's employment was dated June 2015. The relevant parts of the handbook for the purposes of these claims, in summary are as follows:

22.1 Paragraph 2.2 Convictions for Criminal Offences: required all employees to declare any convictions for criminal offences or pending proceedings that may lead to conviction at the time of employment or if convicted after employment has commenced, on the date of such conviction to the company and the SIA in accordance with the SIA licence conditions.

22.2 Paragraph 9.8 contained a telephone policy which provides amongst other things, "*personal mobile telephones are not to be used whilst on duty on any assignment, except in an emergency situation. Such breaches may be dealt with in accordance with the company's disciplinary policy*."

22.3 There was a disciplinary policy and procedure. Paragraph 1 covered disciplinary sanctions and stated: "*Except in the case of gross misconduct, there are four stages in the disciplinary procedure in respect of disciplinary action*." This involved a formal verbal warning, written warning, final written warning and then dismissal. Under stage four it is stated that the company reserves the right to choose the appropriate penalty in accordance with the prevailing circumstances, the seriousness of the matter, the effect on the company's business and any mitigating factors.

22.4 There is a non-exhaustive list of examples of "*gross misconduct, misconduct, including unsatisfactory performance*" at paragraph 13.1.7 of the Handbook. Unusually, there is no separation of gross misconduct but a list of over 30 examples of conduct under the explanation, "*you will be liable to disciplinary action, which may result in summary dismissal, if you are found to have acted in any of the following ways:"* The examples then range from violence, theft and sleeping whilst on duty (which would commonly be regarded as examples of gross misconduct) and unsatisfactory standards of work performance or persistent absenteeism or lateness, which would not ordinarily not be so regarded. "*Unauthorised or inappropriate use of email, Internet, social media dear or telephones including company, personal and client equipment whilst at work*" is included in this list.

22.5 The Respondent had written equality and diversity, equal opportunities and whistleblowing policies in the Handbook, commensurate with an organisation of its size. It was the unchallenged evidence of the Respondent's witnesses that part of its supervisory or management training would include a diversity module. The whistleblowing policy invited staff to raise issues with their immediate line manager in the first instance unless it was inappropriate to do so.

23. In August 2015 the Claimant was made Front of House Security Officer, which he regarded as a promotion. Although this role was on the same level of the hierarchy as an Escort Officer (his original role), there was an increased rate of pay for the former. This change of role came about when the Claimant told a colleague, Mr Haque, that he was interested in it. Mr Haque was not a manager at the time, but it was his unchallenged evidence that he advised the Claimant to put his promotion request in writing to his managers, Mr V and Mr N, albeit Mr Haque also passed on the Claimant's wish to work in a Front of House role to them. Shortly after this, the Claimant was told he had an interview for the role the following day and was appointed. The Claimant had a very difficult relationship with his supervisor at the time (Mr A), who the Claimant claims tried unsuccessfully to block his promotion. The Claimant acknowledged in his witness statement that management "salvaged the situation" and the Claimant was one of eight people who obtained new posts at that time.

24. It was the Claimant's unchallenged evidence that he had not made a written application for the Front of House Officer role, however, the Tribunal heard from the Respondent's witnesses that staff were expected to put a request for a transfer or promotion in the writing. This was demonstrated by Mr Haque's advice to the Claimant in 2015 and by the clear practice of other members of staff in 2018. Mr Parker told the Tribunal that when he joined the Respondent in November 2016, he tightened up the Respondent's processes, such that written applications for all jobs were always required.

25. In a similar way, Mr Beveridge joined the Respondent as Security Manager in August 2017 and tightened up the enforcement of the Respondent's telephone policy, which prohibited their use whilst on duty. The Tribunal was told that the use of mobile phones by security staff was a regular cause of complaint from the Respondent's client, which is why steps were taken to ensure that the policy was not breached.

26. The Claimant can have been in no doubt as to the Respondent's policy on the use of mobile phones. In September 2012 he received a final written warning following an incident in which he was filmed on site dancing in his uniform and this was then uploaded onto social media. An appeal against this penalty was dismissed. Whilst the Claimant considers he was set up by his then supervisor, Mr A, in relation to this incident, the relevance of it for the purposes of this claim is that the outcome letter warned him that the personal use of mobile phones at work was prohibited.

27. On 24 February 2016 a written reminder was sent out to staff about the Respondent's telephone policy by the Claimant's Manager, Mr L, who also clarified that this included using a phone to check the time. A set of written professional standards were issued to all staff on 19 July 2017 reminding employees that the use of *"mobile phones by officers whilst on duty except in an emergency is forbidden by ISS Facility Security Services policy*." This made clear that "*If you need to make an emergency call using a personal phone you must ensure that you ask your Supervisor to be relieved so that you can make your call which must be as brief as possible. Other personal calls should only be made during a rostered break. If anything other than this process is followed you are not devoting the whole of your time, attention and abilities to the Company's business during your working time and therefore may be subject to disciplinary action."* The Claimant signed to say he had received these standards.

28. In February 2017 the Claimant had a specific reminder not to use his phone (in the course of a complaint against him which did not result in disciplinary action). He admitted to checking his phone in March 2017, but again no action was taken, but some performance improvements were agreed.

29. On 23 August 2017 an email reminder was sent to staff concerning the use of mobile phones and supervisors were reminded of their duty to "*report any breaches.*" There was a reminder that phones could not be used as a substitute for a watch.

30. Following Mr Beveridge's arrival at the Respondent in August 2017, the Claimant lodged a grievance on 30 August 2017 against his supervisor, Mr A, alleging that he had been involved in extortion in 2011, that he had treated the Claimant unfairly in 2012 and had refused to permit the Claimant to have a day off for the May Bank holiday in 2017. Mr Beveridge did not uphold his grievance on the basis that there was insufficient evidence to support the Claimant's allegations, however, he appreciated that the Claimant and his supervisor did not have a good working relationship and arranged for workplace mediation to take place between them. The Claimant cooperated with this, although it is clear from the Claimant's evidence that his relationship with Mr A did not improve. Mr A resigned from the Respondent's employment in April 2018 during his suspension related to an allegation of sexual misconduct.

