EMPLOYMENT TRIBUNALS

Claimant: Mr S Bile

Respondent: Ward Security Ltd

Heard at: London South Croydon (by CVP)

On: 28-30 September 2020, 1 October 2020 (afternoon in chambers) & 15 October 2020 (in chambers)

Before: Employment Judge Tsamados
Members:
Mrs S Dengate
Mr C Rogers

Representation

Claimant: In person
Respondent: Mr T Goodwin, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** Judgment of the Employment Tribunal is as follows:

1) The Claimant's complaint of unlawful race/sex discrimination is not well founded and is dismissed;
2) The Claimant's complaint of unauthorised deductions from wages in respect of his 2018 holiday entitlement is not well founded and is dismissed;
3) The Claimant was unfairly dismissed by the Respondent;
4) The Claimant suffered unauthorised deductions from wages in respect of his contracted hours of work following his removal from Rupert Court;
5) The Claimant was wrongfully dismissed by the Respondent and is entitled to damages for breach of contract;
6) The amounts of compensation for unfair dismissal and unauthorised deductions from wages, and damages for breach of contract will be determined at a separate remedy hearing.

REASONS

The claims and issues

1. Mr Bile (the Claimant), has brought two claims to the Employment Tribunal both of which are brought against his former employers, Ward Security Ltd (the Respondent). His first claim form was received on 9 August 2019 following a period of Early Conciliation between 19 July and 15 August 2019. His second claim form was received on 1 September 2019. The claim forms contain complaints of race and sex discrimination, unfair dismissal, entitlement to outstanding wages including holiday pay and entitlement to notice pay. The Respondent sent a defence (the response) to both claims on 22 October 2019 in which it denied all of the complaints.

2. By a letter dated 23 January 2020, the Tribunal notified the parties that the two claims would be dealt with together given that they arose from the same set of circumstances.

3. On 19 February 2020, the parties attended a Preliminary Hearing on case management which was conducted by Employment Judge Morton. At that hearing, Employment Judge Morton adopted a list of issues that had been prepared by the Respondent and set a number of case management orders to prepare the case for this hearing. The case management summary of that hearing is at pages 85-88 of the bundle.

4. The Tribunal panel heard evidence and submissions over four days, sat in chambers on the afternoon of the last day and then met again on 15 October 2020 to finalise our deliberations and to reach this decision.

5. At the start of our hearing on the first day, we went through the issues that we would consider in respect of each complaint. The complaints are of unfair dismissal, direct race and sex discrimination, unlawful deduction from wages in respect of holiday pay and other deductions and damages for breach of contract in respect of entitlement to notice of dismissal. The list of issues is at page 77-84 of the bundle of documents. A copy is also attached as an appendix to our decision. These are the issues that the Tribunal considered in the determining the various complaints.

6. After timetabling the order of events, we adjourned to read the witness statements and referenced documents. The Respondent asked us to read the claim forms and response, the list of issues and the first section of the bundle. The Claimant said it was sufficient to read his witness statement as he had nothing to add.

7. There were a number of connectivity issues with the Claimant's CVP connection at the start of the hearing on the first day. We attempted to resolve this and the Respondent did offer the Claimant the use of a private room with appropriate facilities at their solicitors' offices. Quite understandably, the Claimant was not inclined to take up this offer and so I arranged for him to attend the Tribunal offices in person, given that he lives in Croydon. The Tribunal administration provided him with a private room

and IT facilities. We adjourned the hearing until the afternoon to allow the Claimant time to arrive. On arrival, the Claimant continued to have connectivity and in the end he used a combination of his own laptop to view the electronic documents and his mobile phone for the CVP platform. As a result we did not commence hearing the evidence until 2.40 pm on the first day.

Evidence

8. We heard evidence by way of written statements and in oral testimony from the Claimant and his witness, Mr Alton Boatswain. We heard evidence on behalf of the Respondent by way of written statements and in oral testimony from Mr Bruce Anderson and Mr Paul Hollands.

9. We were provided with an electronic bundle of documents by the Respondent which consisted of 388 pages. We refer to this where necessary as "B" followed by the relevant page number.

10. During the course of the hearing, we were provided with the following additional documents: copies of the Claimant's contract of employment and payslips from employment he obtained after his dismissal; the Claimant's Schedule of Loss sent on 12 September 2020; and the Respondent's calendar entries showing where the Claimant had worked following his move from Rupert Court.

Findings

11. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. The Tribunal have, however, considered all the evidence provided to us and we have borne it all in mind.

Background

12. The Claimant is Black African. He was employed by the Respondent as a Security Officer from 20 January 2016 until his dismissal for gross misconduct on 7 May 2019.

13. The Respondent provides manned security services for a wide range of sites and clients. It employs 900 plus Security Officers. It has an internal HR function.

14. The Claimant's contract of employment is at B95-111 and is dated 12 January 2016. In particular, it states that:

    a) his place of work would be allocated to him by assignment by the operations team and he would be required from time to time to work at different locations and to move assignments in accordance with the needs of the business (at this);

b) his basic rate of pay would exceed the National Minimum Wage but was variable dependent upon the assignment and the current rate of pay detailed within his Employment Offer Letter (at B98).

c) his hours of work and pay will vary according to the operational requirements of the business and as notified to him for each assignment. Further, it was a condition of his employment that he work flexibly in accordance with the working arrangements the Respondent operated. He was required to acknowledge that there may be periods when no work would be available and that the Respondent had no obligation to provide him with any work, or to provide him with any minimum number of hours work or to provide any minimum number of hours in any day or week and equally there would be no minimum pay guaranteed (clause 4.1 at B100);

d) he was entitled to 28 days pro rata holiday per annum which included public and bank holidays (clause 12.1 at B103);

e) he was required to take his holiday entitlement in whole days and at dates agreed with his line manager. He was required to give at least 25 days' notice before the leave sought (clause 12.2 at B103);

f) holidays must be taken in the holiday year of entitlement and may not be carried forward to the following year (clause 12.3 at B103); and

g) the holiday year runs from 1st January until 31st December (clause 12.4 at B103).

15. We were also referred to the Respondent's Annual Leave Entitlement Policy at B138 and in particular the last two paragraphs of section 2, which we set out below:

The Company will review regularly, holiday taken by employees to the holiday entitlement based on the requirements to take holiday throughout the year. Where holiday has not been taken in line with the requirements below across the holiday year, the Company will discuss with you and where practicable, may schedule your holiday, to ensure the statutory requirements to take holiday have been met; where this may be undertaken, the Company will give reasonable notice for each 1 day of the scheduled holiday.

The Company will periodically remind employees through communications on the portal or direct to the employee, to ensure the employee meets their requirements to take their annual holiday entitlement.

16. The Claimant was initially employed as an Interim Relief Officer and his contract of employment is what is commonly known as a zero hours contract. He was initially paid £9.40 per hour. On 17 July 2017 his position was made permanent and he was moved to work at New London House for 72 hours per week (we refer to the Change of Terms and Conditions Form at B112). On 14 May 2018 his employment was revised so that he was working 60 hours a week at Newport Sandringham & 5a Rupert Court (known as Rupert Court for short) at the rate of £10.20 per hour (we refer to the letter dated 9 May 2018 at B113).

17. The Claimant initially said in evidence that he had never seen the letter at B113 before. However, later on in his evidence he relied upon it as a document that recorded all of his terms and conditions of employment. The

Respondent's position was that the Claimant was still employed on his original zero hours contract save for the terms that had been varied within B113.

18. Having considered the evidence we find on balance of probability that the Claimant was permanently employed for 60 hours per week. He was originally on a zero hours contract, but his employment was made permanent at B112. At B113 his place of work, hours and hourly rate were varied. In all other respects the terms of his original contract of employment remained in force.

2018 annual leave entitlement

19. Due to a family bereavement, the Claimant requested that annual leave he had originally booked for September 2018 be moved to December 2018 / January 2019. The Respondent granted his request. Unfortunately, the consequence of moving his annual leave meant that the Claimant lost his outstanding annual leave in the leave year 2018 and instead used part of his annual leave in the leave year 2019. The Claimant's position in evidence was that the Respondent should have pointed this out to him as well as reminded him that he needed to take his leave in the leave year in question or lose it. He relied on section 2 of the holiday policy which we have set out above.

