ase Number: 2206837/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR S WILLIAMS**
MR P MADELIN

BETWEEN:

Mr D Rose

Claimant

AND

JCA Engineering Ltd

Respondent

ON: **20, 21, 22, 25, 26 and 27 October 2021**
(In Chambers: 26 and 27 October 2021)
Appearances:
For the Claimant: **In person**
For the Respondent: **Ms C Lord, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim form presented on 22 October 2020, the claimant Mr Damaly Rose brings claims of unfair dismissal and race discrimination. He confirmed at that outset that he did not bring a claim for unlawful deductions from wages.

2. The claimant worked for the respondent as a multi skilled engineer from 3 December 2018 to 17 July 2020.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video

platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public attended the hearing and we understood that each of them had connections with one of the parties in the case.

5. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance. Most difficulties were solved by the person disconnecting and reconnecting to the hearing.

6. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

7. The participants were told that it was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were in different locations, had access to the relevant written materials which were unmarked. This included the respondent making arrangements on day 1 for the claimant to be sent a hard copy of the bundle. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving evidence.

The issues

9. The issues were identified at a preliminary hearing before Employment Judge Deol on 24 February 2021. The issues were confirmed with the parties at the outset of the hearing. The claimant has had legal advice from counsel during the course of these proceedings but was unrepresented at this hearing.

Unfair dismissal

10. The claimant does not have two years' service so he did not have the right to claim 'ordinary' unfair dismissal.

11. There was a discussion at the outset as to whether the claim for automatically unfair dismissal remained live. The respondent said they understood the claimant to have said at the preliminary hearing that it was not pursued and they wrote to the tribunal about this on 19 March 2021 after receiving the Case Management Order and had not received a reply.

12. We asked the claimant whether the claim for automatically unfair dismissal was pursued. The claimant considered that it remained live, from what he understood at the preliminary hearing.

13. I asked the claimant what he said was the reason from his dismissal? He explained that it was because he did a risk assessment and that he did not want to work in a Covid Positive Zone. This accorded with his Further Particulars drafted with the assistance of his counsel, at bundle page 44.

14. After hearing from both sides we decided unanimously that the claim for automatically unfair dismissal should proceed for the following reasons: (i) the claimant had ticked the box for unfair dismissal in his ET1, (ii) the facts relied upon were pleaded to an extent in the Grounds of Complaint, bundle page 20, (iii) the claimant was a litigant in person when he presented his claim (iv) the claim had been further particularised in his Further Particulars at page 44; (v) counsel for the respondent said that she was able to deal with the claim and (vi) as far as we could see the unfair dismissal claim had never been expressly withdrawn.

15. The claimant's case was that he was dismissed because of his refusal to work in a Red Covid Positive Zone of the hospital, to prevent Covid infection. The issue for the tribunal was under section 100(1)(d) or (e) that in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) he refused to return to his place of work or any dangerous part of his place of work, or in circumstances of danger which he reasonably believed to be serious and imminent, he took appropriate steps to protect himself or other persons from the danger.

16. The respondent's case is that the claimant was dismissed for gross misconduct following what they say was aggressive behaviour on his part. The respondent denied that the claimant raised any health and safety issues with them.

17. In April/May 2020 did the claimant refuse to work in the Red Covid Positive Zone at C&W Hospital due to him seeking to prevent Covid infection?

18. Did the claimant reasonably believe there to be serious and imminent danger which he could not reasonably be expected to avert?

19. Was his refusal to work in the Red Zone the reason for his dismissal?

Race discrimination

20. The claimant described his racial group as black Jamaican and Caribbean.

21. The claim is for direct race discrimination. The claimant says he was less favourably treated than his comparator, Mr Steve Ransome who is white or otherwise a hypothetical comparator.

22. The claimant relied on the following as acts of direct race discrimination. This was taken from a table set out in his Further and Better Particulars which we understand was served on 16 June 2021 and was confirmed

with the claimant on day 1.

a. In July 2019 “the tumble dryer incident” where Mr Steve Ransome accused the claimant of threatening him.
b. In September 2019 “the step ladder incident” where Mr Ransome accused the claimant of threatening him and this was in the presence of Mr Brian Eaton, the engineering manager.
c. October 2019 – taking disciplinary action against the claimant in respect of the two above incidents.
d. In October 2019 Ms Lucy Morgan in HR saying “*I can see why people find you intimidating and aggressive”.*
e. In May 2020 investigating the claimant for allegedly submitting false/incorrect times on time sheets for payments.
f. In May 2020 approaching subcontractors for information and to sign documents to incriminate the claimant.
g. On 14 July 2020 suspending the claimant.
h. On 14 July 2020 denying the claimant access to the site and contact with colleagues/members of staff.
i. On 14 July 2020 Mr Adrian Haigh and Mr Richard Burke unreasonably perceiving the claimant as aggressive and alleging that he acted aggressively towards people at the Chelsea & Westminster Hospital.
j. On 14 July 2020 Mr Haigh and Mr Burke falsely accusing the claimant of not following health and safety rules and unreasonably perceiving the claimant as aggressive.
k. On 14 July 2020 Mr Haigh and Mr Burke falsely accusing the claimant of not following health and safety rules by allegedly not washing his hands, changing or wearing a face mask. The claimant confirmed that issues (k) and (i) related to the same matter.
l. The dismissal.

Time limitation

23. Whether the discrimination claims are within time under section 123 Equality Act 2010, whether there was a continuing act and/or whether it is just and equitable to extend time.

Witnesses and documents

24. We had an electronic bundle of 314 pages. We refer in this decision to the electronic page numbers as the tribunal worked from electronic files and the pagination and electronic page numbers did not match.

