EMPLOYMENT TRIBUNALS

Claimant: **Mr C Vasilescu**

Respondent: **Everyman Media Ltd.**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **28, 29 & 30 April 2021 and (in chambers) 28 May 2021**

Before: **Employment Judge R Barrowclough**
Members: **Ms W Blake-Ranken**
Ms R Hewitt

Representation

Claimant: In person
Respondent: Mr A MacMillan, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's complaints of direct race discrimination and breach of contract succeed, whilst his victimisation complaint fails and is dismissed. The Claimant's claim will be listed for a remedy hearing before the Tribunal with a half day time estimate on the first open day after 28 days following the promulgation of this Judgment and Reasons.

REASONS

1 By his claim, presented to the Tribunal on 20 May 2020, the Claimant, Mr Costin Vasilescu, who identifies himself as being of Romanian nationality and ethnicity, advanced five complaints against the Respondent, Everyman Media Ltd. Those complaints were of (a) unfair dismissal (s.94 Employment Rights Act 1996); (b) harassment related to the Claimant's race or ethnicity (s. 26 Equality Act 2010); (c) direct race discrimination (ss.13 &

39 Equality Act 2010); (d) victimisation, in breach of s.27 Equality Act 2010; and (e) breach of contract, comprising pay in lieu of notice. By its ET3 Response, the Respondent accepted that it had employed the Claimant from 5 November 2018 until his dismissal on 17 March 2020 on grounds of alleged misconduct, and disputed and resisted all the Claimant's claims. At a preliminary hearing on 20 November 2020, the Claimant's unfair dismissal complaint was struck out, the Tribunal having no jurisdiction to hear and determine it in view of the Claimant's insufficient length of service, pursuant to s.108 Employment Rights Act 1996, and the Claimant's harassment complaint was dismissed upon withdrawal.

2 We heard this case remotely by means of the Cloud Video Platform over the course of a three day hearing (28, 29 and 30 April 2021). At the conclusion of that hearing, we reserved our judgment due to the lack of available time, and the Tribunal reconvened virtually in chambers for a reserved decision meeting on 28 May 2021 to review the evidence and submissions we heard and read and to reach this judgment and these reasons.

3 The Claimant represented himself and gave evidence in support of his claim. The Respondent was represented by Mr MacMillan of counsel. He called as witnesses: (i) Mr Tom Johnson, a venue manager at the Respondent's Crystal Palace cinema; (ii) Mr David Howe, one of the Respondent's regional managers, his region including their cinema at Canary Wharf; (iii) Mr Simon McNeill, another regional manager, who conducted the Claimant's disciplinary hearing and took the decision to dismiss him; (iv) Mr Gavin Hughes, the Respondent's operational director who heard and dismissed the Claimant's appeal; and (v) Ms Emma Wilcockson, the Respondent's '*head of people*'. We were provided with witness statements for all those from whom we heard, together with a substantial agreed trial bundle, which includes an agreed list of issues, approved by the Tribunal, at pages 62 to 68. Mr MacMillan helpfully produced a chronology and a cast list; and at the conclusion of the evidence we heard closing submissions from both sides, Mr MacMillan speaking to his written submissions.

4 The Claimant first came to the UK in 2009 having undertaken and completed a university degree in Romania. Since his arrival in the UK, the Claimant has undertaken a number of roles within the catering and hospitality sector, working for a number of well-known brands. For the avoidance of doubt, we record that the Claimant's command and apparent understanding of the English language is excellent. The Respondent is an independent cinema group operating 35 cinemas in the UK, with the stated aim of *'bringing together food, drink, atmosphere, service and film'*. The Claimant commenced employment with the Respondent at their Crystal Palace cinema in November 2018 as a deputy manager, and remained there until being transferred to the Respondent's cinema at Canary Wharf in the same role approximately one year later in November 2019. It was whilst he was working at Canary Wharf on 21 February 2020 that the events took place that gave rise to the Claimant's disciplinary hearing and ultimately to his dismissal.

5 The Respondent's staff hierarchy is, in so far as relevant, as follows. Each region has its own manager, who oversees the cinemas within his/her region, each of which has a venue manager, who has day-to-day control of and responsibility for the individual cinema. Next is the role of deputy manager, the position the Claimant held throughout: our understanding is that there would usually only be one deputy manager at each cinema. At the next level there are a number of assistant and/or duty managers, whose numbers varied depending upon the location and size of the particular cinema. Each cinema (and certainly those at Crystal Palace and Canary Wharf, with which we are principally concerned)

operates an internal kitchen, with dedicated catering staff providing food and drink for patrons.

6 At the time the Claimant joined the Respondent in November 2018, the venue manager at Crystal Palace was Mr Joseph Kelly, who we understand to be a white British male. The Claimant's unchallenged evidence was that Mr Kelly then operated an informal system at that cinema whereby if, due to catering staff shortages and/or very large numbers of patrons attending a particular performance, there was a danger or the actuality that the kitchen service would be or was being overwhelmed, in the sense that patrons who had ordered food and drink on arrival would not receive it in good time before the commencement of the film that they had come to see, then Mr Kelly would designate the cinema as being full or sold out, so that no more tickets for that particular performance could be sold. That approach was adopted whether or not the Crystal Palace cinema was in fact full to capacity, and was undertaken in order to try to ensure not only an agreeable experience for patrons who had ordered food and drink, but also to avoid customer complaints, which tended to arise if refreshments were not provided in a timely manner. The Claimant's evidence, which we accept, was that not only did he witness Mr Kelly adopting that policy on a number of occasions, but also that Mr Kelly had shown him how to do so himself, using the 'Vista' computerized booking and ticketing system; and that the Claimant did so on a number of occasions when instructed by Mr Kelly, and later by Ms Kruppa, the venue manager at the Respondent's Canary Wharf cinema. Additionally, we find that the Claimant removed a film from sale on his own authority on at least two occasions, once at Crystal Palace on 14 October 2019, and subsequently at Canary Wharf on 21 February 2020.