20. Having considered the evidence, on balance of probability we make the following findings. The Respondent could have reminded the Claimant of his need to use up his holiday in leave year 2018, but it did not do so. However, this is not something that gives rise to a legal claim. The Working Time Regulations 1998 preclude the carry over of leave in these circumstances. There is not contractual right to carry over leave. The document that the Claimant relies upon is not contractual, it is a policy document. The Claimant had been employed by the Respondent for three years and he should have been aware of the arrangements as to the taking of annual leave.

Rupert Court

21. The Claimant was absent from work due to ill health following his period of annual leave. He was due back to work on 14 January but did not return until 22 January 2019. On his return to work he found out that the Respondent's client had requested his removal from Rupert Court. The Respondent wrote to the Claimant to advise him of this on 22 January 2019 and we were referred to the letter at B171. In addition, the Respondent commenced a search for an alternative site for the Claimant to work. The letter made it clear that the Respondent viewed the Claimant as a valued employee, wanted to offer him alternative work and to keep him in its employment. We accept that the letter did not attribute any blame to the Claimant for his removal from site as a result of the client's request, but sought to accommodate him in finding an alternative site and the Respondent was being supportive of the Claimant. We deal in more detail with matters arising from the claimant's removal from Rupert Court in his grievance below

22.

Battersea Studios

23. After his removal from Rupert Court, the Claimant worked at various sites, including Battersea Studios. The Respondent provided us with documents which were copies of electronic calendars between January and April 2019. These showed where the Claimant had worked on a daily basis following his removal from Rupert Court and his commencement at Battersea Studios. In addition, the Respondent provided us with an Excel spreadsheet setting out the number of days worked at Battersea Studios between 28 January and 9 April 2018.

24. The Respondent produced these documents following conflicting evidence as to the number of shifts that the Claimant and the Respondent said that he worked at Battersea Studios prior to the incident giving rise to his dismissal. The Claimant had indicated it was a very low figure in support of his assertion that at the time of the incident in question he was very new to Battersea Studios and was unaware of the procedures. The Respondent said it was much higher.

25. Having considered the evidence, we accept that the Claimant had worked 17 shifts at Battersea Studios by the time of the incident and not 2 as he had initially said until confronted with the Respondent's evidence. From this is apparent that certainly from 1 April 2019 onwards, the Claimant was working there on a daily basis. Whilst we did not view his original evidence as untruthful, as the Respondent asserted, we did feel that the Claimant gave the evidence that he thought would best support his case until confronted to the contrary.

26. Battersea Studios site comprises of two multi-tenanted buildings (referred to as Building One and Building Two), a car park and plant area. There is a cafe in Building One that is used by the tenants, their staff and visitors. The Battersea Studios are managed by Knight Frank who outsourced the buildings' security to the Respondent. We were referred to a photograph at B317 showing the reception area in Building One.

27. The detailed arrangements for the operation of security at Battersea Studios are set out within document drawn up between the Knight Frank and the Respondent. This is called the Assignment Instructions (AI) and is at B114-137. We were also referred to an excerpt from the instructions at B161, setting out the requirements with regard to visitors with and without appointments. This is set out below:

> ***Visitors with Appointments***
> *There is no visitor parking facility on this assignment, unless prior notification has been given to park in the tenant's own spaces. Politely request from the visitor their name, company and person they wish to see. Enter/sign in the visitor's details into the reception system and then telephone the person they wish to see and confirm the appointment. If the appointment is confirmed, then ask the person to come to reception and collect the visitor. Hand the visitor a Visitor's Pass and request him to wear it with him always and return it to security on his final departure from the premises. The Security Officer must sign the visitor out. Confirm to the visitor that the person they wish to see is on route, and invite them to take a seat in the reception waiting area.*
>
> ***Visitors without Appointments***
> *Always consider that a visitor without an appointment may be unwelcome by the person he wishes to see. Do not give them any expectation that they will be received. Nevertheless, ask them politely their name, company, and person they wish to see. Contact the person the visitor wishes to see and inform*

him of the visitor's request. If the person wishes to see the visitor, then carry out the procedure as outlined above. If not, then explain to the visitor that he cannot be seen, and outline the reasons as obtained from the member of staff contacted. Avoid allowing the use of the reception desk 'phone unless the call will last a short time. On no account may the visitor step behind the reception desk.

28. The Respondent's position is that the Claimant was provided with a copy of the Assignment Instructions when he started to work at the site. The Claimant stated at his subsequent disciplinary hearing (which we deal with below) that he had read and signed the AI. This is recorded within the notes of the disciplinary hearing at B254. However, in cross examination the Claimant said that in fact he had read them two years ago when he had last worked at Battersea Studios.

29. Mr Boatswain gave evidence for the Claimant. Mr Boatswain had worked for the Respondent and its predecessors in title since September 2012 as the Security Supervisor at Battersea Studios. He worked in this position at the time of the events in question but has since left the Respondent's employment. Mr Boatswain said in evidence that it was the individual obligation of each Security Officer to read and sign the AI and that if they did not do so, then they cannot be held to them. He also stated that it was not his job to enforce compliance with the AI. Whilst it is not strictly relevant to the matter before us, we did form the view that on balance of probability this could not be right given that Mr Boatswain was the Supervisor on site. We also do not accept the proposition that a Security Officer could not be held to the AI simply because s/he had not read them or signed and there must be an obligation to do so.

30. In terms of the relevance to this case, we make the following finding on balance of probability. We find that the Claimant told the Respondent during the disciplinary process that he had read and signed the AI and that he did not give a qualified answer as he did so in evidence to us. It was therefore reasonable for the Respondent to form the view that he had read them at the time of the incident in question.

31. We heard evidence as to the difficulties in providing security within the reception area of Battersea Studios building one. We make the following findings and were aided to an extent by the photograph to which we were referred to.

32. The reception area in Battersea Studios building one is open plan. There are no barriers preventing entry. Staff and visitors could simply enter the building through the revolving entrance doors and then past the reception desk without necessarily being challenged by the Security Officers on duty. There is an external key fob entry system for use by staff to the side of the entrance doors to the building. However, not all members of staff used this and its use was not enforced. Some members of staff had ID badges. Some did not. So this meant that some of the staff simply walked through the reception desk being recognised by the Security Officers on duty and so not challenged. Similarly, this happened with visitors. Some visitors could simply walk through unless either they approached and spoke to the Security Officers on duty or were challenged by those officers.

33. Both parties acknowledged the difficulties that this set up presented to security and the importance of the need to establish whether someone entering the building was there for legitimate purposes.

34. We were just also note that Mr Boatswain had worked at Battersea Studios for many years and he knew members of staff and regular visitors by sight alone and so was able to admit them without ID or challenging them. Clearly, such a practice was not appropriate for Security Officers with less service at and experience of Battersea Studios.

35. In evidence the Claimant referred to security concerns arising from the layout of the Battersea Studios building one reception (BS-1) that Mr Boatswain raised with the Respondent and the lack of action by the Respondent. We have found a number of emails within the bundle of documents in which Mr Boatswain at various times raised his concerns. The most succinct of these is at B334 and is dated 2 January 2019. It is sent following a security incident on that date (involving DW which we deal with later on) and we feel it appropriate to reproduce the contents below:

> *The position at the BS-1 reception desk requires any security presence on the desk to multitask because (sic) accept deliveries, sort deliveries, sign in / out guests, monitor CCTV and monitor access and egress not only to the building but the car park as well.*
>
> *In such working environment it's difficult to avoid such occurrences especially when the building's occupancy level has dramatically increased over the years, yet security haven't been given additional tool to assist in their day to day role.*
>
> *The ideal situation would be to have physical barriers which would allow only valid card / fob holders access or have two security presence (sic) at the desk at all time to minimize the likelihood of this happening again.*

36. Mr Bruce Anderson, the Respondent's Senior Regional Manager, accepted in oral evidence that the setup at Battersea Studios building one presented difficulties. He agreed that if one person was on the reception desk and more than one person passed by at a time then it would be difficult to manage security. He said that he was aware of a few occasions on which issues had arisen and after discussion with Mr Boatswain, Mr Boatswain wrote to him with his concerns. Mr Anderson further stated that he discussed these with the client, Knight Frank, but they raised monetary concerns and he was not in a position to argue with them.