31. On 8 September 2017 Mr Beveridge observed four members of security staff on their phones whilst on duty. As Mr Beveridge had only recently started to work for the Respondent, rather than take immediate formal disciplinary action, he issued an email to all staff headed "Final Warning re the Use of Person Mobile Phones or their Electronic Devices Whilst on Post." The email made it very clear that if anyone was caught in breach of the Respondent's telephone guidelines, "*no excuses will be given and disciplinary action will be taken immediately."* Mr Beveridge saw this as a "line in the sand" in relation to any informal tolerance of telephone use at work.

32. The Tribunal accepts Mr Beveridge's explanation for how he dealt with the issue, which was influenced by the fact that he was new in post and did not want

to come down to heavily on staff he barely knew, before he had issued a clear warning that formal disciplinary action would be taken henceforth.In October 2017 three written warnings were duly issued against members of staff for breach of phone policy. In one of these warnings, the use of a telephone at work was described as gross misconduct.

33. The evidence heard by the Tribunal suggested that disputes between security staff were a regular occurrence. The Claimant was sometimes involved, but by no means always. On 17 October 2017 he reported that his colleague, Mr P had kicked his knee and slapped him on head. He did not want an investigation or to raise formal grievance but wanted management to note the incident. On 30 October 2017, the Claimant reported Mr L for sending him to relieve the wrong security officer on 19 October and Mr L had once attacked him and told him that he wouldn't pass Front of House probation. On 31 October 2017, the Claimant complained about Mr LL who had allegedly unplugged the Claimant's phone and hidden it and then pushed and kicked Claimant's chair. The Claimant was not willing to provide a written witness statement concerning his allegations against Mr LL.

34. The Claimant's three complaints were dealt with as a formal grievance. A grievance hearing was held on 7 November 2017, but the Claimant told Mr Beveridge who investigated the grievance that he didn't want to take the matter any further. He expressly confirmed that he wasn't being bullied or intimidated by his colleagues and that he loved his job, however, he told the Tribunal that what he said did not reflect what he was feeling, he just wanted to bring things to a conclusion and he was worried about the confidentiality of his complaint. Mr Beveridge noted that indiscipline had been rife and reminded the Claimant to withdraw from difficult situations.

35. On 31 October 2017 the Claimant's wife left him and disappeared with their 6 month old baby, which was, understandably, very upsetting for the Claimant. He travelled to Warsaw to try and find his son, but was unable to trace them. The Claimant informed his managers, confidentially, about his personal circumstances. This included Mr Beveridge, who was told in January 2018.

36. On 7 November 2017 the Claimant was seen by his manager, Mr N in the wrong position and on his phone. A disciplinary investigation and hearing ensued, which resulted in a first written warning being issued to the Claimant in relation to the use of his phone. The Claimant claimed to have simply looked at his phone in order to tell a colleague the time, although the evidence suggested that he was looking at his phone for a few minutes. The written outcome from Mr V dated 14 December 2017 appeared to accept the Claimant's explanation that he had used his phone as a substitute for a watch, but that was still clearly contrary to the policy. Mr V indicated that a written warning was appropriate because it was "*what everyone else has got…"* It is common ground that the written warning lasted for 12 months, so was still live at the time of the Claimant's dismissal.

37. On 2 February 2018 an email was sent to all security staff, including the Claimant at his personal email concerning a job opportunity for Plain Clothed

Surveillance officers. Applicants were invited to submit a CV and covering letter and to direct any queries to Mr Beveridge. The Claimant did not respond to this invitation, although other members of staff did. The Claimant told the Tribunal that there was no point in his applying for this role, because it would have been a waste of his time, as he would not have been appointed due to his race.

38. On 16 April 2018 the position of UK Controller was advertised to the Respondent's security staff. Again, the Claimant did not respond expressing an interest in this role for the same reason as above. Other members of staff applied. Two of the Claimant's comparators were successful, Mr K and Mr P, both of whom had already got an SIA CCTV licence, which it was necessary to have in order to perform the Controller role. It was common ground that viewing CCTV evidence without a licence would involve the commission of a criminal offence both by the employee concerned and the Respondent. Mr K had previous experience as a Controller and Mr P had obtained a CCTV licence independently of the Respondent. They were recent employees of the Respondent, who were still in their six-month probationary periods.

39. The CCTV licence training was arranged externally to the Respondent, as independent assessment was needed. Although the Claimant did not have a CCTV licence, he attended other training in which he expressed an interest, namely, a BTEC Level 3 Conflict Management Course in March 2018, a Counter Surveillance course in June 2018 and Detection Officer training on 6 October 2018.

40. Although the Claimant did not respond to the April 2018 advertisement for new jobs, on 30 July 2018 he emailed Mr Beveridge stating his interest in the positions of Undercover Officer, Security Controller and Access Controller. Mr Beveridge responded to this positively, stating that although there were no currently vacancies, they were looking at delivering a one day course in Covert/Counter reconnaissance training for all Front of House staff. He concluded, "*I will look at the opportunity for you to do training in controller and access control, this will be later in the year when we know the numbers required for the PTC project. Keep doing what you are doing and volunteering for events etc. It does not go un-noticed*."

41. The Claimant maintained that he had previously expressed his interest in these roles to management verbally, however, there is no record of these requests or any allusion to them by him or management. Mr Beveridge recalled that the Claimant had spoken to him about his interest in the roles immediately before his email of the 30 July 2018. The Claimant followed up his email on 30 July with an email of 27 September 2018 to Mr Beveridge, Mr Haque and Mr L to remind them of his wish to be trained for the potential new positions.

42. On 6 August 2018 the Claimant was banned from driving for 18 months following a drink driving incident. He explained that he got in his car to drive to react to a report of his wife and child having been seen locally. The Claimant did not inform the Respondent or the SIA of the pending proceedings. When the Claimant informed the Respondent of his conviction, he was suspended on full

pay because the Respondent wanted to establish whether the Claimant's SIA licence was affected by his conviction. There was also some suggestion that the Claimant's failure to inform the Respondent of the pending proceedings amounted to a breach of their criminal offence reporting policy.