7 The Respondent's Crystal Palace cinema was a new acquisition/location for the company, with approximately 45 new members of staff, and was regularly visited and monitored by the Respondent's operations manager, Mr Challiner, and its operations director, Mr Hughes. Subject to one potential exception which we detail below, there is no evidence to suggest that, during the Claimant's year at that cinema, Mr Kelly's informal practice of designating it as being sold out simply to ensure satisfactory catering for patrons was ever criticised or called into question by the Respondent's senior management, or that Mr Kelly and his staff were told that such a practice was inappropriate and wrong, and should not be repeated. In fact, Ms Alex Young, who replaced the Claimant as deputy manager at Crystal Palace in late November 2019, said when interviewed in March 2020 that she and other managers at Crystal Palace had removed films from sale in such circumstances, authorised by Mr Kelly and (she assumed) Mr Challiner, that at no point did she think that such a practice was a secret, and that she was surprised that it was now being treated as a disciplinary matter, since she had discussed it with Mr Johnson (the Crystal Place venue manager who succeeded Mr Kelly) only a couple of months earlier (pages 256/257).

8 The potential exception mentioned above is that Mr Johnson, who became venue manager at Crystal Place in late October 2019, says that he spoke to the Claimant on 12 November that year about a performance at Crystal Palace having been incorrectly marked as sold out due to catering shortages or difficulties. Mr Johnson's impression from their conversation was that the Claimant apparently believed he was allowed to do that; and Mr Johnson says that he explained to the Claimant that, whatever he had previously been told, that was not the protocol to take, since it damaged revenue and that there were alternative ways of dealing with being understaffed. The Claimant denies any such conversation ever

took place; we consider and determine this conflict of evidence hereafter.

9 In October 2019 Mr Kelly left Crystal Palace to become venue manager at another of the Respondent's cinemas at Oxted, and as noted was replaced by Mr Tom Johnson, from whom we heard. One of Mr Johnson's first tasks as venue manager was to hear a grievance brought by the Claimant against a young member of staff called Melanie Livingston and another staff member, Ms Ashley Johnson. Ms Livingston had previously lodged a grievance against the Claimant arising out of an incident at the cinema on 14 October, when the Claimant had sought to prevent her and a companion from attending a film on a complimentary basis as members of staff and when the catering facilities at the cinema were already under great pressure due to staff shortages, and when Ms Livingston alleged that the Claimant had physically grabbed or restrained her. However, her grievance was not proved since footage from the cinema's CCTV revealed that no such physical restraint or assault as alleged had taken place, and Ms Livingston's grievance against the Claimant had not been upheld by Mr Kelly, who heard it. The Claimant had subsequently presented his own grievances (pages 112/113), alleging that Ms Livingston and Ashley Johnson had joined together in a racially motivated attack on him in falsely accusing him of assaulting Ms Livingston on 14 October, that Ms Livingston's grievance against him, supported by Ms Johnson, had been racially motivated, and that Ashley Johnson had shouted at and verbally abused him three days later on 17 October. Mr Johnson's notes of the grievance investigation meeting with the Claimant on 28 October 2019 are at pages 153 – 156 in the bundle. It is noteworthy that during that meeting the Claimant had informed Mr Johnson that on the day in question he had designated the cinema as being sold out because of staff shortages to prevent or at least slow down further ticket sales, as well as forbidding staff bookings for the day, in order to minimise pressure on the cinema for that performance.

10 Mr Genci Cekani, the head chef at the cinema, also presented a grievance at that time relating to a separate incident on 17 October involving an unnamed member of staff and also Ashley Johnson; and Mr Johnson's investigatory meeting with him took place on 1 November. Mr Jonson's evidence was that since both the Claimant's and Mr Cekani's separate grievances involved Ashley Johnson, who in fact had left the Respondent's employment by early November, in her absence and without her input it was not possible to further investigate or to reach conclusions in relation to either of the grievances submitted, which were accordingly not upheld. Mr Johnson did not apparently involve or interview Ms Livingston in his investigation of the Claimant's grievance.

11 In late November 2019, the Claimant moved from Crystal Place to the Respondent's cinema at Canary Wharf. His role there remained that of deputy manager, and his annual salary was increased from £31,000 to £32,000. It seems that that move had been canvassed with the Claimant by Mr Johnson on 8 November, when he reported back to Mr Challiner that the Claimant had indicated that he would definitely be interested in such a move, since it represented a step up, and that the Claimant appreciated that he had to move around in order to progress within the Respondent (page 171). The Claimant says in his statement (paragraphs 55 & 56) that he was surprised by the proposal, but nevertheless agreed to it. Whilst he did not say so at the time, the Claimant now says that he believed the move was not for operational reasons, but was due to his race and was linked to the outcome of his own and Ms Livingston's grievances; and that the Respondent was looking for a means of dismissing him, and awaiting an opportunity to do so.

12 The venue manager at Canary Wharf was then Ms Klaudia Kruppa, who is no longer employed by the Respondent. The Claimant says that Ms Kruppa, like Mr Kelly, adopted the practice of marking the cinema as being sold out for a particular performance when seats were still available if the cinema was short staffed and there were problems in meeting patrons' catering orders. The Claimant draws attention to the Vista record for that cinema at page 282, which reveals that there were nine occasions during 2019 when a film showing was logged as being sold out, when in fact there were significant numbers of seats still available, and when the percentage of seats actually remaining unsold ranged between 17 and 98%.