<u>The incident on 9 April 2019</u>

37. We now turn to the incident which led to the Claimant's dismissal. At approximately 3.20 pm on 9 April 2019, an intruder (that is, someone who was neither a member of staff nor a legitimate visitor) entered Battersea Studios building one and walked through the reception area unchallenged by the Claimant. The intruder gained access to a tenant's premises (an organisation called 90ten) within the building and there was an altercation with the intruder and the tenant's staff. We heard varying accounts of whether this was a verbal or physical assault but we know that it did result in a complaint from the tenant and that the Police were called.

38. The Claimant's initial written statement to the Respondent later that day was that at the time he was dealing with a delivery and a visitor and that he was distracted. This is set out in an email sent from Mr Boatswain's work account to Katey Monaghan, the Respondent's Facilities Manager, and is at B240. We set this out below:

At exactly 15.20hrs, I was on my own manning the 85 1 reception desk when a courier turned up with 15 boxes for book trust.

The courier in question hasn't been on site before so was trying to deal with.

Few minutes after that, a visitor also came in to see KIKI DAWSON from Heritage which I was trying to help her also to register her attendance into the visitors book.

I was the (sic) dealing with two people at the same time as Alton had gone to BS2 to give MO a break and at the (sic) to show the new Officer around.

I got distracted by dealing with the issues above as I didn't see anybody walked pass (sic). Few minutes later someone from 90ten ran to me saying someone has come into their office to threaten them.

I left the visitors at the reception and ran to 90ten Office to see this guy in question standing there using some threatening words to the staff. I pushed him out and called Alton to come over, by the time he had come, The intruder had left.

Alton called the police before 15:40hrs to ensure the incident has been reported to the police.

At 15:50 PC JONES and PC SMALL arrived on site at which time the intruder has (sic) already gone.

When the Police were leaving site around 15mns later they confirmed that they got a good description and they will be checking the area.

39. The incident was investigated by Mr Sam Harding, the Respondent's Operations Support Manager.

40. At a subsequent investigatory meeting with Mr Harding held on 18 April 2019 (at B253), the Claimant said that he thought he recognised the intruder as someone who had previously entered the building and in effect nodded him through believing him to be there for legitimate purposes. At our hearing the Claimant said the same thing.

41. The Respondent's position is set out in Mr Harding's investigation reports at B244 and B245-247. This was based on his viewing the CCTV footage of the reception area at the time of the incident in question. The investigation findings are set out below:

Description of Incident: On 09.04.19 at site Battersea Studios SP: 7763 breach of security, a male entered the building and made his way onto a tennants (sic) floor "90Ten" and behaved in an aggressive manner towards staff.

Discription (sic) of the aggressor (sic): (Obtained via on site CCTV)

Black Male, 6ft Tall, Black jumper, Grey jogging bottoms, Carrying what looks to be a carrier bag.

Timeline of events: (Obtained via on site CCTV) CCTV timeings (sic) are shown 1 hour in front of actual time.

14:24-Agreessor enters Batersea (sic) studios, building 1, acknowledges security by showing "what looks to be a piece of paper or a pass of some kind".

14:25 -Staff members from both "90Ten" & "Allscripts" reporting the situation to security, security then went to the location of incident.

14:27 -Security now seen back at reception and attempts to call the police.

14:28-The agressor (sic) then leaves the building in a hurry via revolving doors on reception leaving "what looks to be a piece of paper or pass on the desk on his way out" Photo attached with this report.

14:49- Police arrive on site.

14:54- Police off site.

Investigation findings:

► At 14:24 when the aggressor (sic) arrives on site, he is acknowledged by security and is unchallanged.
► The statements received (sic) from security post incident manning the reception area at the time stated, he was dealing with deliveries and guests, however, the CCTV clearly shows this is not the case and the security looks to be unhindered nor distracted at the time of the agressors (sic) entry.
► At no point did the security officer dealing with the incident attempt (sic) to make comunications (sic) via the radios.

Actions Taken post investigation:

► Officer manning the reception (sic) area at time of entry has since been removed from site pending outcome of investigation.
► CCTV download and removal of site to be used in relation to both investigation and to be used as evidence in the outcome of the investigation has been requested from Mike Tuohy of Knight Frank.

42. In addition, Mr Harding relied upon the statement taken from the Claimant as we have referred to above, a statement from Mr Boatswain and emails collected from the client as well as tenants.

43. Mr Harding's investigation established that an aggressor was allowed to enter the building unchallenged and gain unlawful access to the tenant's demise. He recommended that due to the seriousness of the incident, the incident involving the Claimant should be put forward to a formal hearing.

44. Whilst there is a reference to an attached photograph, we were not provided with this.

45. The Claimant was removed from the site at Knight Frank's request. However, the Claimant was not shown the request in writing and doubted its existence. The closest we have to this was in the form of a complaint about what had happened on the day in question from the tenant's HR Director in an email to Ms Monaghan dated 10 April 2019 (at B248-249). Whilst the Claimant doubts the veracity of his removal, it does seem more probable than not that Knight Frank did requested removal following the incident.

46. The Respondent suspended the Claimant by way of removing him from Battersea Studios with effect from 10 April 2019. We were referred to a letter from the Respondent to the Claimant dated 11 April 2019 to this effect (at B251-252). The letter stated that the suspension was pending further investigation into the incident at Battersea Studios on 9 April 2019 and the allegation in respect of an "unauthorised person gaining access to a tenanted area of the building".

47. The Claimant attended the investigation hearing on 18 April 2019. This was conducted by Mr Harding. The notes of the hearing are at B253-257. The salient points of the interview are as follows. Mr Harding stated that the CCTV footage had been viewed on site but the images were not available at the meeting. He asked the Claimant to explain what happened on 9 April 2019.

The Claimant explained that he was on his own at the time and that when he first saw the person who subsequently turned out to be the intruder, he thought it was someone he had let into the building earlier and who had signed in before. The Claimant confirmed that he had read and signed the AI and he was aware that these stated that everyone either has to show ID or sign in. Mr Harding pointed out two anomalies between what the Claimant was saying now and what was in his initial statement. Namely: he had said that he was dealing with two people at the time that the intruder entered the building and now he was saying that he was not doing that; and he had said he got distracted and did not see the intruder but now he was saying that he did. The Claimant maintained that the intruder looked like someone he had signed in earlier and so there was not a need to challenge him. Mr Harding responded that if there was any doubt as to whether a person had signed in before or not then that was exactly the reason to challenge them.

48. We would note that whilst the Claimant was told about the existence of the CCTV footage and that it had been viewed, he was not told what it showed or offered the opportunity to see it. Whilst he is told that his answers are inconsistent with his initial statement nothing more is made of it at the meeting.

49. Mr Harding's Investigation Report appears to have been concluded after interviewing the Claimant. Mr Harding's conclusion at B246) is as follows:

Due to the seriousness of the incident, it is recommended that the incident involving Steven Bile, Security Officer, is put forward to a formal hearing.

50. On 25 April 2019, the Respondent wrote to the Claimant requiring him to attend a disciplinary meeting on 1 May 2019 to be conducted by Mr Paul Hollands, the Respondent's Strategic Operations Manager. This letter is at B258-259. The letter explained that the meeting had been arranged to discuss an allegation of gross misconduct which was said to include:

Gross misconduct, in that on 9th April 2019, whilst on duty at Battersea Studios, you failed to follow correct procedures, allowing an unauthorised person to enter a private area of the building and threaten staff, requiring the police to be called. This is a serious security breach and led to a request for removal from the client's site, as your actions made the relationship untenable.

51. The letter went on to advise the Claimant of his right of accompaniment and offered him the opportunity to submit any documentation or evidence in support at least 24 hours before the date of the hearing as well as the name of any representative or witnesses that will be present called upon. The letter warned the Claimant that one of the possible outcomes was dismissal. The letter indicated that the following documents were enclosed: disciplinary policy investigation report; fact-finding minutes 18 April 2019; the Claimant's initial report 9 April 2019; Mr boatswain's report dated 9 April 2019; email from tenant dated 10 April 2019; and section from Battersea Studio's AI.

52. We would note that whilst Mr Harding recommends that the matter is put forward to a formal hearing, the notice of disciplinary hearing letter dubs the charge as one of gross misconduct. We heard no evidence as to who made this decision.

53. The disciplinary hearing took place on 1 May 2019 and we were referred to the minutes of the meeting at B272-277. The Claimant was represented by Mr Boatswain who is shown as being his "TU Rep". The meeting was conducted by Mr Hollands and Claire Wratten, the Respondent's Regional HR Manager was present as notetaker.