43. Once the Claimant informed the SIA of the nature of his conviction on 7 August 2018, it was confirmed on 15 August that his licence was unaffected and he was permitted to return to work with effect from 17 August 2018. The Respondent decided that there was no disciplinary case to answer on the Claimant's part, quite rightly in the Tribunal's view. The version of the criminal offence reporting policy provided to the Tribunal appears to place potential new recruits under an obligation to inform the Respondent of pending proceedings, but on a strict reading of the policy, existing members of staff are obliged to inform the Respondent on the date of conviction, which is what the Claimant did. One of the examples of potential gross misconduct was, however: "*Any involvement in criminal or civil proceedings the effect of which is to undermine the Company's confidence in the integrity of the employee."*

44. The Claimant was very upset by the fact that a return to work form completed following his absence on suspension made no reference to his suspension, but simply stated that he had been on authorised leave and that management were aware of the circumstances. The Claimant refused to sign the return to work form (which he described in his witness statement as a "fraudulent document"). However, it was explained to him by Mr Whitehouse that his reason for absence had been so phrased for the Claimant's benefit. Had the form indicated that the Claimant had been suspended, management were concerned that this might generate negative rumours about the Claimant. The Tribunal considers this was a cogent explanation and a sensible approach by the Respondent.

45. On 3 September 2018 Mr L emailed all the security staff inviting applications for a number of posts to be filled on a temporary, as required basis. This was to ensure that the Respondent had what was termed "Campus Resilience", by which it was meant that there was capacity to fill roles which became absent at short notice or due to holiday or sickness. The positions to be "backfilled" were five Supervisor roles, five UK Controller roles, four Operations roles (nights only) and three Front of House posts. It was said that CCTV licences were preferred.

46. Thirty two members of staff responded to this email expressing their interest in various of the opportunities. These included the Claimant's comparators, Mr K and Mr C. The Claimant did not respond to the email expressing his interest in the UK Controller role (which was a position in which he had expressed an interest on 30 July 2018).

47. The Claimant's alleged protected disclosure took place on 11 September 2018, when he raised a complaint with Mr Parker, the Account Director concerning the handling of an argument between two members of staff earlier in the day. A heated argument had taken place between Mr Ale and another employee, Mr LL,

who like Mr Ale was of Nepalese descent. They confronted each other before work at around 6.45 am in the signing in area. One of the Respondent's managers, Mr L sent an email round all the managers informing them: "*Two individuals did confront each other in an aggressive manner and [their Team Leader] had to get in between them*." The individuals involved were warned that if they could not control themselves they will be sent home. The Claimant was not present during this altercation, but heard Mr Ade's version of it later in the day.

48. There is a dispute between the Claimant and Mr Ade as to what the latter told him. The Claimant suggests that Mr Ade told him that he was headbutted by Mr LL and that he had been unhappy as to how management had dealt with the incident. Mr Ade denied this, although in a revised witness statement he did accept that Mr LL's had lightly touched his nose. The issue was dealt with there and then by one of the Respondent's Managers, Mr L and it resulted in Mr Ade and Mr LL's shaking hands and getting on with their day. Mr Ade threw away his notes of the incident and no disciplinary action was taken against either participant.

49. In his original witness statement to the Tribunal Mr Ade had denied there being any physical contact between Mr LL and himself although said their "blood was high". English is not Mr Ale's first language and although he is proficient enough to perform his role, he suggested that he hadn't fully understood the content of his original witness statement and so clarified that there was some minor physical contact in his subsequent statement. Mr Ade also denied that he and Mr LL clashed regularly, but said they used to joke with each other and that this was common in the Nepalese community.

50. The Claimant alleged for the first time in the Tribunal hearing, that Mr Ade had threatened to report the incident to the police. There is no contemporaneous evidence for this assertion and it is denied by Mr Ade. Since the Claimant made a note in his notebook at the time, it is surprising that he did not mention the potential police report, nor did he mention it in his later complaint to Mr Parker or at a subsequent meeting with other managers to discuss the incident. In the circumstances the Tribunal prefers Mr Ade's evidence in this respect. However, in his oral evidence to the Tribunal Mr Ade referred to himself as of the "victim" in relation to the incident with Mr LL on two occasions and the Tribunal finds it credible that he would have informed the Claimant that Mr LL was the aggressor. Whilst the Tribunal accepts that the word headbutt might not have been used by Mr Ade, given he now accepts that Mr LL's headed touched his nose, it seems likely that something akin to a headbutt was described by Mr Ade to the Claimant. In this respect, the Tribunal prefers the Claimant's account that Mr Ade led him to believe that an assault had taken place (albeit a minor one, since Mr Ade was uninjured).

51. The Claimant had had his own altercation with Mr LL the previous autumn, where he alleged that Mr LL had pushed and kicked his chair. This had not been the subject of any disciplinary proceedings against Mr LL, since the Claimant did not wish this complaint to be progressed as a grievance. However, the Claimant

told the Tribunal that, as this was the second time that Mr LL had physically attacked a colleague at work, he considered that disciplinary action should have been taken against Mr LL on 11 September 2018. The action he was seeking was Mr LL's dismissal.

52. Having reported the matter to Mr Parker, the most senior member of the Respondent's management at the site, Mr Parker referred the matter to the manager who dealt with the incident, Mr L. A meeting was then held between the Claimant and Mr L. Mr Beveridge and Mr Haque were also present as the meeting took place in the managers office and Mr Haque happened to be shadowing one of the managers at the time. It is clear from the email chain passing between management that all three managers thought that the Claimant had his own agenda or a personal grudge in relation to Mr LL. Since the Claimant had not witnessed the incident, it was suggested that he found out about it via the "rumour mill." Mr L and Mr Beveridge clearly took the view that the incident had been dealt with at the time to both participants' satisfaction, it had ended with a shaking of hands and that the Claimant should not really have tried to get involved in an incident in which he was neither involved, nor witnessed.