13 On 21 February 2020, the Claimant was working as deputy manager at the Canary Wharf cinema. He says that the venue manager (Gridi Sula, who had succeeded Ms Kruppa) and the regional manager (David Howe) were then absent on holiday, and that two of his staff had phoned in sick. That afternoon, the cinema was visited by Justin Dove, who we understand to be a venue manager of another of the Respondent's cinemas. He discovered that both screens at the cinema had been marked as being sold out for 4pm performances, whereas in fact both were only 40% full, *'and they had closed them as they didn't have enough staff on'* (Mr Dove's note at page 191). It appears that Mr Dove had then approached the Claimant seeking an explanation for why the screens were designated as being sold out, and that the Claimant had openly told him that he had taken the decision to do so because of staff shortages and in order to avoid customer complaints, which Mr Howe had stressed to him as being very important; and that he had seen that done at other venues belonging to the Respondent and had never received any formal instruction as to whether or not that was permitted, or in what circumstances a film could be 'pulled' (the Claimant's note dated 26 February at page 192). In any event, Mr Dove put both films back on sale and sourced additional staff from the Respondent's Barnet cinema.

14 Two further statements were provided concerning that incident more or less at the time. In one, the regional manager Mr Howe said that they should manage screen cut offs and suspend service when the kitchen was over capacity due to demand, and that he had told the Claimant and the whole team that their whole focus was on customer experience, not revenue, as this was having a detrimental effect on the business; but that he had not told the Claimant or anyone else to restrict screen sales to manage service (page 193). In another, Jason Boscarino, the assistant manager at the time said that at about 4.30 pm on 21 February, when the cinema was down two staff due to sickness and at about 50% capacity, he had gone to the Claimant and asked what they should do, as they tried to avoid complaints, which were their main priority; and that he and the Claimant had agreed that the best course of action was to remove the film from sale, which the Claimant had authorised and Jason had done. Whilst that would reduce revenue, it would also reduce complaints, he said (page 194).

15 On 4 March, Shannon Jelley, a 'people manager', wrote to the Claimant inviting him to a disciplinary hearing, to take place two days later on 6 March. The letter is at page 195, and informs the Claimant that he would then face two allegations: first, removing a film from sale without authorisation on 21 February; secondly, failing to ask other venues for help by way of cover for sick colleagues on the same date. The first allegation was characterised as gross misconduct, which could lead to summary dismissal; the second as misconduct, which could result in a final written warning. The Claimant was reminded that he had a 'live' written warning on file, dating from 16 October 2019. That arose because the Claimant had been found to have breached the Respondent's equal opportunities policy during a

discussion with other staff at the Crystal Place cinema on 15 September in making offensive or inappropriate remarks about countries which the British had colonised in the past as being occupied by 'savages', and also in referring to the prophet Mohammed as having married a child bride (pages 114/115).

16 Enclosed with the Respondent's letter at page 195 were copies of the statements referred to above, and also of the Respondent's disciplinary procedure. We were provided with at least part of the Respondent's policies and procedures (pages 76 to 83), which includes that procedure and what the Respondent therein specified as being non-exhaustive lists of misconduct (page 81) and gross misconduct (page 82).

17 At the Claimant's request, his disciplinary hearing was postponed, and took place on Monday 9 March at midday. Those present were the Claimant, who was unaccompanied and who had been told of his right to have a companion, Mr McNeill, who conducted the hearing, and a note taker called Alex Collett, although it appears that the hearing was recorded. The meeting was in fact a short one, since the Claimant said that he was not aware of any policy of the Respondent's concerning the taking of films off sale, and that he had witnessed it being done, apparently on the venue manager's authority, at the Crystal Palace cinema at busy times. Mr McNeill appeared to be unaware of any such practice, and the Claimant suggested that he check the Vista records for films being marked as sold out when in reality that wasn't the case; and accordingly the meeting was adjourned to enable Mr McNeill to carry out further investigations.

18 Subsequently Mr Johnson was interviewed by Mr Challiner, and Mr Kelly by Mr McNeill. Mr Kelly was then suspended and invited to a disciplinary hearing on March 16 to answer an allegation of taking films off sale as sold out when there was still capacity in the cinemas at Crystal Palace and Oxted, where he had been venue manager. In his interview, Mr Kelly accepted that he had done so on occasions when the cinemas were busy and in order to protect the service and reduce pressure on the in-house catering facilities and subsequent customer complaints, having adopted or witnessed a similar practice in an earlier job he'd had with Pizza Express.

19 The Claimant's reconvened disciplinary hearing took place on 16 March at 12 noon, with the same personnel as before. Notes of what was the said are at pages 245 to 247. The Claimant had been provided with notes of what Mr Johnson had said during his interview on 11 March (pages 207 to 212), when it was pointed out that a lot of films had been marked as sold out when he was venue manager at Crystal Place. Mr Johnson had said that he had a conversation with the Claimant on about 12 November when he had told the Claimant that the practice was wrong and should stop. The Claimant repeatedly said that he could not remember any such conversation, which had apparently not been followed up in writing; but that until recently, he had not appreciated that the practice was not allowed. It had now become clear to him that certain steps or authorization were required before a film could be pulled, but that he hadn't been made aware of that during his training; and that he had acted in good faith in marking the film as sold out on 21 February, as Jason could confirm, to which Mr McNeill responded :*'Not the wrong thing to have done, understand your thought process for doing it. May have been in good faith. But you can't interfere with film. We get charged distributor fees, minimum tariffs'*. The disciplinary hearing ended shortly thereafter, with Mr McNeill taking time to consider his decision.

20 Mr Kelly's disciplinary hearing also took place on 16 March, and the notes of that are at pages 248 to 250. Mr Kelly said that he and his management team had taken off films at both Crystal Palace and Oxted for what he described as *'service reasons'*. He hadn't been instructed to do so, save where there were technical issues or problems, but had done so at Crystal Palace where there were kitchen issues, and at Oxted where there were staff rota issues. Mr Kelly said that at *'a lot of other times it was done when I wasn't in the venue, but it was my instigation'*. When asked whether he had instructed his managers that this way of working was correct, Mr Kelly had replied: *'I never said it was wrong. At the time I didn't feel it was wrong'*. Mr Kelly said that he hadn't asked his regional manager at either venue about the issue, which he now blamed himself for not doing, and that it was a naïve genuine error of judgment, for which he was very sorry. At the conclusion of the hearing, Mr Hughes adjourned to consider his decision.