54. The meeting essentially covered the same ground as the fact-finding meeting, the Claimant been given the opportunity to explain what happened on 9 April 2019. The Claimant again explained that he had not challenged the intruder because he thought he looked like someone he had admitted as a visitor earlier. Mr Hollands made the point that surely then he should have checked. Mr Boatswain explained about the difficulties with the site, there being no barriers and visitors not issued with any distinctive badges or lanyards and there being a café and communal area, although he acknowledged that since the incident lanyards have been put in place to identify visitors. He also pointed to other incidents, some more serious, involving other members of staff in which no action was taken and said that the Claimant was being scapegoated. He provided the names of those members of staff to Mr Hollands. We refer to those members of staff as JN and DW. At the end of the meeting, Mr Hollands indicated that he was going to investigate a number of points that had arisen including the incidents involving JN and DW.

55. We would note that we have no evidence as to any further meeting being convened after any enquiries undertaken by Mr Hollands in particular into the circumstances of JN and DW. Indeed, the Claimant's position is that the next he heard about the matter was when Mr Hollands wrote to him with the outcome of the disciplinary hearing.

56. Mr Hollands wrote to the Claimant by letter dated 7 May 2019 advising him of the outcome of the disciplinary hearing. This is at B278-280. The letter summarises the discussion at the meeting and that he had adjourned to investigate two previous cases that Mr Boatswain had raised in which unauthorised persons had access to the building and it was alleged that no action had been taken. In respect of JN and an incident in January 2018, Mr Hollands reported that she no longer worked for the Respondent and he could find no reference to the incident. In respect of DW, he had looked into the incident and whilst he was unable to divulge confidential information, he was able to confirm that action was taken in relation to the incident but the actual incident differed significantly to the one involving the Claimant.

57. The letter went on to notify the Claimant of Mr Hollands' decision to summarily dismiss him for gross misconduct with effect from 7 May 2019. Mr Hollands set out his rationale which we reproduce below:

> *In coming to my decision, I made the following observations. Ultimately, the role of a Security Officer is to: protect life, prevent crime, and safeguard the client's interests. The Assignment Instructions of the site, which you confirmed you had read and understood, are very clear as to what action should be taken in respect (sic) visitors to site. You are to request from the visitor their name, company and the person they wish to see. You are then to enter/ sign in the visitor's details into the reception system. Once you have confirmed they have an appointment, they are to be handed a Visitor's Pass, asked to wear it and return it to security on their leaving the building. The visitor must be signed out by the Security Officer.*

If this procedure had been followed correctly, it is extremely unlikely that the individual would have gained access to the offices and been in a position to threaten and distress tenants. It was a very serious situation, involving the police being called, and, as your representative pointed out, could have "gone the wrong way". I appreciate the potential concerns you have raised regarding the building, but at the time in question, there was only this gentleman entering reception and you did not challenge him. I also appreciate that you felt that you recognised him, but as you yourself asserted, you have been working as 'cover' at the site and therefore do not know all the regular tenants. In my view, this is an even more compelling reason as to why you should have made certain that the individual had authorisation to access the building.

I was also concerned that there was a difference in the accounts you gave of the incident. In your initial report, provided via email to Sam Harding, Operations Support Manager, on 9th April 2019, you stated that you were dealing with two people on the reception desk and that you did not see the individual walk past. However, in the investigation meeting notes, again held by Sam Harding and held on 18th April 2019, you stated that you saw the gentleman enter the building and you couldn't remember what you were doing at the time.

58. We would note that it was unclear how Mr Hollands reached the conclusion that the intruder was the only person going through the reception area at the time, given that the Claimant said the opposite during the disciplinary meeting and Mr Harding's review of the CCTV footage does not state this. We would also point again to the photograph that was indicated as attached to Mr Harding's investigation report but was not provided to us and to be fair was not something that the Claimant raised either at the time or at our hearing.

59. However, a major concern was that whilst in the dismissal letter Mr Hollands had noted his concerns as to the difference in accounts that the Claimant had given of the incident initially and then to Mr Harding, in his evidence to the Tribunal he had elevated this to concerns that the Claimant had been dishonest. But he was quite clear in evidence that whilst it was a concern it did not form part of the reasons for dismissal.

60. By a letter to the Respondent dated 11 May 2019, the Claimant appealed against his dismissal. That letter is at B281-283. The Claimant gave a number of reasons for his appeal: that it was retaliation because of a grievance he had raised in April 2019; that the sanction of dismissal was unwarranted; the particular difficulties with maintaining security at Battersea Studios; that he thought he recognised the intruder as someone he had admitted to the building earlier; that there had been previous incidents of a similar nature in which no action had been taken against any employee; he related the incidents involving JN and DW in some detail; he doubted that Mr Hollands had actually investigated these matters and pointed out that Mr Hollands had been the hearing manager in his previous grievance hearing an hour prior to the disciplinary hearing; that dismissal had already been decided before the hearing in order to appease Knight Frank; that he was used as a scapegoat and made an example for the same offence others had committed without facing disciplinary; that Mr Boatswain had clearly demonstrated how the security team at Battersea Studios was failed by the Respondent and no security review undertaken; that he has been treated less favourably than his other security counterparts who are females and of a white origin.

61. The appeal hearing was held on 30 May 2019. We were referred to the minutes of the meeting at B287-294. The meeting was conducted by David Tracey with Ms Wratten of HR present as notetaker. The Claimant was again represented by Mr Boatswain.

62. Mr Tracey did not give evidence to the Tribunal. The Claimant and Mr Boatswain did not address the matter in evidence. All we have to go on are the minutes of the appeal meeting and the outcome letter.

63. At the start of the meeting, Mr Boatswain attempted to discuss the previous similar incidents that he had raised before Mr Hollands and to determine what investigation had been undertaken. In response, Mr Tracey stated that this had been addressed by Mr Hollands in his letter of 7 May 2019 and read from the letter that NG no longer works for the Respondent and the incident involving DW differed from the one involving the Claimant. He further stated that these incidents have been "closed down with the outcome letter". As to the Claimant not being told what the investigation comprised of and Mr Tracey said that it was closed, in effect. Mr Boatswain then attempted to discuss the previous incidents in detail, but the discussion came to nothing with Mr Tracey referring him to the AI and Mr Boatswain accusing him of not listening. The meeting then moved on to discuss the Claimant's failure to follow the AI which had led to the incident in question with Mr Boatswain pointing to the difficulties with the site and Mr Tracey pointing to the AI. It does appear from the minutes that the meeting took on a rather agonistic tone particularly from Mr Boatswain's side.

64. We would note the concerns previously raised as to the Claimant's differing versions of the incident were not even mentioned at the appeal meeting.

65. By a letter dated 12 June 2019, Mr Tracey wrote to the Claimant advising him of the outcome of his appeal. This letter is at B296-297 and enclosed two copies of the minutes of the appeal hearing, requesting that the Claimant sign and return one copy or notify of any inaccuracies. The letter advised the Claimant that his appeal was dismissed and set out the reasons as follows:

> *• Your failure to challenge a visitor when entering a protected area which lead (sic) to a tenant being assaulted as you thought you recognised the individual*
> *• The client requested your removal from site*
> *• You failed to work to the expectation of your SIA licence and training*
> *• Your initial report stated you did not see the unauthorised visitor walk through to the protected area but subsequently you have stated you did see him and thought you recognised him from earlier, therefore did not offer a challenge.*

66. We would note the following. Whilst Mr Tracey upheld the decision made at the disciplinary hearing, he has added two new reasons for the dismissal. The first of these is that the Claimant failed to work to the expectation of his SIA licence and training. This was not something that was discussed during the appeal hearing. The second is as to the differing accounts he gave of the incident initially and at the fact-finding meeting. This is also something that was not discussed at the appeal hearing and it was only a concern of Mr Hollands raised in the dismissal letter, although there was an attempt to elevate it to an issue of dishonesty at our hearing.

<u>The Claimant's grievance</u>

67. We have only considered the grievance process in as far as it is relevant to the complaints of underpayment of wages and that the Claimant raises the fact of the grievance as the reason why he was subsequently dismissed.

68. Whilst we can consider the fairness of what happened on the face of it, beyond that and make findings relevant to the issues in the case before us, we would stress that it is not our function to reopen the grievance process.