53. The management email chain concerning the Claimant's complaints and the outcome of it was routinely copied to all the managers, including Mr Whitehouse, the Senior Security Manager, who subsequently dismissed the Claimant. However, in his witness statement, Mr Whitehouse said he wasn't aware of the Claimant's reporting of the alleged assault on Mr Ade by Mr LL because he was not on-site that day and had nothing to do with the investigation or discussions about it. When he gave his oral evidence to the Tribunal, however, Mr Whitehouse realised that he had been copied into the email chain concerning the incident. He had clearly not appreciated this when his witness statement was prepared and signed. He maintained that he had no memory of having read the email chain (or of seeing it). He said had recently returned from holiday and explained that, faced with a large number of emails, it is likely that he would not have read this email chain as the issue was being dealt with by his managers. The Tribunal accepts that evidence. Had it been Mr Whitehouse's intention to mislead the Tribunal about his knowledge of the Claimant's alleged whistleblowing, he would have addressed this email chain in his witness statement. As a senior manager, who was partly involved in project managing a new building, the Tribunal considers it is credible that he would not have involved himself in the (very many) staff issues and disputes which occurred amongst the Respondent's security staff.

54. Shortly after the Claimant reported Mr LL to Mr Parker, on 23 September 2018, the Claimant was seen on his shift using his personal mobile phone on two occasions by a Supervisor and Manager respectively. Mr M, who was a Supervisor (albeit not the Claimant's Supervisor) saw the Claimant looking at his phone at 15.39. He challenged the Claimant about it and told him to put his phone away. At 16.50, Mr Haque then observed the Claimant again looking at his phone. An investigation ensued by the Respondent's Security Manager, Ms T, who considered there was a case to answer.

55. The Claimant was invited to a disciplinary hearing on 10 October 2018 by letter dated 5 October 2018. The allegations which the Claimant was to meet were as follows:

> "1. *Unsatisfactory standards of work performance (13.1.7/ISS Security Handbook Version 6) – Misconduct.*
>
> *2. Failure to devote the whole of your attention and abilities to the Company business and its affairs during your normal working hours (13.1.7/ISS Security Handbook, Version 6) - Misconduct*
>
> *3. Unauthorised or inappropriate use of email, internet, social media or telephones including company, personal and client equipment whilst at work (Section 9.8/ISS Security Handbook, Version 6) – Gross Misconduct (Prior written warning)*
>
> *4. Gross insubordination and or continual refusal to carry out legitimate instructions (Section 13.1.7/ ISS Security Handbook, Version 6) – Gross Misconduct."*

56. The Claimant was given the documents and witness statements on which reliance was to be placed and was informed that CCTV footage would be available to view, if required. The Claimant attended a disciplinary hearing on 10 October 2018 which was chaired by Mr Whitehouse. The Claimant was represented at the hearing by his Trade Union.

57. The Claimant's initial explanation for his use of his telephone to Mr Whitehouse was the same as it was in the investigation meeting, namely, that he did not realise that the telephone rules with the same at weekends and for Operations officers. The Claimant also denied using his phone but said that it was on the table and that he didn't look at it. However, Mr Whitehouse referred the Claimant to the fact that he had been seen scrolling down his phone and typing for a whole hour from 15:01 hours until the end of his duty at 16:00 hours. He was interrupted by a supervisor Mr M at 1539, then Mr M having instructed him not to use his phone, the Claimant was then seen continuing to do so for 20 minutes whilst shielding it from view with a piece of paper. Mr Whitehouse invited the Claimant to view the CCTV footage, but he declined. It was then put to him that he was using his phone for the entire time he was on post and the Claimant agreed that he was.

58. The Claimant accepted that he was on a written warning for checking his phone and Mr Whitehouse reminded him that, in the previous eight years he had undergone at least six investigation meetings of which there were four disciplinary hearings resulting in warnings all based on phone misuse or poor performance. He also referred to a meeting of concern in March 2017 and various emails he had received about the telephone policy. Mr Whitehouse explained that he was referring to these to demonstrate that the Claimant was aware of the phone policy but he was not interested in the contents of the previous investigations or hearings apart from that.

59. The Claimant suggested in the course of the disciplinary hearing that other people used their phones and it's a common thing and nothing happens to them. Mr Whitehouse gave that defence short shrift. The Claimant was also asked why he had told Mr M he'd only been on his phone for a minute and that he had been checking the time and then put his phone away. When challenged as to why he had lied in the investigation meeting Claimant suggested that it was to do with the way that the investigator had put the questions and he didn't want her to know his personal issues. The Claimant also suggested that as Mr M was not the Supervisor on shift, that he had no right to tell the Claimant what to do, albeit he accepted that he did put his phone away when Mr Haque asked him to, even though Mr Haque wasn't his line manager. The Claimant suggested that was because he approached the issue in a different manner.

60. The Claimant was wearing headphones whilst he was looking at his phone and he explained that this was because he was expecting an important call from his lawyer. He accepted that he had not informed his Supervisor that he was expecting an important call (in accordance with the policy), so that arrangements could be made to cover his work when he took the call. The Claimant also suggested towards the end of the disciplinary hearing that he had been looking at a picture of his son on his phone. Before he adjourned to consider his conclusion, Mr Whitehouse asked if there was anything the Claimant would like to add or say before he did so. The first time, the Claimant said, "*I have only been like this since my personal issues started.*" Mr Whitehouse pointed out that the Claimant had a written warning for phone use before his personal issues and started and his conduct had been an issue as far back as 2012. The Claimant maintained that the written warning was given when his issues started and that people had been trying to get him sacked before. The second time Mr Whitehouse asked if there was anything else to add, the Claimant and his representative did not volunteer any further information.

61. Mr Whitehouse adjourned for around 10 minutes and then announced his decision that the Claimant had knowingly used his phone on duty when it was against ISS procedures and that the Claimant's actions indicated he didn't care. He purposely ignored a line manager who gave him a clear and reasonable instruction to put his phone away and then continued to use it until caught a second time by the Security Manager and hour later he lied during the investigation meeting and suggested the Supervisor had lied and was out to get him, he then lied in the disciplinary hearing until the point that he was told the evidence was on CCTV. The written warning for phone misuse had already made no difference and his "*disciplinary conduct shows that the process has no effect on you changing the way you behave*." Mr Whitehouse concluded that the Claimant should be summarily dismissed for gross misconduct.