21 Both the Claimant and Mr Kelly were summarily dismissed for gross misconduct the following day, 17 March. The Respondent's dismissal letter to the Claimant is at pages 251/2; to Mr Kelly at page 253. The basis of that finding in relation to the Claimant was that Mr McNeill accepted that the Claimant had been specifically told by Mr Johnson as venue manager at Crystal Palace that under no circumstances should a film be removed from sale without authorisation from senior management, and that on his own admission the Claimant had done so on 21 February 2020 at Canary Wharf. On the subsidiary allegation, Mr McNeill accepted that the Claimant had in fact tried to obtain cover for staff sickness absences on 21 February by contacting other team members, and accordingly acquitted the Claimant of that charge.

22 The Claimant appealed against that disciplinary outcome, and his email of 18 March setting out his grounds in brief is at page 254. He complained that his dismissal was unfair, that the penalty imposed was disproportionate and too severe, and of a lack of consistency in relation to the issue of marking films as being sold out. The notes of the Claimant's appeal hearing, which took place on 24 March and which was chaired by Mr Hughes with Ms Jelley as note taker, are at pages 259 to 264. During the course of that hearing, the Claimant said that, whilst he had seen venue managers at both Crystal Place and Canary Wharf take films off sale when the cinemas were not full, he could not recall any venue manager telling him that either that he could, or alternatively could not, take films off sale in such circumstances. The Claimant also said that whilst what he had done was now characterised as being gross misconduct, it had apparently been continuing until recently, at least at the Crystal Place cinema, and of an overall lack of consistency in treatment or approach by the Respondent.

23 Mr Hughes outcome letter of 26 March, dismissing the Claimant's appeal for the reasons there stated, is at pages 265 to 267. In relation to the suggestion that the penalty imposed was too severe or disproportionate, Mr Hughes stated that the allegation of removing films from sale was *'incredibly serious'*, and that to remove the sale of tickets for sale to the public was a very serious offence. In relation to the issue of consistency, Mr Hughes said that individuals who committed the same offence had been and would continue to be investigated and disciplined appropriately, and that the Respondent had and would continue to adopt a consistent approach and course of action when such an incident was discovered.

24 On 20 March, four days before the Claimant's appeal hearing, Ms Alex Young, the deputy manager at the Crystal Palace cinema in succession to the Claimant, and who had been a manager there during the Claimant's time at the cinema was herself the subject of

a disciplinary investigation meeting, conducted by Alex Collett, the notes of which are at pages 256/257. In addition to her answers as noted at paragraph 7 above, Ms Young was asked whether she personally had ever removed a film from sale. When she confirmed that she had, and was asked when, she replied: '*Back when Joe Kelly was manager, he instructed the team that if service should be suffering due to lack of staff, we were under direction to cap the screens*'.

25 On 23 March 2020 the Respondent decided to postpone all disciplinary and investigative matters until venues reopened for trading, in light of the Covid-19 pandemic (page 258); and on 18 August Ms Young was invited to attend a disciplinary hearing, to answer a charge of alleged gross misconduct, in that on a number of occasions between July 2019 and January 2020 she had removed films from sale at the Crystal Palace cinema as being sold out. That hearing took place on 20 August and was chaired by Mr McNeill, with Ms Jelley as witness and note taker. The hearing was adjourned at its conclusion, notes being at pages 273 to 277. The outcome letter (page 278), also dated 20 August, is from Ms Jelley, rather than Mr McNeill, and simply records that the Respondent had decided to take no further action in relation to the allegation, and that formal proceedings concerning Ms Young were at an end.

26 The Claimant's claim had been presented to the Tribunal some three months earlier on 20 May 2020.

27 Three of the Claimant's original complaints remain to be determined by the Tribunal, namely (i) breach of contract, (ii) victimisation, and (iii) direct race discrimination. Notwithstanding that they are differently sequenced in the list of issues (pages 64 to 68), it is convenient to deal with them in that order. Before embarking on that exercise, we should consider first the jurisdictional issue of time limits (items 2 to 4 in that list). Those matters were not raised or addressed by Mr MacMillan in either his written or oral closing submissions on the Respondent's behalf, correctly in our view. It is agreed that the Claimant was summarily dismissed on 17 March 2020, and his claim was presented to the Tribunal, following ACAS early conciliation, just over two months later on 20 May. In simple terms, the Claimant alleges that for the purposes of his victimisation complaint the protected act was his grievance of 17 October 2019 claiming that he had been subjected to a racially motivated attack, and that as a result he suffered a number of detriments by the Respondent with a view to and culminating in his dismissal. Additionally, the Claimant alleges that because of his race or ethnicity, he was treated less favourably in being dismissed. Finally, the breach of contract alleged is of a failure to pay the notice pay due consequent upon the Claimant's dismissal. We have no difficulty in concluding that all the Claimant's complaints are in time, and that the Tribunal has jurisdiction to hear and determine them.

28 The relevant law in relation to this particular alleged breach of contract is uncontroversial and straightforward. The burden of proof is on the employer to prove, on a balance of probabilities, that the employee did in fact commit an act or acts of gross misconduct. If the employer succeeds in doing so, then he was entitled to dismiss the employee summarily and without notice pay, and the claim fails. Conversely, if the employer fails to do so, then the employee was entitled to the notice pay due, and the claim succeeds. In this case, the Claimant claims one month's pay in lieu of notice, in accordance with his contract of employment (pages 70 to 75). That provides that the Respondent's employees are entitled to one month's notice for every complete year of service (up to a maximum of 12 weeks), having completed the three month probationary period, which itself can be

extended for a further three months. It was not in dispute that the Claimant had self-evidently completed his probationary period, and also one complete year's service.