25. The respondent introduced 10 pages of documents on day 1. The claimant did not object to the introduction of those documents. A further document was introduced by the respondent on day 2, relevant to the cross-examination on day 1. At 10am on day 2 a further 6 documents were introduced by the respondent and again the claimant did not object.

26. For the claimant we heard from three witnesses:

a. The claimant
b. Mr Reece Sutherland, the claimant's former colleague
c. Mr Wayne Collu, the claimant's former supervisor

27. There was a witness statement for the claimant from Ms Amanda Turner. Counsel had no cross-examination for this witness so her statement was taken as read.

28. The claimant produced a witness statement from Mr Freddie Bosher, his former manager. Mr Bosher did not appear to give evidence, despite a number of opportunities being given, so we could attach little weight to his statement.

29. For the respondent we heard from five witnesses:

a. Mr Steve Ransome, engineer and the claimant's former colleague
b. Ms Lucy Morgan, HR
c. Mr Adrian Haigh, Operations Manager
d. Mr Ian Coleman, the dismissing officer
e. Mr Ian Jackson, Chairman and the appeal officer.

30. We had written submissions to which the parties spoke. All submissions together with any authorities relied upon were fully considered, whether or not expressly referred to below.

Findings of fact

31. The claimant worked for the respondent as a multi skilled engineer. His period of service was from 3 December 2018 to 17 July 2020. He was based at the Chelsea & Westminster Hospital in Fulham. The claimant's contract of employment was at page 65 of the bundle.

32. The respondent is an engineering company providing services to clients, including NHS Trusts. They employ about 180-200 employees in total with about 31 employees at the hospital where the claimant worked. The respondent's employees are based at the client's premises. At C&W Hospital, the respondent has around 24 engineers and 6 support staff. They report to a Deputy Engineering Manager, a Service Desk Manager and 2 Engineering Managers. The Engineering Managers report to the Operations Manager.

33. At the date of the claimant's dismissal in July 2020 the respondent recorded the racial composition of the engineering department and we find it to be to be as follows:

- 3.33% Asian
- 3.33% Asian other
- 10% Black African
- 13.33% Black Caribbean
- 13.33% Black other

- 53.3% White European
- 3.33% White other

34. The respondent's Chairman, Mr Jackson's evidence was that in the 17 years since the company began trading they have had no grievances complaining of race discrimination. The claimant himself did not raise a grievance, despite being given the opportunity to do so.

35. During the period of the claimant's employment from December 2018 to July 2020 the respondent held four disciplinary hearings, 3 with white employees and 1 with a black employee, namely the claimant, who was disciplined twice in that period.

36. Of their workforce based at the Chelsea & Westminster hospital, the respondent's data shows that 36% identify themselves as black.

The tumble dryer incident

37. On Friday 26 July 2019 an incident took place between the claimant and his colleague Mr Ransome, who has worked as an engineer at the C&W Hospital for 26 years. The claimant wanted to use a washer/dryer in the crew room when Mr Ransome asked that the claimant wait before using it due to the heat and noise. The tumble dryer is provided for use by the engineers for their uniforms. It was a hot day in the middle of summer and it was during the lunch break. Mr Ransome wanted the dryer off until after his break. The claimant refused and this resulted in the machinery being switched on and off a number of times by the two of them. Mr Ransome alleged that the claimant said "*touch my stuff again and see what happens to you".* The claimant accepts that he may have said "*don't touch my stuff*" but he did not accept that he said the phrase as alleged.

38. Mr Ransome said he found the claimant aggressive and threatening towards him. In an email to Ms Emma Lee on 31 July 2019 Mr Ransome said he did not feel safe working with someone who had threatened and insulted him (page 93). Mr Ransome identified three witnesses to the incident. He said:

> *"Morning Emma*
> *Thanks for finding the time yesterday to discuss the incident between Damaly and my myself on Friday 26th July.*
> *As I explained I found the whole situation to be aggressive and threatening towards myself.*
> *Paul and Devon and one agency lad were witnesses to the incident. I would like this to be de dealt with correctly please as I do not feel safe working with someone who has threatened and insulted me.*
> *Please keep me informed of what will happen next."*

39. The claimant accepted that on receipt of an email such as this, the respondent needed to investigate. On 26 July HR asked a supervisor, Mr Adams, to investigate the incident. The claimant gave a statement on the

incident on 31 July 2019, page 94. The claimant also accepted that until 26 July 2019 he had a good working relationship with Mr Ransome and they helped each other out at work.

40. A statement was taken from the agency worker Paul K (page 95). Paul gave his ethnicity to the respondent as black African and a British national. Paul K said that on 26 July, the claimant was "*speaking on the top of his voice*" and Mr Ransome was "*calm*". A statement was taken from agency worker Devon W on 5 August 2019. It was not in dispute that he is of the same racial group as the claimant. Devon W recalled the claimant saying on 3 occasions, words to the effect of: "*touch my washing again and see what happens"* (page 97). Devon recalled the claimant telling Mr Ransome to "*F*** off".* The claimant could not recall whether he said this. He did not expressly deny it. Devon also said that the claimant was shouting.

41. We find that Mr Ransome did accuse the claimant of threatening him. Having heard from Mr Ransome in evidence, we find that he did feel threatened by the claimant. Devon W, who is of the same racial group as the claimant, said that the heard the claimant say three times, "*touch my washing again and see what happens"* and recalled the claimant telling Mr Ransome to "*F*** off"* and Paul K said that the claimant was speaking at the top of his voice. We find that the claimant was shouting at Mr Ransome.

42. We find that the reason Mr Ransome accused the claimant of threatening him was because Mr Ransome legitimately felt threatened by the claimant. We find that Mr Ransome did not make this accusation because of the claimant's race but because of the way the claimant was behaving towards him.

43. This matter was investigated by supervisor Mr Adams who passed the result of his investigation to Mr Chris Dillon, Operations Manager. We saw Mr Dillon's email to Ms Morgan in HR dated 16 August 2019 who said he would speak to the claimant about the incident and no further action would be required (page 108).