69. On 27 March 2019 the Claimant sent an email to Ms Wratten, the Respondent's Regional HR Manager, raising a formal grievance. This email is at B178-179. The Claimant complained about his removal from Rupert Court on return from his annual leave/sick absence in January 2019, inconsistencies in his pay since his return and the loss of nine days of annual leave from his 2018 annual leave entitlement.

70. Ms Wratten wrote back to the Claimant by letter dated 2 April 2019 acknowledging his grievance, enclosing a copy of the Respondent's grievance policy and notifying him of the procedure that would be followed. This letter is at B180.

71. The Claimant was subsequently sent a letter dated 8 April 2019 advising him that a grievance meeting would take place on 16 April 2019 to be conducted by David Grant, the Respondent's Lead Operations Manager, with Ms Wratten as notetaker. The letter advised the Claimant of his right of accompaniment. This letter is at B 181.

72. The Claimant subsequently requested that the date of the meeting be rescheduled and as a result the Respondent wrote to the Claimant by letter dated 25 April 2019 advising him that the meeting would take place on 1 May 2019 and be conducted by Paul Hollands, the Strategic Operations Manager. This letter is at B188.

73. The grievance hearing took place as scheduled on 1 May 2019. It was conducted by Mr Hollands with Ms Wratten in attendance as notetaker. As the Claimant has pointed out in his appeal against dismissal, this was one hour before Mr Hollands conducted the disciplinary hearing. However, we could find nothing untoward in this.

74. The Claimant was represented by Mr Boatswain his TU representative. We were referred to the notes of the grievance meeting at B 193-201. Mr Hollands invited the Claimant to set out his grievance and the Claimant proceeded to do so. At the end of the meeting Mr Hollands indicated that he would pick up an email sent to Mr Grant by the Claimant, review all the information, adjourn the meeting and get back to the Claimant.

75. By letter dated 7 May 2019, Mr Hollands wrote to the Claimant advising him of the outcome of the grievance meeting. This letter is at B203-205. The letter dealt with the circumstances surrounding the Claimant's removal from Rupert Court in January 2019, the inconsistencies in his pay, the 2018 annual leave issue as well as feedback received regarding an interview in Mayfair.

76. With regard to the removal from Rupert Court, the Claimant's concerns were essentially twofold. Firstly, that he had been notified of his removal from Rupert Court without clear reasons being given and which he disputed. Secondly, that he was entitled to be paid for 60 hours per week and that he had not been provided with alternative work consistently at this level since

his removal from Rupert Court and so had suffered financial detriment. In the grievance outcome letter, Mr Hollands set out what had happened upon the Claimant's return from his leave and his attendance at a meeting with Ms Huxtable on 22 January 2019 at which she explained to him clearly the concerns that the client had about him. He further stated that she confirmed this in her email of the same date which contained a list of vacancies at other sites which the Claimant was asked to review and respond back (we have already referred to this email above). Mr Hollands determined that the Claimant was not entitled to a guaranteed 60 hours per week and that when he was notified of his assignment to Rupert Court, his terms and conditions letter clearly stated that 60 hours was specific for that site and would be reviewed if he was moved to another site or role. He further found that Ms Huxtable had tried very hard to find the Claimant suitable alternative work as far as possible at or near the 60 hour week he ideally preferred.

77. With regard to the issue of the Claimant's 2018 annual leave, the Claimant's concern is the one which we have already identified above. In essence, he moved his booked annual leave during 2018 so that part of it fell within the 2019 leave year and as a result he lost nine days of annual leave not taken during 2018. In the grievance outcome letter, Mr Hollands recites the background to the matter and whilst noting the Claimant's concerns as to the lack of reminders to staff to take outstanding leave within the annual leave year, he was unable to uphold the Claimant's grievance. He took the view that ultimately it is the employees' responsibility to ensure that they book their annual leave correctly.

78. Whilst the grievance outcome letter also deals with an issue regarding the Claimant's concerns as to the feedback received in respect of an informal interview at Mayfair, this was not raised in evidence and does not appear to have any relevance to the matters we have to determine.

79. We would note that at B169 there is an email from Ms Huxtable to the Claimant dated 25 Jan 2019 headed "Removal from Rupert Court" which states the following:

> *I am working with Gerry at the moment to organise you a roster for next week, as I said on the phone I will ensure you are paid for your contractual hours whilst this is ongoing for a "reasonable period of time".*

80. This email is sent in the context of the Respondent seeking to accommodate the Claimant at another site on a commensurate number of hours to Rupert Court. This appears to have been ultimately achieved by placing the Claimant at Battersea Studios which he worked at on a daily basis from at least 1 April 2019 onwards.

81. By an email dated 11 May 2019, the Claimant appealed against the outcome of his grievance in respect of his removal from Rupert Court and the inconsistencies in his pay, and in respect of the 2018 annual leave issue. This email is at B206-208.

82. The Respondent wrote to the Claimant by letter dated 17 May 2019 notifying him that an appeal meeting will take place on 30 May 2019. That letter

advised the Claimant of his right of accompaniment. This letter is at B209-210.

83. The meeting took place on 30 May 2019 as scheduled. It was conducted by Bruce Anderson, the Respondent's Senior Regional Manager with Ms Wratton and Debbie Aitken from HR as notetakers. The minutes of the meeting are at B 213-221 and at B222-238. Whilst it was not put to us and does not appear to be of any consequence, it does seem likely that the reason why there are two sets of minutes is that there were two minute takers.

84. The grievance meeting was adjourned so that Mr Anderson could carry out some further enquiries as the Respondent's letter to the Claimant at B232 indicates.

85. By letter dated 19 June 2019, Mr Anderson wrote to the Claimant setting out the outcome of his grievance appeal hearing. This letter is at B 234-235. In essence, Mr Anderson upheld the grievance findings with regard to the Claimant's removal from Rupert Court and in respect of his 2018 annual leave. However, he did find that the Claimant was underpaid wages following his removal from Rupert Court. The letter sets out the rationale for this as follows:

> *I confirm that in accordance with your contract of employment you are guaranteed 60 hours per week at the rate of £10.20/hour. Whilst working at alternative sites following the client request to remove you from Rupert Court, you in fact were underpaid by 50.5 hours at the rate of £10.20/hour which equated to the gross amount of £515.10 (shown as alternative site on your payslip) over the months of January and February 2019.*
>
> *Stephanie Huxtable confirmed in an email to you on 22 January 2019 @ 11 :14hrs that you would be paid your normal hourly rate of pay and hours of work to ensure that you were not at a detriment; you were in fact paid the hours that you had worked only which caused your pay to be less than you would have received had you worked 60 hours per week.*
>
> *The underpayment of £515.1 0 was paid to you in May 2019 payroll.*

86. In his written evidence, Mr Anderson explained that his enquiries revealed that the Claimant had been underpaid following his removal from Rupert Court and his subsequent placements. His further evidence was that the Claimant was underpaid by 50.5 hours at £10.20 per hour which amounted to £515.10 gross. In oral evidence he explained that the reason he came to a different decision to Mr Hollands was as a result of considering the documentation, the change to the Claimant's terms and conditions, Ms Huxtable's email to the Claimant which in essence said that he would be paid the normal rate whilst the Respondent found a permanent site. When asked as to the period for which he made the calculation, he said that he passed it to the payroll department to deal with.

87. Unfortunately, this did not really explain to us how the calculation had been reached. We know that the Claimant returned to work on 22 January 2019 after his annual leave, he was not allowed to continue working at Rupert Court, and that whilst he carried on working at a number of different sites, he did not consistently receive and get paid 60 hours of work per week. We do not know when the end date of Mr Anderson's calculation is. Whilst the Claimant is seeking payment for this within his Schedule of Loss sent to the

Respondent and the Tribunal on 14 September 2020 this just contains a monetary figure for a period of 14 weeks.

Closing submissions

88. Both parties provided us with written submissions which they spoke to. We have taken their submissions into account in reaching our conclusions.

Essential relevant law

89. Section 13 of the Equality Act 2010:

1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

90. Section 94(1) of the Employment Rights Act 1996:

An employee has the right not to be unfairly dismissed by his employer.

91. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

92. Section 13 of the Employment Rights Act 1996:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

93. Employment Tribunals (Extension of Jurisdiction) (England & Wales) Order 1994.

Conclusions

Direct Discrimination

94. Under section 13(1) of the Equality Act 2010 read with section 9, direct discrimination takes place where a person treats the claimant less favourably

because of race than that person treats or would treat others. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

95. The burden of proving unlawful discrimination is set out in section 136 of the Equality Act 2010, which states:

'…(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision….'

96. What this boils down to is the following: where the Claimant proves facts from which the Employment Tribunal could conclude in the absence of an adequate explanation that the Respondent committed an unlawful act of discrimination, the Tribunal must uphold the complaint unless the Respondent proves s/he did not commit that act.

97. We have followed the guidance given as to the burden of proof by the Court of Appeal in **Igen Ltd and others v Wong; Chamberlin Solicitors and another v Emokpae; Brunel University v Webster** [2005] IRLR 258.

98. The Claimant's case is that he was directly discriminated against on the basis of his race defined as Black African and/or his sex. Paragraph 7-11 of the agreed list of issues sets out the particulars of the direct discrimination.

99. The Claimant alleges in the agreed list of issues that he was treated less favourably because of his race and/or sex in comparison to JN and DW both of whom are white women and were employed at Battersea Studios as Security Officers.

100. In particular, he alleges that the Respondent did not subject DW to formal disciplinary proceedings in respect of a similar breach of security on her part and/or allowing a number of unannounced and unexpected guests into Battersea Studios. In respect of JN he alleges that the Respondent did not subject her to formal disciplinary proceedings in respect of a similar breach of security on her part. In comparison he was subjected to formal disciplinary proceedings in respect of a similar breach of security and his employment was terminated.

101. In his claim form, the Claimant referred to the concerns raised by Mr Boatswain at the disciplinary hearing as to the disparity/inconsistency of treatment between himself and JN and DW who were involved in similar situations to his in which they allowed uninvited guests to enter Battersea Studios, but were never subjected to any formal process. In JN's case he alleges that an uninvited guest was able to access the building and was involved in an altercation with the tenant who was hurt and bleeding as a result of his injuries. He further alleged that no formal action was taken against her. In DW's case he alleges that there were multiple complaints against her of allowing uninvited guests into the building, and even when one of the tenants complained, no further action was taken.

102. The Claimant relies upon this both as evidence of direct race and/or sex discrimination and/or as inconsistency of treatment in relation to his unfair dismissal claim. He complains that Mr Hollands did not investigate the matter as he promised and that Mr Tracey could not give an account of how Mr Hollands investigated the matter when asked.

103. In oral evidence the Claimant accepted that none of the incidents were factually comparable to his own case. However, it is fair to say that what he did take issue with was that no action was taken against JN or DW whereas he was subjected to formal disciplinary action and dismissed.

104. In considering the evidence, we established the following with regard to the incident involving JN whilst she was working on reception at Battersea Studios building one. This is largely from an email that Mr Boatswain sent to the Respondent on the day of the incident and is at B 312-313. On 23 January 2018, she signed in two male visitors who said they had come to see AS in one of the tenant's offices. Before she had verified that AS was expecting them, one of the guests asked to use the toilet. JN allowed him to. However, he did not go to the toilet, he went straight upstairs to the tenant's office and was involved in a scuffle with AS. No action was taken against JN.

105. Having considered the circumstances of this incident, we find that it is not comparable to the Claimant's situation and is materially different. At its highest JN was engaging with the visitors in accordance with the AI but she before she had been able to verify that AS was expecting them, she was fooled into letting one of them through on the basis that he said needed to use the toilet. The Claimant's situation is that he did not engage with the visitor in accordance with the AI, believing he was someone that he had previously allowed to enter as a visitor.

106. In considering the evidence, we established the following regard to the two incidents involving DW whilst she was working on reception at Battersea Studios building one. This is largely taken from an email that Mr Boatswain sent to the Respondent on 10 December 2018 and is at B320-32 (in respect of the first incident) and from an email that Mr Boatswain sent to the Respondent on the day of the incident and is at B333-334 (in respect of the second incident).

107. The first incident occurred on 30 November 2018. An unannounced visitor was able to get past reception unchallenged by DW, who was at the time distracted by another person such that she did not see the unannounced visitor. The unannounced visitor was able to gain access to a tenant's office. There was a complaint by the tenant. No action was taken against DW

108. The second incident occurred on 2 January 2019. A man was able to pass through reception having used a deactivated staff fob. Whilst an alarm had sounded when he used it, DW did not realise that the alarm was associated to the use by the man of the deactivated fob. The man gained access to a tenant's office and by the time DW and Mr Boatswain realised what had happened he was on his way out. There was a complaint by the tenant. No action was taken against DW.

109. Having considered the circumstances of the two incidents, we find that they are not comparable to the Claimant's situation and are materially different. The first incident, whilst there is a degree of culpability in that she was distracted whilst on duty, is simply not the same as the Claimant's situation in which he was not distracted and allowed someone to walk through on the basis that he thought he had let them in before. The second incident at its highest was that the intruder used a deactivated fob to pass by receptions and that whilst an alarm sounded DW was unaware that the sounded alarm had been caused by the use of a deactivated fob.

110. We heard some evidence as to other comparators which had not been raised within the Claimant's claim form or detailed in the agreed list of issues. We nevertheless considered them.

111. In evidence the Claimant referred to an incident in February 2016 in which JN was not paying attention and allowed two strangers to go through the Battersea Studios building one reception and access TS's offices whereupon they yelled and shouted at staff and then ran out of the building, and no action was taken against her. However there was no documentary evidence to support this incident and the evidence we heard lacked detail. We are therefore unable to make any findings on it.

112. Mr Boatswain, in his written evidence referred to an incident involving DW on 13 February 2019 in which IM was able to go past her with a "pet" unchallenged and make his way to Ms Monaghan's office without her being notified that she had a visitor. His evidence stated that Ms Monaghan raised this is an issue and as a result DW was removed from site because it was the last straw. However, there was no documentary evidence to support this incident and the information that we were provided with was scant in detail. Mr Boatswain also referred in his written evidence to Ms Monaghan asking on a number of occasions for both JN and DW to be removed from site and yet they were never removed (until the last straw incident he referred to above). Again we were not provided with any documentary evidence in support and the evidence he gave was scant in detail. For this reason to reach any findings with regard to either matter.

113. Mr Boatswain also said in his written evidence that only he, the Claimant and a colleague called Raja Khan ever received disciplinary action. Mr Boatswain's evidence was that he, himself, was disciplined because of an allegation that he lowered the security barrier on FN's car, an allegation was untrue. As to Mr Khan, there was some evidence within the bundle relating to disciplinary action. However, this indicated that Mr Khan was issued with a final written warning following a disciplinary hearing which he did not attend. This related to a breach of security which he had already accepted occurred when he had been distracted by a cleaner. Whilst Mr Boatswain's written evidence was that Mr Khan was never given the opportunity to appeal, we were not provided with any documentary evidence in support or any further detail. On balance, these matters were really of no assistance to the Claimant's case. They each stood on their own circumstances and did not indicate any pattern of discrimination.

114. Having considered our findings and looked at the matter on a general as well as a specific level, we were unable to find any evidence to support the Claimant's complaint of race and/or sex discrimination. The comparators relied upon were not truly comparative. The additional comparators that Mr Boatswain adduced in his witness evidence were not part of the Claimant's pleaded case but in any event were not truly comparative. There was no evidence to point to any discriminatory circumstances. The mere fact that the Claimant, Mr Boatswain and Mr Khan were alleged to be the only three employees who had been disciplined is not in itself sufficient to support the complaint of discrimination. Whilst the Claimant believes that Mr Holland did not sufficiently investigate the incidents involving JN and DW, we were satisfied that he did and in respect of JN he was simply unable to find any information about her at that time. In any event, this is not a matter that was indicative of unlawful discrimination.

115. We therefore find the complaints of unlawful race and/or sex discrimination not well founded and we dismiss them.

Unfair Dismissal

51. The issues arising in the Claimant's unfair dismissal complaint are set out at paragraphs 2-6 of the agreed list of issues. We have taken these into account but followed a more straightforward approach.