29 In relation to this issue, Mr MacMillan's primary submission is that the Claimant was directly instructed by Mr Johnson, his then venue manager, in a conversation on 12 November 2019 that he should not in future take films off sale without senior management's prior approval; that the Claimant did so on 21 February 2020, and that that amounted to gross misconduct under the Respondent's procedure as being a failure or refusal to follow a lawful instruction. In the event that the Tribunal did not accept that such an instruction had been given, Mr MacMillan advanced two back-up submissions, which we summarise as follows. First, that it did not matter that there was no evidence of the Respondent having any policy which governed the circumstances in which films could properly be withdrawn from sale. Mr MacMillan relied on the Employment Appeal Tribunal's decision in **Hodgson v Menzies Aviation (UK) Ltd EAT 0165/18**, where it was held that it was not necessary for disciplinary rules to contain an exhaustive list of possible offences, and that a high degree of specificity in the employer's disciplinary procedures was not required for the employee to realise that, by doing what he did, he was putting himself at risk of summary dismissal.

30 Secondly, Mr MacMillan drew attention to a recent decision of the High Court in **Palmeri and ors v Charles Stanley and Co Ltd [2020] EWHC 2934 QBD**. There the Court had found that Mr Palmeri's conduct as a whole amounted to serious misconduct and a breach of the implied term of trust and confidence. Mr MacMillan submitted that a similar approach should be adopted here. The Claimant had a live written warning on his record, which had been imposed only some 6 months or so earlier and when he had expressed no contrition for what he had said, for what it was submitted had rightly been held to be a breach of the Respondent's equal opportunities policy. In addition, whilst the October 2019 grievance brought by Ms Livingston against the Claimant alleging assault had not been upheld, there had been evidence that his actions and approach on that occasion had been disproportionate. The Tribunal was invited to find that the Claimant's conduct overall amounted to a breach of the implied term which, we remind ourselves, provides that neither party to an employment contract shall without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence which should exist between employer and employee.

31 Whether or not there was any meeting or conversation between the Claimant and Mr Johnson on or around 12 November 2019, we are not persuaded or satisfied that Mr Jonson then or at any other time instructed the Claimant that he should no longer mark films as being sold out in order to protect the catering and refreshments service at the cinema, and that he could only take such a step having obtained the approval of senior management. Mr Johnson's account was that he first became aware that films were being pulled or taken off sale (apart from due to technical issues or problems) at a venue managers' meeting on 12 November, and that he spoke to the Claimant shortly afterwards when he explained that, whatever the Claimant may have previously thought or believed, such a practice was not allowed and should cease. There are a number of difficulties with that account. First, it is clear from the agreed notes of Mr Johnson's grievance hearing with the Claimant on 28 October 2019 that the Claimant then told him in terms of having designated the cinema as sold out due to staff shortages and in order to minimize pressure on the catering function – see page 153/154. Secondly, Mr Johnson accepted in cross-examination that he did not subsequently confirm his discussions with/instructions to the Claimant in writing. Nor could he recall speaking to anyone else about the matter, whether in HR or another manager,

despite there being no written policy about withdrawing films and the Claimant's apparent belief that doing so to ensure good customer service was acceptable. That is surprising, in the light of Mr Hughes' later observation that taking films off sale was '*incredibly serious'*. Thirdly, the evidence suggests that the practice continued at Crystal Palace during December 2019 and January 2020, when Mr Johnson was venue manager there, as was put to him in his own disciplinary investigation meeting (page 208). Finally, there is the deputy manager Alex Young's account, when interviewed in March 2020, that she had discussed the practice of capping the screens when service was suffering, commenced by Mr Kelly, with Mr Johnson about two months earlier, that at no point did she think it was a secret, and that she was surprised that it had now come to disciplinary interviews (page 256/257).

32 Mr MacMillan laid great stress on what he describes as the Claimant's '*pirouettes of circumlocution*' in never denying that he had had the alleged conversation with Mr Johnson about withdrawing films from sale. With respect, we think such a description is unjustified. The Claimant's account, throughout the disciplinary investigation, hearing and appeal and in his evidence to us has remained essentially the same: that in the nature of the job he frequently had discussions on all sorts of topics with venue and other managers, that he had no recollection of the specific conversation which Mr Johnson alleges, so could neither confirm nor deny it, but that the first time he was made aware that it was wrong and unacceptable to mark screens as sold out in order to protect the service being provided to patrons was during his disciplinary process. That account seems to us to be consistent with what Ms Young, another manager at Crystal Palace and the Claimant's successor as deputy there, said in her investigation, and also with at least some of the Vista evidence we were taken to: not only were films being regularly withdrawn at Crystal Palace and Oxted, where Mr Kelly was venue manager, but also at other venues, for example Canary Wharf when Ms Kruppa was in charge.

33 Overall, we did not find Mr Johnson to be a witness on whom we could place much reliance, and we prefer the Claimant's account that he was not told that the practice introduced by Mr Kelly and which he witnessed and adopted was wrong until the disciplinary process commenced.

34 In relation to Mr MacMillan's subsidiary submissions, we quite accept and indeed it is trite law that an employer is not required to specify everything that will amount to gross misconduct in its disciplinary procedure: such a task would not be feasible, in any event. However we do consider that for misconduct to rank as gross, particularly where, as here, there was no established policy or procedure, no written warning or prohibition, and where the conduct in question is not in the list of examples in the disciplinary policy, it must be clear and obvious to both employer and employee. That is simply not the case here. Quite apart from the Claimant and Ms Young, Mr Johnson confirmed that he did not appreciate that what the Claimant had apparently done amounted to gross misconduct. Secondly, Mr Howe accepted in his contemporaneous note that he had stressed to the Claimant, and no doubt to others, that their priority should be customer experience rather simply revenue, in order to avoid detrimental effects on the business: which is after all what the Claimant was seeking to do. Finally, Mr McNeill said the following to the Claimant during his disciplinary hearing about what the Claimant accepted he had done: *'Not the wrong thing to have done, understand your thought process for doing it. May have been in good faith. But you can't interfere with film'.* In our view and in the light of all those matters, what the Claimant did cannot properly be described as gross misconduct.