<u>The step ladder incident</u>

44. On 5 September 2019 the claimant went to find a ladder. He found the ladder chained up so he cut the padlock. He said he did this because he had a job to attend to. Photographs of the ladder were in the bundle at pages 137-143.

45. Mr Ransome had been told that there were not enough ladders for everyone in the team and he was asked to go around the building to locate any sets of ladders that were not being used. He found a set of ladders which he thought had been discarded, it had identification on it from a contractor that had left site. He locked this set to his own ladders for safekeeping, because he said if he did not, ladders could often

"*disappear*". He admits putting his own initials on the ladders he found. The next day he found the padlock had been removed and the claimant accepts that he removed the padlock. Mr Ransome says that the claimant accused him of stealing his ladders, became agitated, shouted and pointed angrily in his face. The claimant did not accept that he did this.

46. Manager Mr Brian Eaton was asked to deal with the matter. Mr Ransome said that the claimant called him a "*thief"* and a *"liar"* and told him that he was on his "*final warning*". The claimant's evidence was that he said to Mr Ransome: "*why would you lie in front of a manager"* and told Mr Ransome to keep away and he was on his "*last warning*". The claimant denied being threatening or intimidating. The claimant was told he would get a new ladder.

47. The claimant relied upon a sentence in Mr Eaton's statement which said "*Brian feels this was not said in a threatening way in which Steve turned to Brian and said Damaly had just threatened him".* This related to the claimant saying to Mr Ransome, "*keep away"* and *"this is your last warning".* We saw Mr Eaton's statement at page 128 of the bundle. Mr Eaton said he heard the claimant call Mr Ransome a liar.

48. We find that Mr Ransome did accuse the claimant of threatening him. Mr Eaton's statement says as much. We have considered whether Mr Ransome threatened the claimant because of his race. We find that the claimant called Mr Ransome and a "*thief"* and a *"liar*" because he was incensed by the ladder incident and we find that he also told Mr Ransome he was on his "*last warning"* and Mr Ransome felt threatened by this. We find that Mr Ransome did not make this accusation because of the claimant's race but because of the way the claimant was behaving towards him.

49. We make no finding of fact as to what was the situation regarding the ladders because the issue for us was whether Mr Ransome made the accusation because of the claimant's race and we find that he did not.

<u>A formal disciplinary investigation</u>

50. As we have found above, supervisor Mr Adams conducted an investigation into the tumble-dryer incident and Mr Dillon made a decision that no further action would be required. The Operations Director Mr Ian Coleman sent an email to Ms Morgan on 13 August 2019 (page 106) saying that Mr Dillon should meet with the claimant and Mr Ransome to "*settle the dispute amicably*".

51. On 5 September 2019 Mr Dillon telephoned Ms Morgan to say that there had been another incident between the claimant and Mr Ransome, being the step ladder incident. Ms Morgan recommended that Mr Dillon look into it together with the tumble dryer incident, as it appeared that informal resolution had not been successful.

52. A disciplinary investigation was undertaken in relation to both the ladder and the tumble dryer incidents. The claimant says that no action was taken against Mr Ransome and that action against himself was because of his race. On 10 September 2019 both the claimant and Mr Ransome were sent letters inviting them to separate investigatory meetings (letters pages 113 and 114). The investigation was conducted by their manager Mr Freddie Bosher. There was no less favourable treatment of the claimant in relation to the investigation as investigatory interviews were held with both of them.

53. Mr Ransome put in a formal grievance on 12 September 2019 (page 116) to Mr Bert Potts, Deputy Engineering Manager about the two incidents. In relation to the September incident Mr Ransome said:

> *"On the way there Damaly started to accuse me of being a thief and a liar again and again loudly while pointing at at me and saying how he would make sure everyone knows I stole his ladder and that I was a thief and liar. This was out side lift bank D LGF for everyone to hear.*
>
> *Inside the electrical store I asked if Damaly had cut my lock off, he replied, so what if I did. He got very angry and accused me of pushing his buttons, he said he has kids and couldn't afford to loose this job and I was on my final warning, then he walk away in a rage."*

54. Mr Ransome's evidence was that he began to feel very unsafe around the claimant who began to talk loudly around him about how thieves and liars would be killed in Jamaica and he felt that these comments were directed at him. One such conversation took place in a staff room between the claimant, Mr Reece Sutherland and Devon W sitting a few feet away from him. Mr Ransome found this intimidating to the extent that he made a covert recording of what was being said. Ms Morgan's evidence was that the recording was of poor quality and was vague. The making of the covert recording is not in issue for us in these proceedings.

55. On 7 October 2019 the claimant was invited to a disciplinary hearing (page 143). The disciplinary charges were:

> • *Behaviour that may be regarded as either disorderly, indecent or unacceptable to the company when at a client premises, and/or conduct which brings JCA's name into disrepute*
> • *Actions which contravene JCA Policies and procedures, including but not limited to those set out under the dignity at work policy*
> • *Actions considered to be non-compliance with management instructions regarding conduct at work*

56. We saw Mr Freddie Bosher's investigation report at page 121. The claimant produced a witness statement from Mr Bosher, but Mr Bosher did not appear to give evidence at this hearing. Mr Ransome had raised concerns about his safety around the claimant and Mr Bosher conducted a risk assessment. His view was that the claimant did not pose any danger

to Mr Ransome. The claimant did not raise any concerns about his own safety around Mr Ransome.