62. It is clear from the notes of the disciplinary hearing that the Claimant's representative was expecting to have an opportunity to address Mr Whitehouse on the appropriate disciplinary sanction once he had delivered his decision as to whether the Claimant had committed any of the misconduct alleged. When he raised this, Mr Whitehouse declined on the basis that he had given the Claimant's

representative a chance to speak before he adjourned. As far as Mr Whitehouse was concerned (as he explained to the Tribunal in evidence), the Claimant had eventually admitted the misconduct in the course of the disciplinary hearing, so it was really only the question of penalty that he had to consider. He reminded the Claimant of his ability to appeal. His decision was confirmed in a letter dated 12 October 2018

63. The Claimant appealed against his dismissal by letter dated 12 October 2018 to Mr Parker referring to the fact that he had not been in the right state of mind due to his personal issues and that he'd been staring at his son's picture on his phone. He also challenged the reference to the number of formal investigation meetings he'd faced, questioning whether Mr Whitehouse had included some of his grievances including against his former supervisor, Mr A. The Claimant's own letter was supplemented by a letter from Solicitors instructed on the Claimant's behalf. The letter suggested that the summary dismissal of an employee with 12 years' service was excessive and unreasonable, that the Claimant had felt that he had been singled out by people who wanted to push him out of the company (which had been the subject matter of earlier grievances and disciplinary issues) and that the incident on 23rd September had been used as an excuse to exit him from the business. It was suggested that expired warnings had improperly influenced Mr Whitehouse and that the Claimant was under a considerable amount of stress as a result of having to take family court proceedings to gain contact with his son.

64. The Claimant's appeal was heard by Mr Parker on 7 November 2018, when the Claimant was again accompanied by a Trade Union representative. This was not a full rehearing, but a consideration as to whether the penalty of summary dismissal was too severe in the circumstances. In the course of the hearing the Claimant reiterated the suggestion that a couple of people had been trying to exit him from the business (his supervisor, Mr , and another), however, Mr Parker pointed out that they were no longer employed by the Respondent at the time. The Claimant's representative highlighted that the Claimant was going through depression due to family circumstances and leniency should be exercised. The Claimant maintained that he was looking at a picture of his son on his phone and that he had not put his phone away when the supervisor Mr M asked him to because of the way that he spoke to the Claimant in an attacking manner. He also highlighted the fact that everyone uses their phone and that he had been expecting a call but the call never came. No evidence of the call was provided.

65. Mr Parker informed the Claimant that his appeal had not been successful and the reasons were set out in a letter dated 14 November 2018. He did not accept that the Claimant's historic grievances against his former supervisor had any bearing on the case and stated that his admission to using his phone for an hour whilst on a security post was not compatible with expected standards, about which he was fully aware. It was not accepted that the Claimant had an unblemished work record as he was on a current written warning for the same offence. He continued to use his phone in direct contradiction of the reasonable request by a line manager, Mr M. Mr Parker stated, "*I have every sympathy to*

your personal circumstances, which I acknowledge are challenging and distressing,", but Mr Parker explained that had he forewarned his supervisor on the day that he was expecting an important call given the management team are aware of his personal circumstances arrangements could have been made to facilitate this. Mr Parker considered that the sanction of summary dismissal was appropriate and his appeal was dismissed.

Conclusions

Protected Disclosure

66. The information which the Claimant disclosed to the Respondent is set out in the Claimant's further particulars, namely that he reported a "*second serious assault in the workplace involving Mr LL".* The Claimant's Security Incident Notebook dated 11 September 2018 describes his informing Mr Parker "*about the incident that occurred early today and how [RL] tried to protect [LL] from losing his job. And the main reason why I got involved in this case is that [LL] once Assaulted and Attacked me in the security rest room…"*

67. The Tribunal is satisfied that the Claimant reasonably believed that Mr LL had assaulted Mr Ale. Mr Ale himself describes Mr LL's head touching his nose and still maintains that he was the "victim" of the incident. It is thus unlikely that he would have minimised Mr LL's culpability when talking to the Claimant. Whilst the Tribunal doubts that Mr Ale would have used the term "headbutt" or "assault", it was reasonable of the Claimant to believe that, as there was physical contact between the two men in the context of a heated argument, Mr LL had assaulted Mr Ale. The Respondent accepts that this would amount to information tending to show that either a criminal offence had been committed, Mr Ale's health and safety was endangered or a legal obligation had been breached for the purposes of section 43B(1)(a),(b) and (d) of the ERA 1996.

68. The email correspondence passing between the Respondent's management at the time of the Claimant's complaint about this incident suggests that the outcome the Claimant was seeking was Mr LL's dismissal. The managers involved were under the impression that his motivation was a personal one against Mr LL, relating back to the Claimant's previous complaint against him. The allegation he had made against Mr LL was that he had kicked and pushed his chair rather than directly assaulted him. It was the Claimant's evidence that, whilst he confirmed at the time that he did not want any action taken against Mr LL, he did not mean what he said. This tends to support the impression gained by the Respondent's management that the Claimant's involvement in Mr Ale's and Mr LL's dispute was simply a continuation of his own dispute with him. The Claimant's suggestion that Mr LL had committed two "*serious assaults*" in the workplace, was clearly not correct. The word serious suggests an elevated level of violence or consequential injury rather than the kicking or pushing of a chair or a "squaring up" between two parties, but there had been some direct physical contact between Mr LL and Mr Ale. The Tribunal acknowledges that even if the Claimant's motivation was personal, it does not preclude his having genuinely and reasonably believed that making a complaint against Mr LL's conduct in relation to

Mr Ale was in the public interest. The difficulty is that the prominence of the Claimant's personal motivation and exaggeration of Mr LL's conduct has obscured any evidence that he subjectively believed that his disclosure was the public interest.