35 Perhaps the greatest difficulty with Mr MacMillan's alternative argument – that the Claimant's conduct over a period of time amounted to serious misconduct, sufficient to breach the implied term of trust and confidence – is that that was not the Respondent's reason for dismissing the Claimant. The reason for dismissal is simply and clearly set out in Mr McNeill's letter of 17 March: that the Claimant had been told not to withdraw films from sale without senior management's prior approval, but had gone ahead and done so on 21 February that year. No other reason is mentioned or relied on, nor is the Claimant's earlier written warning (which, we observe in passing, was for a wholly unrelated and different type of behaviour), and it is not possible for the Respondent to construct and substitute a different reason – that the Claimant had breached the implied term – at a much later stage. In any event, and for the avoidance of doubt, we would not accept that the Claimant's conduct and behaviour as an employee came anywhere near doing so.

36 It follows that in our judgment the Respondent has not established that the Claimant committed any act of gross misconduct, the Claimant's breach of contract complaint succeeds, and he is entitled to one month's pay in lieu of notice.

37 We next consider the Claimant's victimisation complaint, the relevant questions being set out at section 12 of the list of issues.

38 We have no difficulty in determining that the Claimant's grievance dated 17 October 2019, when he said *'I have strong reasons to believe this was a racially motivated attack against myself as an immigrant of a different race and nationality'* constituted a protected act within s.27(2)(d) of the Equality Act 2010, since that subsection specifically identifies 'making an allegation (whether or not express) that A or another person has contravened this Act'. It is not disputed that the Claimant was then referring to the actions of two of the Respondent's employees, Melody Livingston and Ashley Johnson, in presenting and/or supporting a grievance against him.

39 The Claimant alleges that because he had raised his grievance, he was subjected to a number of detriments by the Respondent. These included (a) that the Respondent chose not to properly or fully investigate the Claimant's grievance allegation of a racially motivated attack; (b) that he was transferred from the Crystal Palace cinema to that at Canary Wharf on 29 November that year; (c) that the Respondent specifically targeted and hunted down the Claimant, leading to his summary dismissal for gross misconduct; and (d) that the Respondent chose to treat the Claimant's actions in removing a film from sale at Canary Wharf as an act of gross misconduct, notwithstanding its earlier knowledge that such a practice was taking place and no disciplinary action having then resulted. The way the Claimant put his case was that he was perceived by the Respondent as being a *'loose cannon'*, as he was in fact described by Mr MacMillan in his closing submissions on the Respondent's behalf, and that once the Claimant had raised an allegation of discrimination, it could be said that his card was marked, and that the Respondent was thereafter determined to get rid of him as soon as possible and had engineered his dismissal.

40 Was the Claimant subjected to one or more detriments by the Respondent, as he alleges? In relation to his grievance dated 17 October 2019, that he had been subjected to a racially motivated attack by Melody Livingston and Ashley Johnson three days earlier, there is no doubt that the Respondent's investigation into the surrounding circumstances was curtailed. The reason for that, Shannon Jelley said in her outcome letter dated 29 October (pages 158/159) was that, whilst CCTV footage proved that the Claimant had not

grabbed Ms Livingston as she had asserted, Ms Johnson had by the time of the investigation left the Respondent's employment, and accordingly could not be questioned about that or the other grievance involving her which the Claimant had raised. With respect to Ms Livingston, Ms Jelley said that she continued to maintain the 'grabbing' allegation, and that she would be spoken to in the light of what the CCTV footage had (or, more significantly, had not) revealed. Ms Jelley concluded that the Respondent could not uphold the Claimant's grievance as there was no evidence to support a racially motivated attack. We were not told by Mr Johnson whether he or anyone else had in fact spoken to Ms Livingston thereafter; but it seems unlikely, if they did, that any suggestion of her grievance against the Claimant being racially motivated was put to her. We bear in mind that the thrust of the Claimant's grievance was that he had not grabbed Ms Livingston during their altercation on 14 October, so that she must have made that up, presumably for racist reasons, and that Ms Johnson's motive for supporting the allegation must be racial, since the Claimant had had no previous dealings with her. In our view, the fact that the matter was not pursued further with Ms Livingston could certainly amount to a detriment.

41 Equally, if the Claimant was moved from the Crystal Place cinema to Canary Wharf one month later on 29 November unwillingly and against his will, that might amount to a detriment, although the contemporaneous evidence suggests that was not the case, and the Respondent's explanation was that an experienced deputy manager such as the Claimant was needed there, that the Claimant received a pay increase for so doing, and in fact went willingly.

42 The Claimant's allegation that he was targeted and hunted down by the Respondent is not particularised, and we were not told of any specific instances of such treatment, other than the three particular incidents relied upon. The last of those is the Claimant's summary dismissal for taking a film off sale on 21 February without senior management's prior approval. As before, that might amount to a detriment arising from the Claimant's protected act, although the evidence we heard and read does not support the suggestion that the Respondent's senior management (that is above venue manager level) were already aware of that practice and had previously turned a blind eye towards it.

43 In victimisation claims, there is no absolute need for the Tribunal to identify or construct an appropriate comparator, although if a claimant establishes that he has done a protected act and that he has then suffered a detriment at the hands of his employer, a prima facie case of discrimination will be established if there is evidence from which we could infer a causal link between the act and the detriment. That would raise an inference of victimisation, requiring the employer to prove that the protected act was not the reason for their treatment of the claimant. We have grave doubts as to whether such a causal link has been established in this case by the Claimant, but even if it has been, and the burden of proof therefore shifts to the Respondent, we would find that the Respondent has proved on a balance of probabilities that the Claimant's protected act did not cause and was not the reason for the Respondent's alleged detrimental treatment of him.