57. Mr Bosher concluded that the claimant acted in a manner which could be perceived to be threatening on both the 26 July and 5 September and it should progress to a disciplinary (page 123). The claimant does not complain that Mr Bosher's decision to refer it to a disciplinary was race discrimination. The claimant's complaint was that the incidents had already been dealt with and a further investigation had taken place. This was at a time when the claimant said Mr Ransome was not even on site, because he was off sick. The claimant says that the discrimination was re-investigating it on Mr Ransome's complaint of 12 September 2019 and issuing the claimant with a warning. The claimant said that this was "*to satisfy Steve".* The claimant said that it was discrimination because he is black and Mr Ransome is white and he (the claimant) was being treated unfairly.

58. We find that the reopening of the investigation into the tumble dryer incident was not because of Mr Ransome's grievance on 12 September 2019. It arose from Mr Dillon's phone call to Ms Morgan on 5 September 2019, the day of the step ladder incident and Mr Dillon's decision that informal resolution had not been successful. The respondent now had allegations of two incidents of threatening behaviour on the part of the claimant and the claimant does not contend that Mr Bosher's decision to refer it to a disciplinary was discriminatory.

59. We find that the decision to take disciplinary action in respect of the two incidents was not because of the claimant's race, it was because the respondent now had two incidents of threatening behaviour on the part of the claimant which needed to be addressed. It was clear that informal resolution had not been successful following the first incident.

60. The respondent does not dispute that no disciplinary action was taken against Mr Ransome. The claimant said he thought that Mr Ransome should have been disciplined for provocation, by taking the ladder issued to him and crossing out the claimant's initials on the ladder.

61. We find that there was a material difference in circumstances between the claimant and Mr Ransome in that there was no allegation of threatening behaviour on the part of Mr Ransome. We find that the reason for the disciplinary action was the allegations of threatening behaviour and this did not apply to Mr Ransome.

62. On 25 September 2019 Ms Karen Hood, the Contracts Compliance Manager sent an email to Mr Bosher, as the claimant's line manager, complaining about the claimant's attitude. The claimant was frustrated about the number of jobs showing on his device; she said he came across as angry and when the service desk tried to explain, he walked off refusing to listen. At Ms Morgan's request (email 26 September 2019 supplementary bundle page 6) we find Mr Bosher spoke to the claimant

about this matter.

The disciplinary hearing in October 2019

63. A disciplinary hearing in relation to the claimant's conduct on the two matters, tumble dryer and step ladder incidents, was held on 10 October 2019. The disciplinary was chaired by Mr Dillon with Ms Morgan attending from HR. The claimant attended with his colleague Mr Wayne Collu. The notes of the hearing were at page 144.

64. The claimant's case was that at the disciplinary hearing Ms Morgan said "*I can see why people find you intimidating and aggressive".* Ms Morgan admitted that she made a comment which is not recorded in the notes, but said that she told the claimant that he needed to be mindful of the way he spoke to other people because it could be perceived as being intimidating. Ms Morgan did not recall using the word "*aggressive".* She admits that she told him that his raised voice could be seen as intimidating and she found it intimidating. She commented that the claimant is 6'2" in height and she is 5'3" and also that he was waving his arms around. Ms Morgan said the claimant became loud during the hearing and that he spoke over Mr Dillon. The claimant denied this.

65. Ms Morgan's evidence was that she made her comment by way of advice, to be supportive and to help the claimant understand the way his conduct could be perceived by others and to help him avoid problems in the future. She says she would have made the same comment to a white man or woman who came to a disciplinary hearing and raised their voice, because she considered this to be inappropriate and intimidating.

66. We find that Ms Morgan made a comment to the claimant to the effect that his raised voice could be found to be intimidating and that this was in response to his conduct at the hearing, as he became loud and spoke over Mr Dillon. We find that Ms Morgan did not use the word "*aggressive*". Ms Morgan readily admitted using the word "*intimidating*" and we find that she was acting in an HR advisory capacity and not in an accusatory manner.

67. We had evidence from Mr Jackson, to which we refer below, that at the appeal hearing against dismissal, the claimant spoke over him to such an extent that he considered bringing the hearing to an end. This is consistent with the evidence of the claimant's behaviour towards Mr Dillon on 10 October 2019.

68. The claimant did not accept that he raised his voice. He said that when he tries to explain something, he may project his voice a little bit to get his point across, but it is not a deliberate attempt to overpower anyone with his voice. He said this was a cultural matter. This was a point that he made many times during this hearing and also during internal hearings with the respondent. The respondent's position at all times was that they had no objection to the claimant's normal tone, it was the raised voice and the shouting with which they took issue.

69. The claimant's case was that his normal tone was loud and he projected his voice and this was cultural but he did not come across in this way during this tribunal hearing. We found the claimant's tone to be consistent with all the other witnesses; he did not appear to project his voice and we had no difficulty understanding him. On a balance of probabilities we accepted the evidence of the respondent's witnesses to the effect that the claimant acted in a loud manner which could be perceived as intimidatory.

70. The claimant's case is that Ms Morgan would not have made the comment to a white person raising his or her voice at a disciplinary hearing. As we have found above, Ms Morgan was acting in an HR advisory capacity and not in an accusatory manner. She was trying to help the claimant and we find in that HR capacity she would have said the same to a white employee behaving in the same way as the claimant. We find that her comment was not made because of the claimant's race.

71. After a brief adjournment on 10 October 2019, the disciplinary hearing reconvened and the claimant was given a first written warning for 12 months for his conduct towards Mr Ransome, namely raising his voice which could be perceived as intimidating and that such behaviour would not be tolerated. Mr Dillon told the claimant to be aware of his tone generally when speaking to colleagues. The claimant agreed that Mr Dillon said this.

72. On 16 October 2019 the written warning was confirmed in a letter, it was to last for 12 months (page 150). The claimant was given a right of appeal against this warning and accepts that he did not appeal.