69. The nature of the Claimant's disclosure is different from the paradigm complaint which the change to the law was designed to address (per *Parker v Sodexho* [2002] IRLR 109), as it involved the potential commission of a criminal offence of violence, however minor. There is a public interest in the prevention of crime and its investigation and prosecution can act as a deterrence, albeit the CPS must expressly consider the public interest in making a decision whether to prosecute. Based on what the Claimant understood of the incident, second hand, it was reasonable for him to conclude that a common assault had been committed against Mr Ale (amounting to potentially a crime and tort) and that the latter's health and safety had been threatened. The Tribunal does not accept that Mr Ale suggested to the Claimant that he was planning to report Mr LL to the police as the Claimant suggested for the first time in his oral evidence. The Claimant was also aware that Mr Ale and Mr LL had worked their shift, Mr Ale was uninjured, the tensions had been defused and the matter dealt with by management. It was a flare up between two colleagues, which had no obvious wider impact on the workforce as a whole. The same can be said for the incident involving the Claimant. The nature and scale of these two workplace disputes were not such as to suggest that the wider public were at risk or that there was a particular principle of public importance involved. In these circumstances, even if the Claimant did subjectively believe that there was a public interest in his pressing for further management action against Mr LL, that belief was not a reasonable one.

70. Even if the Claimant's disclosure was in the public interest, the Tribunal is not satisfied that it had any bearing on his dismissal. The Tribunal accepts Mr Whitehouse's evidence that he was not aware of the Claimant's disclosure at the time he took the decision to dismiss him, notwithstanding the fact that he had been copied into the management email chain in relation to it. Whilst the two events were chronologically close, this is not a case where events were manipulated by managers who were aware of the Claimant's disclosure. The Claimant's misconduct was (eventually) admitted and captured on CCTV. Mr Haque knew about the Claimant's disclosure and also witnessed the Claimant's being on his phone, but it is not suggested that he exaggerated the Claimant's conduct to ensure his dismissal. In the circumstances, the Tribunal is satisfied that the Claimant's disclosure, even if qualifying and protected, did not influence his dismissal in any way, let alone amount to the principal reason for his dismissal for the purposes of section 103A of the ERA. The principal reason for the Claimant's dismissal was his conduct.

Wrongful Dismissal

71. The Respondent's disciplinary policy does not make it clear which of its non-exhaustive list of examples of misconduct amount to gross misconduct. The Tribunal has not, therefore, been assisted in its determination of whether the

Claimant's conduct in using his phone contrary to the Respondent's clear policy amounted to gross misconduct. The misconduct is admitted by the Claimant, albeit he has minimised his culpability. It is accepted that the Claimant was caught on his phone by a supervisor and was instructed to put it away. The Claimant objected to the tone in which the supervisor spoke to him and did not comply with his instruction, but continued to use his phone for a significant amount of time. The Tribunal is satisfied that the Claimant was well aware of the Respondent's telephone policy, knew it applied at weekends as well as in the week and that arrangements could have been put in place for him to receive an important call. He flagrantly breached the policy in the currency of a written warning for exactly the same type of misconduct, ignored a reasonable management instruction to put his phone away, sought to conceal his phone use, then continued to use his phone for a significant period of time, until stopped by Mr Haque. Part of the Claimant's job was to be alert to potential security incidents. This was clearly compromised during the time his attention was focused on his phone.

72. In the Tribunal's judgment, an short and isolated breach of the Respondent's telephone use policy would not be capable of amounting to gross misconduct and it is clear from the written warning given to the Claimant the previous November, that the Respondent did not consider it such. However, the Claimant's failure to comply with a Supervisor's reasonable instruction to stop using his phone amounted to gross insubordination in all the circumstances. The Claimant had effectively rendered himself unmanageable on 23 September 2018 and the Tribunal is satisfied that his behaviour viewed in the round was such as to amount to gross misconduct.

Unfair Dismissal

73. It does not necessarily follow from the Tribunal's finding that the Claimant was guilty of gross misconduct, that his dismissal was fair. It is conceivable that the context of the misconduct, including where there is clear evidence of inconsistent disciplinary treatment, taken together with compelling personal mitigation, that a dismissal for gross misconduct could be unfair. The Tribunal's consideration of the fairness of the Claimant's dismissal is purely focused on the penalty. There is no dispute that the Respondent's belief in the Claimant's guilt was reasonable and the investigation is not criticised. The Claimant suggests that a reasonable employer would have issued him with a final written warning.

74. A reasonable employer can be expected to deal with similar types of misconduct in comparable ways. This Respondent has provided evidence of the disciplinary action it has taken in relation to telephone misuse amongst its security staff since 2016. The majority of penalties awarded were written warnings (including for the Claimant in December 2017), there was one final written warning and, at the time of the Claimant's dismissal, he was the only person who received this sanction. Mr Beveridge did not impose any disciplinary sanction on four members of staff he caught using their phones on 8 September 2017. However, the Tribunal is satisfied that had the Claimant been one of the people observed by

Mr Beveridge on his phone, he would have escaped a warning on that occasion. Mr Beveridge explained why it was that he did not immediately issue warnings, given his relatively recent appointment, but took the opportunity to issue a general warning to all members of staff to the effect that, henceforth, any telephone misuse would attract a disciplinary penalty. That communication appears to have been borne out by the Respondent's subsequent practice. Mr R is relied on by the Claimant as an example of someone who was dealt with more leniently than him, however, this was because he was one of the group of four observed by Mr Beveridge and was subsequently caught and given a written warning. Whilst it might be said that Mr R received the benefit of Mr Beveridge's being a new manager, but when he was subsequently disciplined, it was as if for a first offence and he was treated in the same way the Claimant was and given a written warning.

75. In the course of the Tribunal hearing, the Claimant provided an example he had not mentioned earlier, of a member of staff (Mr T) who had not been disciplined at all for using his phone (albeit he is shown as having received a final written warning on another occasion). Mr Parker investigated this assertion in the course of the hearing by looking at Mr T's personnel file in which any such event should have been recorded. There was no reference to it. The supervisor who allegedly took no action was not at work and, therefore, could not be asked for his recollection of the event. However, even if there was an isolated occasion when a staff member did not receive a formal disciplinary sanction for using his phone after September 2017, this would not demonstrate a structural inconsistency with the Claimant's treatment, as he was not disciplined for an isolated incident, but for two incidents on one day whilst there was a live written warning for exactly the same type of misconduct.

76. Since the Claimant's dismissal, the Respondent has dismissed another member of staff for telephone misuse in July 2019 (Mr D) and a final written warning was issued to Mr O on 3 December 2018 relating to using his phone on duty on 24 September 2018. There was delay in issuing this penalty due to Mr O's annual leave. None of the other members of staff who received disciplinary penalties for phone misuse were in the same or similar circumstances to the Claimant in that he had a live written warning for phone misuse, but was also caught using his phone twice on one day for a considerable period of time, having continued to use his phone in the face of an express instruction not to do so. The Claimant's misconduct was, therefore, not simply phone misuse, but also a serious failure to follow a reasonable management instruction.