44 In our view, any link between the Claimant's grievance that he had been subjected to a racially motivated attack and the apparent fact that the Respondent did not put that allegation to Ms Livingston is tenuous at best. We bear in mind that it was clear and undisputed that the Respondent is a multi-ethnic employer, particularly in respect of staff working at its cinemas. Secondly, the Claimant did not at any point prior to his dismissal and the commencement of these proceedings allege that his treatment had anything to do with

his grievance (or indeed his race/ethnicity), as he accepts. Thirdly, the Respondent may well have concluded that not a great deal would be achieved by putting the Claimant's allegation to Melody Livingston, herself a black woman who was then a minor and who continued to maintain that the Claimant had grabbed her, other than to further inflame staff relationships. That is particularly so given Mr Johnson's undisputed evidence that in a brief conversation with the Claimant following his grievance hearing, he had told him that Ashley Johnson had left the business, and that the Claimant had seemed satisfied by that outcome.

45 In our judgment, the Claimant willingly agreed to move from Crystal Palace to the Canary Wharf cinema, so no detriment in fact arises. As already noted, the only contemporaneous evidence (at page 171) suggests that the Claimant saw such a move as representing progress or a step up within the Respondent's organization, and was given an increase in salary for doing so; and his evidence was that it was more or less as convenient for him to travel from his home to either cinema. Additionally, the Respondent's reason for moving the Claimant as an experienced deputy manager seems both rational and reasonable. Finally, there is simply no evidence of any causal link between the Claimant's grievance and his dismissal some five months later. The Respondent's senior management were not, we find, aware of the practice of taking films off sale to protect the cinema's catering service until alerted to the fact by Mr Dove following his encounter with the Claimant at Canary Wharf on 21 February, so no question of different and preferential treatment of other staff members before that date for doing so arises. There is also no evidence to support the Claimant's allegation of the Respondent pursuing a campaign against him following his grievance and culminating in his summary dismissal. We conclude that for these reasons there is insufficient if any evidence from which we could infer that the Claimant was subjected to a detriment because of his grievance alleging a racially motivated attack; but that if we were wrong in coming to that conclusion, we are satisfied that the Respondent has proved that the Claimant's protected act did not cause and was not the reason for their treatment of him. The Claimant's victimisation claim must be dismissed.

46 We turn finally to the Claimant's complaint of direct discrimination, in breach of s.13 Equality Act 2010 (paragraphs 5 to 9 in the list of issues). Whilst some of the issues in that list focus on allegations of less favourable treatment of the Claimant in relation to both the investigation of his grievance (when compared to the investigation of Melody Livingston's grievance against him), and the Claimant's move from Crystal Palace to Canary Wharf, for the reasons already given we would dismiss them. The main thrust of this complaint is that the Claimant was treated less favourably by the Respondent in being summarily dismissed for gross misconduct in removing films from sale, whereas others (and in particular the deputy manager Ms Alex Young) were not.

47 The approach to be adopted by the Tribunal concerning allegations of direct discrimination is well-established. Has the Claimant proved facts, on a balance of probabilities test, from which we could conclude, in the absence of a satisfactory explanation, that the Respondent has committed an act of discrimination – in this case, less favourable treatment because of his race or ethnicity? If not, then the complaint must fail. The outcome at this stage will often depend on what inferences may properly be drawn from the primary facts we find, since few employers would be willing to admit such discrimination, even to themselves. If the Claimant has succeeded in so doing, then the burden of proof shifts to the Respondent. It is then for the Respondent to prove on a balance of probabilities that their treatment of the Claimant was in no sense whatsoever on the protected ground. If the Respondent does so, the complaint fails; conversely, it will succeed where the

Respondent fails to do so.

48 The Claimant relies upon a real, as opposed to a hypothetical comparator, namely Ms Young. She, like himself, was a deputy manager at the Crystal Pace cinema and, once again like the Claimant, she admitted to the Respondent that she had on occasions removed films from sale in order to protect the catering service there and to ensure the timely supply of refreshments to customers who had ordered them. Both the Claimant and Ms Young were subjected to (separate) disciplinary process by the Respondent, the outcomes of which were very different: the Claimant was summarily dismissed, whereas no disciplinary sanction or penalty was imposed on Ms Young. The Claimant is a Romanian male, Ms Young a white British female.

49 The Respondent and Mr MacMillan on their behalf contend that there are material differences for the purposes of comparison between Ms Young and the Claimant. Ms Young, it is said, was following orders from the venue manager Mr Kelly in removing films from sale, whereas the Claimant was not, rather acting on his own initiative. In addition, the Claimant was specifically instructed by Mr Johnson in mid-November 2019 that such a practice was wrong and should not be repeated, but went ahead and did so at Canary Wharf on 21 February 2020. Mr MacMillan suggests that if anything, Mr Kelly is a more appropriate comparator, or at least closer to such a hypothetical individual if one is required since, like the Claimant, he removed films from sale without a superior manager's permission. Mr Kelly is a white British male, and he too was summarily dismissed, more or less simultaneously with the Claimant. The Claimant does not accept such a comparison. He points out that Mr Kelly was a venue manager, rather than a deputy manager, and that he withdrew films on numerous occasions at both the Crystal Place and Oxted cinemas, whereas the Claimant took that step only once or twice. In addition, the Claimant says that Mr Kelly had instructed and shown him how to designate the cinema as being sold out, using the Respondent's Vista booking and ticketing system, to prevent further tickets for a performance being sold online.