73. Less than 10 days after the written warning, on 25 October 2019 a complaint was received by Mr Dillon from a Manager at the C&W hospital about the claimant throwing bicycles on the floor and behaving in a hostile manner (email supplemental bundle page 10). The NHS manager asked that the respondent did not send the claimant over to their site again. This was a satellite site at Dean Street. The claimant agreed he was told he was not allowed to go to the Dean Street site again, but said he was not given an explanation. We saw the note of a meeting on 18 December 2019 at page 11 of the supplementary bundle, where the matter was discussed between the claimant and Mr Dillon. This is a note which the claimant accepted he had signed. We find based on the note that he signed, that the claimant was given an explanation as to why he was no longer allowed to go to Dean Street.

74. On 5 February 2020 a meeting was held by Ms Morgan and Mr Bosher with the claimant to discuss his recent sickness absences. The claimant had 8 individual days sick days in the calendar year 2019 (sickness record page 169). He had a high "Bradford Score" in relation to his sickness absence, which led the respondent to hold the meeting with him. The notes of the meeting were at page 172.

The pandemic

75. Once the pandemic took hold, C&W hospital introduced three zones in the hospital. The blue zone was a public areas, such as corridors and reception, the green zone was for patient and clinical areas and the red zone was for patients who had tested positive for Covid 19. Anyone entering the red zone was required by the hospital to have additional PPE, comprising a specially fitted Filtering Face Piece (FFP3) mask, a gown, gloves, face visor and hat. The use of the FFP mask was either a Government or NHS requirement, it was not a requirement that came from the respondent.

The cohort ward

76. The claimant's case was that in April or May 2020 he was asked to work in a red zone and he refused to do so. The claimant said he raised it with HR. He did not cover this in his witness statement. Ms Morgan's evidence was that she and HR did not have any record of the claimant raising it. The claimant could not recall who in HR he raised it with, he did not recall how he raised it. We find that he did not raise this in April or May 2020.

77. The tribunal asked the claimant whether page 204 was the note of the meeting he relied upon and the claimant confirmed that it was. This was a note of a meeting on 6 July 2020 with himself, his colleague Mr Reece Sutherland accompanying him, Mr Haigh chairing the meeting, Mr Eaton and Ms Pape as a note taker. It was not a meeting in April or May 2020. The meeting was to discuss an incident "*earlier in the day*" therefore on 6 July 2020. On that morning the claimant had refused to do a job on the Ron Johnson Ward. Mr Haigh wanted to discuss with the claimant both his refusal to do the job and his refusal to complete a risk assessment.

78. The Ron Johnson Ward was described to us as a "*cohort ward*". This is a ward which has a mix of patients who are Covid positive in separate bays or rooms and non-Covid positive employees on the ward itself. On the ward itself the NHS assessment is that ordinary standard blue masks are sufficient PPE. When an engineer is required to work in a bay or room previously occupied by a Covid positive patient, additional safety measures are needed including deep cleaning and further PPE. It is only in extreme circumstances that engineers are asked to work in one of those rooms.

79. On 22 June 2020 the claimant had a meeting with Mr Haigh (notes at page 200). The claimant signed the notes as an accurate representation of the meeting. The claimant had refused to complete the NHS Trust's BAME risk assessment to identify whether BAME staff were likely to be at higher risk to Covid and to safeguard them. The risk assessment was an NHS Trust requirement, it did not come from the respondent. The claimant said he had issues with the risk assessment and did not wish to complete and sign it until he had the clarification he wanted. He thought there should be a risk assessment for each job and he thought that the BAME risk

assessment was too late and too generic.

80. The meeting on 6 July 2020 took place at 1pm and there was a discussion of the claimant's reasons for not wishing to work on the Ron Johnson ward. At the end of the meeting the claimant agreed to complete the Trust's BAME risk assessment which he did (page 201) after the meeting.

81. The claimant accepted that when he completed the risk assessment it was agreed that he would not have to work in a red zone. No disciplinary action was taken against him for refusal to work on the Ron Johnson ward prior to signing the risk assessment. After signing the risk assessment he was not asked to do so because the risk assessment highlighted that it was not appropriate for him to work on a red zone. It was an agreed outcome that the claimant was able to work on a cohort ward but not in the red zone on religious grounds (page 202).

82. Due to the operational needs brought about by the pandemic the respondent made changes to the engineers' shift patterns, changing it from Monday to Friday 8am to 5pm to two teams working 4 days on and 4 days off. This change was applied to the entire engineering team.

83. The claimant was unhappy with the changes and met with Mr Haigh who explained the reasons for the changes. Mr Haigh explained that the changes had been made to better support the hospital during the pandemic. We saw the note of the meeting on 19 March 2020 at page 177. Mr Haigh said: "*We have to go to this shift pattern, we would like everyone to get on board. It covers the government criteria of social isolation and reduces journeys into work. It is not an option that we have, if we cannot get to agreement we will have to go to the next step which will be a more formal meeting*". The claimant interpreted this as a threat to his job and said he was going to speak to his union representative, which he did. The claimant accepted in evidence that ultimately he agreed to the change.

Time Sheets

84. On 12 April 2020 Mr Bosher sent an email to Mr Haigh and others to say that he had seen a time sheet for the claimant, claiming 6 hours of overtime on Saturday 4 April 2020 (supplementary bundle page 5). Mr Bosher had looked at the Swipe records and saw that the claimant was not at work that day.

85. The claimant agreed that it was necessary for Mr Bosher raise the question, but he said it was not necessary for the respondent to look into it because they had authorised the overtime job he had done. The claimant understood that Mr Eaton had authorised it. The claimant's witness Mr Collu accepted in evidence that it was reasonable for Mr Bosher to look into this matter and we find that it was.