77. It is suggested that Mr Whitehouse took into account expired disciplinary warnings in reaching his conclusion concerning penalty and that insufficient regard was had to the Claimant's difficult personal circumstances in mitigation. The Tribunal was concerned that both the Claimant and his representative had not realised that Mr Whitehouse adjourned the disciplinary hearing to enable him to consider both whether the allegations against the Claimant were proven and to consider what penalty should be imposed. Mr Whitehouse explained in evidence that by the end of the hearing, the misconduct had been admitted, so it was only

penalty he had to decide. He gave the Claimant two opportunities to add anything before he adjourned, but it is clear from the minutes of the meeting, that the Claimant's representative had genuinely expected there would be an opportunity to address Mr Whitehouse on penalty. Whilst the Tribunal considers that a separate opportunity to mitigate would have made no difference to the outcome, the Respondent's processes in this regard could have been clearer to avoid the Claimant's perception of unfairness.

78. In response to Mr Whitehouse's invitation, the Claimant raised his personal circumstances, suggesting that it was only after his wife left with their child that his conduct had declined. Mr Whitehouse then pointed out the 8 previous disciplinary issues the Claimant had in recent years. Whilst it is acknowledged that Mr Whitehouse initially referred to these incidents in response to the suggestion that the Claimant's performance issues were a recent phenomenon, he also set them out at the end of the dismissal letter. It left the Claimant with the impression that these issues had contributed to his dismissal. Having heard Mr Whitehouse's evidence, the Tribunal is satisfied they did not, but including reference to them in the dismissal letter gave them a prominence which was inappropriate.

79. Both Mr Whitehouse and Mr Parker were aware that the Claimant's wife had left him the previous year and that she had taken their son with him and appreciated that this must have been difficult for the Claimant. However, neither considered that this was sufficient mitigation for the Claimant to avoid dismissal. Had the Claimant immediately accepted his culpability and relied on circumstances in his private life to explain or excuse his behaviour, that might have been different. As it was, the Claimant only sought to excuse his conduct by reference to his personal circumstance having initially lied and deflected blame to avoid disciplinary action.

80. The Claimant's length of service was taken into account on both sides of the balance, in that Mr Parker considered that the Claimant would have been well aware of the Respondent's policies. He did not accept that the Claimant had "unblemished" service (which he clearly did not). The Respondent was criticised for failing to obtain medical evidence when the Claimant asserted in the course of the appeal that he had been depressed. Given the Claimant had the support of his Trade Union at both the disciplinary hearing and the appeal, if the Claimant's actions had any medical cause, the Tribunal would expect the Claimant himself to have adduced some evidence in this respect.

81. Having accepted that the Claimant was guilty of gross misconduct, unusual circumstances would be needed for the penalty of dismissal to fall outside the range of reasonable responses for an employer. The Respondent did take into account the Claimant's difficult personal issues, but formed the view that they were insufficiently compelling to commute the penalty to a final written warning. That was a decision reasonably open to the Respondent. In the Tribunal's view, dismissal fell within the range of reasonable responses to the Claimant's admitted misconduct. As such, the Claimant was not unfairly dismissed.

<u>Race Discrimination</u>

82. The Claimant's original claim for race discrimination was confined to a failure to promote him in 2017, however, he amended his claim to suggest that the failure to promote him was an act of race discrimination which continued until his dismissal. Whilst the term "promotion" tends to imply a movement up a hierarchical structure, the Claimant is referring to a change of job role at the same level to be either a UK Controller or Access Controller. The former was paid at a lower hourly rate than a Front of House Officer, but would have been a stepping stone to obtain a Euro Controller Role, which was paid at £17.01 per hour (which was also the rate for an Access Controller) rather than the £16.09 he was paid as a Front of House Officer. Having experience of performing other roles, even if at a lower pay rate is likely to be good for building skills and career development generally, so the fact that a particular role might not technically be a "promotion" is of no significance in the context of the Claimant's race discrimination claim. If the Claimant wished to be considered for an alternative role at the Respondent but was not successful in obtaining one because of his race, that would amount to direct race discrimination regardless of whether it was strictly a failure to promote.

83. The Respondent provided statistics in relation to the racial composition of its workforce, which were not challenged. This demonstrates that the workforce as a whole was diverse (using the Respondent's definitions, 28.5% of the work force were black, 47.4% white and 21.7% Asian). In the course of oral evidence, Mr Beveridge and Mr Haque were able to set out the number of Supervisors or first tier Managers who were black. For instance, it was Mr Haque's unchallenged evidence that four out of six permanent supervisors and five out of seven "step up" supervisors were black. The Tribunal was aware that the Claimant's immediate supervisor (until his resignation in April 2018) was black and shared the Claimant's national and ethnic origins. There was thus, no evidence that black employees generally were unlikely to be promoted or advanced by the Respondent. Further, when the Claimant himself expressed an interest in a new role in 2015, he secured one very quickly.

84. The Claimant named five black employees in his witness statement who he suggests had made unsuccessful applications for "different positions for many years". The details of these applications and when they were made were vague – some dated back to 2006, 2010 and 2011 (prior to Mr Beveridge, Mr Parker and Mr Whitehouse's employment). Mr Beveridge explained that one of the named employees concerned could only work nights, so could not have been put on a shift rotation, a second worked only Thursday nights and another could only work Tuesday and Thursday nights and during the day at weekends, so this would have been the reason why they could not have changed roles. A general assertion that five black employees have not been promoted historically (on dates and for posts which are uncertain), particularly when three of those employees have very restricted availability to work, is insufficient to enable the Tribunal to draw an inference that the reason for their lack of promotion was because of their race. Further, there is no evidence as to who was appointed in their stead, let alone their colour. Given the diversity of the Respondent's workforce at supervisory level, the Tribunal is not satisfied that there is an informal policy or practice of discriminating against black members of staff in promotion or staff development terms.