50 We have already indicated that we do not accept Mr Johnson's evidence of his alleged instruction to the Claimant not to mark films as being sold out in order to protect the catering service. Nor do we accept that there was in truth any material difference between the Claimant and Ms Young's understanding of when such a step was appropriate, and/or whether they were authorised to do so without seeking a senior manager's approval. As we have already noted, during Ms Young's investigation meeting on 20 March 2020, when she accepted that she had removed films from sale once or twice, Ms Young had been asked when, and replied: *'Back when Joe Kelly was manager, he instructed the team that if service should be suffering due to lack of staff, we were under direction to cap the screens'.* When asked how often this had happened, she responded: *'Personally, once or twice, when Joe was there it happened often with other managers'*, and that Mr Kelly had been aware of that (pages 256/257). Ms Young also expressed her surprise that the issue was now being treated as a disciplinary matter. Secondly, Mr Kelly had shown the Claimant how to mark a performance as being sold out using the Respondent's systems. Thirdly, the Claimant had told his venue manager Mr Johnson during his grievance hearing on 28 October 2019 that on 14 October he had designated the Crystal Palace cinema screens as having been sold out due to staff shortages and in order to slow down ticket sales, but had not been criticised or censured for so doing, either then or later. Fourthly, the undisputed evidence was that Mr Kelly had removed films from sale on numerous occasions during the Claimant's year at Crystal Palace, at a time when that cinema had only recently opened and was regularly

visited by senior managers, without his doing so leading to any issue. Finally, it is significant that when challenged by Mr Dove on 21 February 2020, the Claimant openly volunteered what he had done and why he had taken that step. In our judgment, and whether or not Mr Kelly directly or tacitly authorised the Claimant and Ms Young to remove films from sale in such circumstances, they both understood that they could do so on their own authority and without seeking a senior manager's approval.

51 It seems to us that Ms Young is indeed an actual comparator for the Claimant, and that there are no material differences in their circumstances, whereas there plainly are in the comparison with Mr Kelly that the Respondent suggests, not only in the seniority of his role and function to that of the Claimant and Ms Young, but also in the fact that he instructed and authorised them as to when films could be removed from sale.

52 Having found Ms Young to be the Claimant's comparator for the purposes of this complaint, it is in our judgment clear that there are facts from which we could conclude that the Respondent treated the Claimant less favourably because of his race or ethnicity in the absence of a satisfactory explanation, namely (i) that the Claimant was summarily dismissed for removing films from sale, whereas no disciplinary penalty at all was imposed on Ms Young for a virtually identical offence, and (ii) that the Claimant is Romanian, whereas Ms Young is British. Accordingly, the burden of proof shifts to the Respondent.

53 The explanation advanced by Mr MacMillan and the Respondent as to why their treatment of him is not tainted by unlawful discrimination seems to rest on two propositions. First, that they are a multi-ethnic employer and that therefore it is unlikely that they would adopt a discriminatory approach towards their employees. Secondly, that because the Claimant did not raise any allegation of discrimination at the time, and only did so for the first time in his ET1, it must be simply a makeweight claim to bolster his unfair dismissal complaint, which he suggested was the Claimant's real issue with the Respondent, and accordingly has no merit. We do not find either suggestion particularly helpful. The fact that an employer has a diverse workforce does not prevent it or its managers from acting unlawfully. We also bear in mind that the Claimant has apparently had no previous experience of the Employment Tribunal, and that his discrimination complaints together with his other claims were advanced in an ET1 drafted by solicitors and presented on 20 May 2020, less than two months after his disciplinary appeal: so he can hardly be accused of undue delay in raising such allegations. Mr MacMillan suggests that Mr Kelly might be a more appropriate comparator, but we find that there were significant and material differences between his role and the Claimant's. As Mr Kelly said at his own disciplinary hearing, he as venue manager at Crystal Palace had introduced and instigated the practice of removing films from sale to protect the cinema's catering service, based upon his previous experience in the hospitality sector; and it was that practice or procedure which the Claimant (and Ms Young) occasionally adopted as deputy manager in the absence of a venue manager.

54 It may be that, as Mr MacMillan suggested, there was an underlying feeling within the Respondent, rightly or wrongly, that the Claimant was a 'loose cannon', and that that played some part in the decision to dismiss him, although there is, as already noted, no evidence to substantiate that. But even if that is right, it does not really assist the Respondent. Whilst we bear in mind that the potential unfairness of an employer's decision or conduct does not of itself by any means necessarily amount to unlawful discrimination, it is for the Respondent to prove that their treatment of the Claimant was in no sense

whatsoever on the protected ground, usually by means of cogent evidence.

55 The Respondent's treatment of Mr Johnson is also relevant, in our view. Mr Johnson succeeded Mr Kelly as the venue manager at Crystal Palace, and would therefore not be a direct comparator for the Claimant. But, and as we have already noted, the Claimant told him on 28 October 2019 that he had withdrawn a film from sale a fortnight earlier because of staff shortages, and was not criticised for so doing, or told not to do it again. Secondly, the Vista records would seem to indicate that performances at Crystal Palace were marked as sold out on a number of occasions from November 2109 onwards, when Mr Johnson was venue manager and the cinema wasn't in fact full. Thirdly, Ms Young said that she had discussed the practice of withdrawing films from sale with Mr Johnson about a couple of months before March 2020, and was surprised that it was at that later stage being treated as a disciplinary matter. Whilst Mr Johnson was called to a disciplinary interview, no further action resulted.

56 Bearing all these matters in mind, we find that no satisfactory explanation for the Respondent's treatment of the Claimant in summarily dismissing him has been provided. The imbalance in the Respondent's treatment of the Claimant on the one hand and Ms Young on the other, where the similarities in their circumstances, all of which were known to the Respondent by the time of Ms Young's investigation meeting on 20 March 2020 at the latest (four days before the Claimant's appeal hearing), is so marked that in our judgment the Respondent has clearly failed to prove on a balance of probabilities that their treatment of the Claimant was in no sense whatsoever on the protected ground of his race.

57 Accordingly and for these reasons, the Claimant's complaint of direct race discrimination succeeds. There will have to be a remedy hearing before us in respect of that and his successful breach of contract claim in due course; our provisional time estimate for such a hearing is half a day. The parties are respectfully reminded that they may seek to resolve all outstanding matters by means of 'Without Prejudice' negotiations, if they wish to do so.

Employment Judge R Barrowclough
Date: 22 July 2021