86. On 1 May 2020 Ms Morgan wrote to the claimant (page 185) to inform him

that he was to be investigated on an allegation of falsifying time sheets. Due to the potential seriousness of the matter, the investigation was authorised by Mr Haigh. An investigatory meeting took place with the claimant on 2 May 2020 carried out by Mr Eaton. Mr Haigh instructed Mr Eaton to speak to the subcontractors on site who manage the electronic access system to find out whether the claimant had used his swipe card to access areas of the hospital on the day in question, despite there being no record of him signing in that day.

87. When Mr Eaton completed his investigation the matter was referred to Mr Haigh who decided that there should be no disciplinary action. Mr Haigh concluded there was a lack of understanding of what employees should do when booking overtime and completing timesheets, and the general administration and approval around this. He considered this a failure in the respondent's processes and understood that the claimant had been acting in accordance with instructions from his supervisor Mr Collu, to record a job against an incorrect day. Mr Haigh decided that the claimant had followed the instruction he was given. Mr Haigh made sure that Mr Collu was corrected about this and informed of the right process. Mr Haigh decided to organise a Toolbox talk to go over how timesheets were to be completed. The claimant was informed of this in a letter dated 13 May 2020 (page 188).

88. On 19 May 2020 the claimant emailed Ms Morgan about the matter, asking whether there was a "*witch hunt*" against him. The claimant said he felt singled out. Ms Morgan was concerned about the matters the claimant raised and she offered him a Teams call to discuss it. The claimant said he was not comfortable with another meeting and Ms Morgan then gave him the opportunity of raising a grievance. The claimant, who was discussing matters with his union representative, did not raise a grievance or agree to a Teams call with Ms Morgan.

89. The claimant was asked in evidence whether his case was that if he had been a white man with the same discrepancies in his time sheets, this would not have been investigated. The claimant said that it was raised with him, he is a black man and he could only speak for himself.

90. We find that the investigation into the time sheet matter was not because of the claimant's race. It was because the claimant had put in a claim for overtime on a date when records appeared to show that he was not at work. On the face of it, there was a legitimate issue to be investigated. We find that it was reasonable within the investigation to speak to the subcontractor who manages the electronic access system of find out whether the claimant had used his swipe card on the day in question. We find that this had nothing to do with the claimant's race. We find that the respondent would have taken the same action with a white employee in the same circumstances.

<u>The incident on 14 July 2020</u>

91. On 14 July 2020 at 07:22am the claimant sent an email to Mr Haigh and Mr Eaton (page 210) saying that he would be late to work that day. The email said:

> *"Good morning I will be late in getting to work this morning. I've got a bit of stomach bug it seems which is still on me as we speak.*
> *I will be coming in still today as soon as I feel a bit better to move I cannot lose my days wages due to the company policy on sick. I will be there as soon as I can move without needing the toilet as much as I do now.*
> *Thanks for your understanding."*

92. The claimant came to work but his arrival time was unclear. The electronic log showed that the claimant signed in at 13:26 but the claimant said he had arrived at work earlier than this.

93. The claimant accepted in evidence that one of the reasons for signing in was a health and safety matter, so that staff can be accounted for in the event of an emergency. Mr Haigh had spoken to the claimant about signing in on 26 March 2020 (confirmed in an email at page 180). The claimant was told that if he was going to be late, he had to put in a call to one of the managers. There was also a toolbox talk about this on 2 April 2020.

94. On 14 July 2020 Mr Haigh was working in his office and heard shouting coming from the site office. The noise came from 15 metres away, through two doors and two walls. He went to see what was going on and saw the claimant shouting at a colleague, Ms Hood, about his work device, known as a PDA, showing that no jobs had been booked for him that day and showing him as off sick when he was at work. The claimant's concern, as he said in his email, was about losing pay for the day.

95. The claimant accepted in evidence that there was no guarantee that he was going to make it in that day. He said that there was also a possibility that he would come in. The way in which the claimant had emailed regarding his possible absence was in breach of the sickness reporting procedure which required the employee to telephone his manager if sick.

96. The claimant denied that he lost his temper with Ms Hood. We find that the claimant did lose his temper with Ms Hood, he had done so previously on 25 September 2019, resulting in a complaint. In addition Mr Haigh found the claimant's tone to be loud and aggressive and asked him to lower his voice and calm down. Mr Haigh said that the claimant then stormed out of the office.

97. Mr Haigh checked the electronic signing in system and noted that the claimant had not signed in on 14 July. The claimant returned to the office and attempted to sign in. Mr Haigh asked him why he had not signed in. Mr Haigh's evidence was that the claimant strode towards him, waving his arms and shouting. Mr Haigh found this behaviour intimidating and

aggressive.

98. The incident was witnessed by Mr Smith, an Authorising Engineer with a subcontractor at the hospital, dealing with water engineering. Mr Smith sent an email to Mr Haigh at 13:52 on 14 July setting out his view of what happened (page 212).

> *"Adrian,*
> *I was present in the JCA office undertaking my audit work on behalf of the trust. At around 13.20 on 14" July a member of your helpdesk team questioned one of the engineering team as to what time he had arrived at site, why he wasn't signed in and what works had he been doing that day. The engineer was evasive, aggressive and dismissive in manner not answering the question. Subsequent to this a few minutes later you undertook to ask the same questions eliciting a similar aggressive and evasive response."*

99. Mr Haigh's note of the incident dated 14 July 2020 was at page 215. He said that the claimant was loud and "*over the top*" of Ms Hood and would not let her speak.

100. Mr Haigh decided that an investigation should be carried out into whether the claimant had engaged in aggressive conduct and in front of a third party (being the subcontractor) thus bringing the respondent into disrepute.

The suspension

101. Mr Haigh decided that due to the potential seriousness of the claimant's actions, he should not work alongside others while the matter was investigated. At 4pm on 14 July Mr Haigh met with the claimant and suspended him pending an investigation into loud and aggressive conduct. Mr Coleman, Mr Haigh's manager, was also present during the suspension meeting. The note of the suspension meeting was at page 213. The suspension letter was at page 218 and anticipated that the investigation would last around a week or less.