84. As to the Claimant's allegations concerning his own lack of promotion in 2017/2018, there was no evidence from the Claimant or Respondent suggesting that there were any promotion/staff development opportunities in 2017. This was not a workforce where promotions or transfers could take place in isolation from there being available posts to fill. There were a number of job opportunities in the course of 2018 in particular because the Respondent's client was relocating offices and there were additional roles needing to be covered in the transition period: on 2 February 2018, 19 April 2018 and 3 September 2018, when staff, including the Claimant, were sent emails inviting expressions of interest in a variety of roles. The Claimant did not respond to any of them, because he said he did not want to waste his time applying for roles he would not get because of the colour of his skin (albeit this statement was inconsistent with the fact that he did express an interest in the Controller role on 30 July 2018).

85. In his further particulars, the Claimant set out the white members of staff to whom he compares himself, albeit at the outset of the hearing, Mr Rogers indicated that he no longer compared himself to a female comparator, as she had been promoted back in 2015. There were four other white comparators, Mr SC, Mr MP, Mr KA and Mr KW. Mr KA and Mr MP expressed an interest in the Controller positions which were advertised on 19 April 2018 by replying to the email. Both Mr KA and Mr MP held CCTV licences. Mr KA received practical training in the Controller position and provided cover on an occasional basis up until 1 January 2019 when he was placed in a UK Controller post on a temporary basis. Mr MP had obtained the requisite CCTV training privately in November 2017 and like Mr KA received on the job training in June 2018 following his expression of interest in April 2018. He provided cover until December 2018 and then, like Mr KA was placed in the temporary position of UK Controller on 1 January 2019 to cover the office relocation project. Mr SC had both supervisory experience and an existing CCTV licence, so he was able to provide cover for a Controller position without further training. Thus, three of the Claimant's comparators were already qualified to perform the Controller Position without further training as they held CCTV licences, which permitted them to monitor the CCTV's.

86. Section 23 of the Equality Act 2010 explains that in relation to a comparator for the purposes of a direct discrimination claim (amongst others), "*there must be no material difference between the circumstances relating to each case."* There are two material differences between Mr KA, Mr MP and Mr SC and the Claimant in relation to their obtaining the position of Controller. The first is that they applied for the position and the Claimant did not. The second is that they already held CCTV licences and the Claimant did not. The Tribunal was told and accepts that applicants who already held CCTV licences were more likely to be successful as they were mandatory for the Controller role.

87. Of the Claimant's comparators, the one (apart from the Claimant), who did not have a CCTV licence was Mr KW. He was sent on a CCTV training course by the Respondent between 8 and 11 October 2018, along with 5 other employees (including one who was black). Those who were sent on the CCTV training course responded to the Respondent's invitation to express an interest in the

vacant roles on 3 September 2018. If the Tribunal asks itself why it was that Mr W (and the other 5 members of staff) who were sent on the CCTV course rather than the Claimant, the obvious answer is that they applied for the advertised roles, which needed a CCTV licence, whereas the Claimant did not. It is right that the Claimant had expressed an interest in the Controller post on 30 July 2018. Mr Beveridge was encouraging of his interest, but explained there were no current vacancies. When the vacancies were subsequently advertised, other members of staff applied for them in accordance with the invitation (to email Mr L with a detailed cover letter explaining why they were a suitable candidate), whereas the Claimant did not. The Claimant sent a general reminder to management that he was interested in being "*trained*" to be an Undercover Officer, Security Controller and Access Controller on 27 September 2018 (after he was caught using his mobile phone on two occasions and was facing disciplinary action), but this was over 3 weeks after applications/expressions of interest were sought and it was not an "application" for the posts, but a request for training. Even if the Claimant's email could be interpreted broadly as an expression of interest in the roles rather than a request for training, it was not in the form requested as there was no cover letter explaining why he was a suitable candidate.

88. Whichever way the Tribunal approaches the reason for the Claimant's treatment in failing to be promoted, namely by reference to express comparators or simply by asking what the reason for the Claimant's treatment was, the answer is that he was not promoted because he did not apply for the only vacant roles there were. There was no evidence to suggest that the Claimant's colour (or ethnic origins) played any part in the promotion process, so even if the allegations were approached on the basis that the Claimant was treated less favourably in not being promoted as against non-black members of staff, the Claimant has not discharged the initial burden by pointing to facts from which the Tribunal could infer that his race was the reason for his treatment. This was a claim wholly without merit.

89. There was a suggestion in the evidence that the Respondent's failure to offer the Claimant CCTV training was a separate act of race discrimination. This was not set out in the Claim Form or the list of issues. For the sake of completeness, however, the Tribunal is satisfied that the reason the Claimant was not offered CCTV training was because he did not formally apply for the vacant role of Controller. Those who did apply and needed training, were sent on the course (one of whom was black).

90. There were three separate opportunities for the Claimant to apply for promotion in 2018. It stretches the language of section 123 of the Equality Act 2010 too far to suggest that a failure to appoint someone who did not apply for a series of roles can amount to "conduct extending over a period". Any allegations, therefore, of a discriminatory failure to promote the Claimant in February and April 2018 were substantially out of time. The only reason put forward as to why it might be just and equitable to extend time was that the Claimant was representing himself. However, he clearly had access to advice and representation from his Trade Union, so the Tribunal is not satisfied that this alone would constitute a cogent reason to extend time. This is particularly the case where the Claimant expressed no dissatisfaction concerning his failure to be promoted at the time, let

alone raising a suggestion that the reason for it was discriminatory. The Respondent had no opportunity to investigate the allegation close in time to its occurrence, which might mitigate against any evidential prejudice in an out of time claim. In so far as the Claimant's email requesting training dated 26 September 2018 could be construed as an application for promotion and, therefore, the Respondent's failure to appoint him as a result occurred on that day (because it was not treated as an application for promotion), it was in time. The Claimant contacted ACAS on 9 November 2018 and the ACAS certificate was issued on 6 December 2018, so the period from 10 November to 6 December are disregarded for the purposes of the primary time limit (per section 207B of the ERA). The Claim Form was presented on 9 January 2019. As such, the Tribunal has jurisdiction to hear it, but considers it was not well-founded.

_____