52. We first considered whether the Respondent had shown a potentially fair reason for the Claimant's dismissal within section 98(1) and (2) ERA 1996. We find that the Respondent has shown that the potentially fair reason is to do with conduct. This is set out within the dismissal letter at B278:

> *Gross misconduct, in that on 9 April 2019, whilst on duty at Battersea Studios, you failed to follow correct procedures, allowing unauthorised person to enter a private area of the building and threatened staff, requiring the police to be called. This as gross misconduct in that it was a serious security breach and led to a request for the Claimant's removal from the client's site as his actions made the relationship of untenable.*

53. Mr Holland considered the representations made by the Claimant and Mr Boatswain at the disciplinary hearing and having investigated and considered the information as to JN and DW reached the conclusion that the Claimant was guilty of gross misconduct as charged and that there was no inconsistency of treatment. He specifically states in the dismissal letter:

> *In summary, I do consider that you have significantly failed in your duties. The Company and the client trusted you to control access to their building. You failed to do this, potentially putting yourself and tenants and risk.*

54. This clearly reflects a potentially fair reason for dismissal as being one of conduct. There is nothing to suggest that this was anything other than a genuine reason for the Claimant's dismissal. There was nothing beyond assertion by the Claimant that this had anything to do with his grievance.

55. We then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

56. In terms of the process followed, we had regard to the Respondent's disciplinary procedure and to the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015).

57. We also had regard to the test contained within BHS v Burchell (1979) IRLR 379, EAT relating to conduct dismissals. This requires us to consider the following:

    a. Whether the employer believed that the employee was guilty of misconduct;
    b. Whether the employer had in mind reasonable grounds upon which to sustain that belief; and
    c. At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

55. When assessing whether the Burchell test has been met, the Tribunal must ask itself whether what occurred fell within the "band of reasonable responses" of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (Sainsbury's Supermarkets v Hitt [2003] IRLR 23, CA).

56. In addition, we remind ourselves that we must be careful not to substitute our own decision for that of the employer when applying the test of reasonableness.

57. Paragraph 4 of the agreed list of issues in effect sets out the Burchell.

58. We had a number of concerns as to the process and the reason for dismissal. Whilst there is no doubt that the charge against the Claimant was for a genuine reason and that it was something that could amount to a sufficient and substantial reason for dismissal, we had misgivings about the reasonableness of the Respondent's actions/inactions. We deal with these in the headings below.

Inconsistency of treatment

59. The Respondent was asked by the Claimant at the disciplinary hearing to consider allegations of inconsistency of treatment. We have already indicated our findings and conclusions with regard to the comparability of the circumstances of the Claimant and JN and DW for the purposes of the complaints of unlawful discrimination.

60. The ACAS Code states that employers should act consistently. This can come up in two ways: either because two employees commit the same offence at the same time, but only one is dismissed; or because some other employees have been treated more leniently for the same offence in the past (Post Office v Fennel [1981] IRLR 221, CA). Both situations are potentially unfair, but in practice, inconsistency rarely makes a dismissal unfair in a particular case. This is partly because any argument about inconsistency

only works when the comparable situations really are similar. In reality few cases are identical (Hadjioannou v Coral Casinos Ltd [1981] IRLR 352, EAT). Also, where an employer consciously thinks about two cases and makes a distinction between them, the dismissal will only be unfair if there was no rational basis for the distinction (Securicor Ltd v Smith [1989] 356, CA). Employers are allowed considerable flexibility and can choose to become stricter than in the past, provided no one has been misled.

61. When considering inconsistency in the context of unfair dismissal, the case law is clear that it only works if the comparable situations are really similar. Clearly, in the Claimant's case they are not and so we reject the allegation of inconsistency as set out at paragraph 6.1.5 of the agreed list of issues.

62. In terms of Mr Hollands' investigation we accept that he reasonably investigated the matter and reached reasonable conclusions based on the information he could ascertain at the time. Whilst information became available after the disciplinary process concluded, we have no reason to suppose that his investigation was not reasonable in this regard. However, he should have put the outcome of his investigation to the Claimant and allowed him to respond before reaching the decision to dismiss. We find it was unreasonable not to have done so and in breach of the Respondent's own disciplinary procedure at B144 because he was afforded no opportunity to respond before the decision to dismiss was made.

63. The Claimant also raised the issue of inconsistency on appeal and pointed to his concerns as to Mr Holland's lack of investigation. He also raised the issue as one of race/sex discrimination so it was beyond being an issue of mere inconsistency. However, at the appeal hearing, Mr Tracey did not allow him to discuss that element of his appeal and the meeting took a rather argumentative to as between tone as between Mr Boatswain and Mr Tracey, with Mr Tracey taking the view that the matter had been closed off at the first instance hearing and simply closing the discussion down. We find that Mr Tracey should have reasonably dealt with the matter given that it was part of the Claimant's challenge to the decision to dismiss him. This was in breach of the Respondent's own disciplinary procedure at B148.

64. We then turned to other concerns as to the conduct of the first instance hearing and the appeal hearing and the outcome letters.

First instance

65. As we have already indicated we believe it would have been reasonable for Mr Hollands to have reported the outcome of his investigation into the incidents involving JN and DW to the Claimant and to allow him to respond before moving on to reach a decision.

66. We are also concerned as to Mr Holland's finding in the dismissal letter that the intruder entered the building alone. This is not something that arises during the investigation or at the disciplinary hearing. It is therefore not a reasonable finding and cannot form part of the genuine belief in the Claimant's guilt.

67. As to the CCTV footage. We accept that it was reasonable for Mr Hollands not to view the CCTV footage first hand, given that Mr Harding had viewed it as part of his investigation and based his investigation report on it. We further accept that it was reasonable not to have shown the Claimant the CCTV footage given that he did not request it and there was no suggestion by that stage that events on the day in question was factually in dispute. However, this anomaly in the findings does suggest that it would have been better practice for the disciplining officer to have view the CCTV footage with the employee for the avoidance of any doubt.

Appeal

55. We are in some difficulty given that we heard no evidence from Mr Tracey and the Claimant and Mr Boatswain's evidence was not forthcoming as to the detail of what happened. So all we have to go on are the minutes of the meeting. However, as we have indicated we believe it would have been reasonable for Mr Tracey to have allowed the Claimant and Mr Boatswain to raise the issue of the comparators (particularly given the context of an allegation of unlawful discrimination) and to have explored those matters rather than simply stopping them on the basis that the matter had been closed off at first instance by Mr Hollands.

56. We are concerned as to the two additional reasons given by Mr Tracey in the appeal outcome letter. Whilst the inconsistency in the Claimant's accounts was raised by Mr Harding during the investigation and by Mr Hollands in the dismissal letter as a concern, Mr Tracey elevates it to a reason for dismissal and we do not have any indication of the basis for this. As such it cannot amount to a reasonable ground for dismissal or feed into the genuine belief of guilt. As to the failure to work to the expectation of the Claimant's SIA licence and training, this arises apropos of nothing. It is not mentioned during the investigation, disciplinary hearing or even at the appeal hearing. Again as such it cannot amount to a reasonable belief because it does not even arise from the investigation and as such it cannot form part of a genuine belief in the Claimant's guilt.

57. We therefore find that the Claimant's dismissal was both procedurally and substantively unfair following the test within section 98(4) of the Employment Rights Act 1996 and in Burchell.

58. Further, we find that dismissal did not fall within the band of reasonable responses open to a reasonable employer in these circumstances.

59. For the sake of completeness we would say that we do not accept that any of the issues in paragraph 6 of the agreed list of issues are made out. We had insufficient evidence as to the appeal process beyond the documents within the bundle. Whilst it does appear that the meeting was somewhat argumentative as between Mr Boson and Mr Tracey and Mr Tracey should reasonably have allowed the Claimant to raise the issues regarding JN and DW, we did not find the procedural flaws alleged in paragraphs 6.1.1 and 6.1.2 to be made out. As we have already indicated we do not accept that Mr Hollands failed to investigate the Claimant's assertions in respect of JN and DW as alleged at paragraph 6.1.3. We had no evidence as to the

Respondent's alleged failure to adduce witness evidence from or otherwise consult Mr Boatswain and/or Ms Monaghan as part of the disciplinary proceedings, as alleged at paragraph 6.1.4. As to paragraph 6.1.5, we have already dealt with the inconsistency allegation above. As to paragraph 6.1.6 there was no evidence to support the allegation that the Respondent decided to dismiss the Claimant because of his grievance. The answer to paragraph 6.2.1 is therefore no and so paragraph 6.2.2 is not applicable.