102. We saw the respondent's disciplinary policy at page 308 which said:

> *"There may be instances where suspension with pay is necessary while investigations are carried out. JCA has the right to suspend with pay where there are reasonable grounds for concern that evidence may be tampered with, destroyed or witnesses pressurised before a disciplinary hearing, or if there is a potential risk to the business or other employees or third parties in allowing the employee to remain at work."*

103. In the suspension letter the claimant was told: "*Unless you have Ian Colemans prior written consent, you should not, at this stage, access the workplace nor contact any of JCA's or Chelsea and Westminster Hospitals customers, suppliers or your work colleagues"*. The claimant was not flatly

denied access to the site or contact with colleagues or members of staff, but was told that if he wanted to do this, he would need Mr Coleman's consent.

104. We find that the claimant was not suspended because of his race. We find that the reason for suspension was because of a further instance of alleged aggressive and intimidating behaviour and which allegedly took place in front of a third party potentially bringing the respondent into disrepute. The reason for the suspension was the seriousness of the alleged behaviour towards other employees and we find that it was a reasonable step to remove the claimant from the workplace pending an investigation.

105. We have found that the claimant was not flatly denied access to site, or contact with colleagues. He was told that he needed consent in order to do this. We find that this was consistent with the respondent's disciplinary policy to manage any potential risks to other employees or third parties and we find that the respondent would have done the same with a white employee who had behaved in the same way.

106. Investigatory interviews were carried out with other witnesses to the incident, namely Mr Potts, Ms Roberts and Ms Hood who had all been in the office at the time. We were told that Mr Potts and Ms Roberts are black and Ms Hood and Mr Haigh are white. Mr Potts said that the claimant had been speaking in a raised voice. Ms Hood described the claimant as behaving "*slightly aggressively towards [her]"* but she had *"seen him worse".* She found his manner unacceptable (investigation notes page 221). She said that she found the claimant's "*challenging and aggressive nature put [her] on edge".*

107. As Mr Haigh was finalising his investigation he was visited by Mr Burke, another engineer, who came to speak to him about a separate incident which took place on 14 July. The claimant confirmed that Mr Burke is a black Jamaican man. Mr Burke had accompanied the claimant to the Dermatology department to do a job. We saw at page 231 Mr Burke's account of an incident. Mr Burke said he found the claimant's behaviour "*unprofessional".* He said that when they got to the Dermatology ward, they were both asked by NHS staff to change their masks and sanitise their hands and the claimant became aggressive towards the Lead Nurse who had asked them to do this, saying that he did not have to and that he became loud. The claimant accepted in evidence that he did not change his mask, he said this was because he was already wearing a mask.

108. A statement was taken from the Lead Nurse in Dermatology who was present when the claimant and Mr Burke attended on 14 July (page 232, statement dated 17 July 2020). As a matter of policy it is for the lead clinician on the ward to decide the grounds for entry to the ward. The nurse noticed that the claimant was moving from one area to another without following procedure and he asked both of them to gel their hands and change their masks. The nurse said that the claimant, became

annoyed and wanted to challenge him about the process. The Lead Nurse said: "*With reluctance and aggressive attitude just passed by me and I can't even remember if he did change his mask or gel his hands".* The nurse said that the other member of staff, namely Mr Burke, did exactly as he had been asked.

109. Having reviewed the two incidents on 14 July Mr Coleman decided that there were two potential gross misconduct matters; firstly the claimant's aggressive and unprofessional conduct towards colleagues including both NHS and the respondent's staff and the health and safety breach in terms of not following the proper procedures when arriving at the dermatology ward.

The disciplinary hearing

110. A disciplinary hearing was held via Teams on 17 July 2020 before Mr Ian Coleman. The claimant was accompanied by his union representative Mr Akinola. Ms Morgan attended from HR.

111. The claimant complained at the start of the disciplinary hearing that he had only just received the statement from the Lead Nurse on the dermatology ward so Mr Coleman read it out to him. It was not a long statement, consisting of 2 main paragraphs and one further sentence. The claimant, who was represented, did not seek an adjournment of the disciplinary hearing. We find based on his evidence that Mr Coleman would have granted this if it had been requested.

112. The claimant was asked about his failure to sign in correctly when he arrived on 14 July. He confirmed that he was aware of procedures and told Mr Coleman that it was in case he had to leave again due to sickness. The claimant was given an opportunity to state his case. His position in the disciplinary hearing was that he had done nothing wrong. He did not offer any reflection on his behaviour or recognise how he could be perceived. He said in evidence that there was nothing for him to consider. The claimant told Mr Coleman that he thought his behaviour was of a professional standard in front of the respondent's client (notes of disciplinary page 242). This was during the incident on the Dermatology ward. This NHS Trust is one of the respondent's key clients. The incident also took place in front of another contractor.

113. The claimant's case was that he was "*unreasonably perceived as aggressive*" and that he acted aggressively towards people at C&W hospital. We considered the evidence that was put forward at the disciplinary hearing. As we have found above, Mr Haigh said that he found the claimant was overbearing towards Ms Hood, he did not let her speak and he was shouting. The contractor Mr Smith described the claimant as "*evasive, aggressive and dismissive in manner not answering the question*". The claimant knew of no reason why the contractor would make up these allegations. Mr Potts, who is black, said that the claimant had raised his voice and "*ranted*" and Mr Potts thought that the claimant should

not have behaved that way towards Ms Hood. We find that the claimant was not unreasonably perceived as aggressive. The perception was reasonable based on accounts from a number of witnesses to the events on 14 July 2020. We find that a white employee behaving in the same manner would also have been perceived as aggressive. We find that the perception was based on the claimant's conduct and was not because of his race.