60. We had hoped to be in a position in reaching this Judgment to indicate the parties what impact issues arising from Polkey and contributory fault would have on any award of compensation made at a separate remedy hearing. Indeed, we asked the parties to address us on these issues and I even explained in straightforward terms for the benefit of the claimant, what Polkey and contributory fault meant. Unfortunately, neither party dealt with these matters in their written or oral submissions and we did not realise until after the parties had gone.

61. In the circumstances, we felt that it was only fair to ask the parties to provide us with submissions on Polkey and contributory fault at the remedy hearing.

62. Although I did explain this at our hearing, for the Claimant' s benefit as an unrepresented party I have set out written guidance as to what Polkey and contributory fault below:

Polkey

63. In a case called Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords (as the Supreme Court was then known) held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal.

64. Of course a dismissal may be unfair for procedural reasons only, even though the actual reason for dismissal is fair. In such cases, the compensatory award may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed. A percentage reduction can be as high as 100 per cent, although a Tribunal might still award loss of earnings for the time it would have taken to go through proper procedures.

65. It is often difficult to decide whether unfairness is procedural or a matter of substance. Either way, the Tribunal must consider the question of whether and when the employee would have been dismissed if the employer had acted fairly.

Contributory Fault

66. Under section 123(6) of the Employment Rights Act 1996, if the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it can reduce the compensatory award proportionally as it thinks fit. This is known as "contributory fault" and Tribunals usually make a percentage reduction, eg 25 per cent or 50 per cent, but in very rare cases, it can deduct 100 per cent.

67. There are two separate questions: (1) did the Claimant's conduct cause or contribute to the dismissal? and (2) if so, by how much would it be "just and equitable" to reduce any compensatory award made?

Unlawful deductions from wages

Holiday pay

68. The Claimant claims unlawful deduction from wages pursuant to sections 13 and 23 of the Employment Rights act 1996 on the basis that he was not able to take his full holiday entitlement in the holiday year running from 1 January to 31 December 2018. This is dealt with at paragraphs 12 and 13 of the agreed list of issues.

69. For the purposes of the legislation we have to determine what amount is properly payable to the Claimant and what amount, if any, did he receive and was there any shortfall between the two by way of an unauthorised deduction.

70. From our above findings we conclude that the Claimant has no contractual or statutory right to receive a payment in lieu of holiday not taken during the leave year. The unfortunate consequence of his moving his agreed annual leave so that part of it fell within the 2019 leave year was that he lost any untaken annual leave within the 2018 leave year. Neither his contract nor statute allows him to carry it over in the circumstances. The policy document he referred to was simply that and whilst within it there was an onus upon the Respondent to remind employees to take their leave before they lost it, this is not a legal obligation or enforceable in the way that the Claimant believes.

71. We therefore find that this complaint is not well founded and we dismiss it.

Hours/rates

72. The Claimant claims unlawful deductions from wages pursuant to sections 13 and 23 of the Employment Rights Act 1996 on the basis that the Respondent failed to pay him his full hourly rate and/or provide work to a minimum number of hours. This is set out at paragraphs 14 and 15 of the agreed list of issues.

73. The complaint relates to the point at which the Claimant was employed at Rupert Court and was entitled to be paid for a minimum of 60 hours work per week at the rate of £10.20 per hour gross. The Claimant was removed from Rupert Court at the behest of the client with effect from 22 January 2019 on his return from leave. It would therefore appear that the alleged underpayment of wages must have started then and continued until the Claimant was working at Battersea Studios and being given at least 60 hours per week on a regular basis. We were unable to determine when this was on the evidence provided to us.

74. As part of his grievance appeal, the Claimant was subsequently paid in respect of the shortfall in his hours at that time. However, the methodology and period of this shortfall is not clearly explained and the Claimant's own

Schedule of Loss simply refers to a 14 week period and does not give credit for the payment received as a result of the grievance appeal. We are therefore not able to conclude our determination of liability and given that there is going to be a remedy hearing in respect of the other complaints in any event, we felt it in the interests to justice determine this matter at that hearing.

Damages for breach of contract

75. This is a wrongful dismissal claim. It is dealt with at paragraphs 16 and 17 of the agreed list of issues. The Claimant claims that he was entitled to receive notice of the termination of his employment and in the absence of that payment in lieu of the same.

76. Under his terms and conditions of employment he was entitled to statutory notice of 3 weeks.

77. The Claimant was dismissed by the Respondent on 7 May 2019 with immediate effect. He was summarily dismissed for gross misconduct as set out in the letter of dismissal.

78. In order to justify summary dismissal there has to be a repudiatory breach of contract. In order to amount to a repudiatory breach, an employee's behaviour must disclose a deliberate intention to disregard the essential requirements of the contract of employment – Laws v London Chronicle (Indicator Newspapers) Ltd (1959) I WLR 698, CA. The employer faced with such a breach can either affirm the contract and treat it as continuing or accept the repudiation, which results in immediate, ie summary, dismissal.

79. The degree of misconduct necessary in order for an employee's behaviour to amount to a repudiatory breach of contract is a question of fact for a court or tribunal to decide.

80. In Briscoe v Lubrizol Ltd [2002] IRLR 607, the Court of Appeal approved the test set out in Neary & Anor v Dean of Westminster [1999] IRLR 288, ECJ (Special Commissioner), in which it was found that the conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in this employment".

81. We recognise that there are no hard and fast rules and that many factors may be relevant, for example, the nature of the employment and the employee's past conduct and whether within the terms of the employee's contract of employment certain acts have been identified as warranting summary dismissal.

82. We also recognise that certain acts such as dishonesty, serious negligence and wilfully disobeying lawful instructions can justify summary dismissal at common law.

83. In London Central Bus Company Ltd v Nana-Addai & Nana-Addai v London Central Bus Company Ltd UKEAT/0204/11 & UKEAT/0205/11, the

Employment Appeal Tribunal took the opportunity spelt out the differences in the two tests of unfair dismissal and wrongful dismissal. Unfair dismissal is a right created by statutory. Cases such as Burchell have made it clear that in an unfair dismissal case, it was for a Tribunal to identify what was the reason for the dismissal and to decide whether or not the employer's decision to dismiss was based on a reasonable conclusion after making such enquiries and investigation as was appropriate and then to ask if the dismissal fell within the band of reasonable responses. Wrongful dismissal is a contractual right. The question is, has the employee committed a fundamental breach of his/her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice? Thus, in a case of wrongful dismissal it is for the Tribunal itself to decide what happened and not the employer's perception of what happened.

84. Having considered the circumstances leading to the Claimant's dismissal with this test in mind we reached the following conclusions. There were difficulties in providing security at the reception given the layout at Battersea Studios building 1. The Respondent was aware of them from Mr Boatswain, the then Security Supervisor. There had been previous incidents involving varying degrees of breaches of security some of which had resulted in serious altercations. The Respondent did not take any corrective action until after the events leading to the Claimant's dismissal. Mr Anderson said in evidence that there were cost implications involved in altering the reception layout. Mr Boatswain did not accept that it was his responsibility to ensure that the Security Officers had read the Assignment Instructions. So where did the responsibility lie? The Claimant had been employed at Battersea Studios for 17 days at the time of the incident in question. Whilst his behaviour amounted to misconduct, in that he should have taken more diligent steps to determine whether the intruder had a legitimate right to enter the building, even taking into account the imperfect nature of the reception set up, his conduct did not amount to deliberate behaviour or serious negligence and it was not conduct that gave rise to a repudiatory breach of contract. Whilst what happened as a result of his lack of diligence was serious, the consequences of his lack of diligence should not form part of this analysis or render his behaviour to be considered more serious than it was.

85. We therefore conclude that the Claimant was dismissed in circumstances in which he was entitled to notice of dismissal. He did not receive such notice and is entitled to damages for breach of contract in respect of his payment of wages for his notice period. This amounts to 3 weeks' pay pursuant to clause 23.4 of his contract subject to quantifying the amount less for any income received during that period at the remedy hearing.

Further disposal

86. The parties are given the opportunity to reach agreement as to the amount of compensation between themselves and are invited to use the services of ACAS in this regard. They should inform the Tribunal by 3 February 2021 at the latest whether this has proved successful or not, and if not a one day remedy hearing will be fixed for the first available date.

Employment Judge Tsamados
Date: 15 December 2020