114. The claimant's case was that he was "*falsely accused of not following health and safety rules and unreasonably perceived as aggressive.*" We have already dealt with the allegation in relation to being perceived as aggressive. As we have found above, the claimant accepted in evidence that one of the reasons for signing in was a health and safety matter, so that staff can be accounted for in the event of an emergency. There was an added dimension to this with the onset of the pandemic that reporting to the office and signing in on arrival allowed the engineers to be briefed about the Covid situation in the hospital on that day. There was a daily briefing session which the claimant had missed on 14 July 2020. Mr Coleman's evidence was that on all employees on arrival at the hospital were temperature checked for signs of Covid and the claimant had avoided this on 14 July.

115. We find that the claimant was not 'falsely' accused of not following health and safety rules. We find as a fact that he had not followed health and safety rules which were in place at a hospital, during a pandemic. This allegations fails on its facts and in any event the health and safety requirements applied across all employees at the hospital and had nothing to do with the claimant's race.

116. The claimant's case was that he was "*falsely accused of not following health and safety rules by allegedly not washing his hands, changing/wearing a face mask.*" This related to the incident on the Dermatology ward on 14 July 2020. The claimant accepted in evidence that he did not change his mask, so we find that this was not a 'false accusation'. This was also confirmed by Mr Burke in his statement; Mr Burke is of the same racial group as the claimant. The Lead Nurse on the ward could not remember if the claimant changed his mask or gel'd his hands. There was no positive evidence that the claimant had sanitised his hands. We find that it was not a false accusation. It was a disciplinary charge based on the evidence of two witnesses to this incident on 14 July. This was based on the evidence in front of the respondent and it was not because of the claimant's race.

<u>The dismissal</u>

117. Mr Coleman took an adjournment during the disciplinary hearing from 16:15 to 16:35 hours to make his decision. He initially acknowledged the situation with Mr Ransome as this had been raised by the claimant during the disciplinary hearing. Mr Coleman said that they had offered counselling, mediation and the opportunity to raise a grievance. The

claimant had not taken up any of this. Although the claimant suggested that the situation with Mr Ransome was unresolved, it was the claimant who declined mediation. In June 2020 Ms Morgan offered mediation between the claimant and Mr Ransome. The claimant refused the offer of mediation in an email dated 11 June 2020 (page 197). The claimant said: "*I do not need a mediation and it is not my job to reassure a liar that he can come back to work".*

118. Initially Mr Ransome had said that he did not feel "*in a fit state for this*" but by June 2020 he had agreed to it and he had already had an initial conversation with the mediator. Mr Ransome was off sick for 11 months after the incidents with the claimant. We saw Ms Morgan's email to the claimant of 11 June 2020 at page 197 setting out Mr Ransome's agreement to the mediation.

119. We find that the disciplinary hearing did not relate to the issues with Mr Ransome. That situation did not require a resolution in order for that disciplinary to go ahead. It was also the claimant who had refused efforts to resolve matters by declining mediation.

120. Mr Coleman said that the seriousness of the two incidents of aggressive and intimidating behaviour towards a Lead Nurse, who was their client and the claimant's colleagues brought the respondent into disrepute. Mr Coleman said that the claimant's behaviour did not meet their standards, particularly in the sensitive environment of a hospital. Mr Coleman noted that the claimant had a first written warning for aggressive behaviour. He considered the claimant's behaviour to be gross misconduct and summarily dismissed him.

121. The claimant was given a right of appeal to Mr Jackson, the company's Chairman. The claimant was also paid his notice pay as a gesture of goodwill due to the pandemic.

122. After his dismissal the claimant made representations to the effect that he was not aggressive but this was cultural and that he spoke Patois and that he projected his voice to be understood. Mr Coleman reminded the claimant that he had a right of appeal.

123. We have considered what was the reason for dismissal? The claimant's case is that he was dismissed as an act of direct race discrimination so that his dismissal was because of his race. We accepted Mr Coleman's stated reasons for dismissal and find that the reason for dismissal was the claimant's gross misconduct for his aggressive behaviour and failure to comply with health and safety matters at a hospital during a pandemic. Mr Coleman found the claimant's conduct to be sufficiently serious to warrant summary dismissal. He based his conclusions on evidence from witnesses including third party witnesses who did not work for the respondent. We find that it was reasonable for Mr Coleman to decide that the claimant's conduct brought the respondent into disrepute with their NHS client and with another subcontractor. We find that Mr Coleman

would have reached the same decision with any employee of any racial group who had acted in the same manner as the claimant.

124. We find, from the statistics set out above, that the respondent is an ethnically diverse workforce including within the engineering department where the claimant worked. The disciplinary statistics during the claimant's employment showed only 4 employees were disciplined of whom 3 were white and 1 being the claimant, was black. This did not lead to the suggestion of any adverse inference.

The health and safety dismissal claim

125. The claimant's case is that he was dismissed for his refusal to work in a red Covid positive zone at the hospital in order to prevent Covid infection. The claimant put this as taking place in April or May 2020 but we had no evidence of any such incident in those months. The issue related to an incident on 6 July 2020 when the claimant refused to work in a red zone on the Ron Johnson ward. This was dealt with in a meeting on the same day with Mr Haigh and Mr Eaton after which the claimant completed a risk assessment and was told that he did not have to work in a red zone.

126. We find that if the respondent had wished to dismiss the claimant for refusing to work in a red Covid positive zone, they had the opportunity to commence disciplinary action on 6 July 2020 which they did not do. Once they saw the risk assessment completed by the claimant they had no difficulty with agreeing that he should not work in such an area. The disciplinary in respect of the 14 July 2020 incident took place swiftly and we find that if the respondent had wished to discipline the claimant for refusing to work in a red zone on 6 July, they would have dealt with this promptly and would not have looked for an alternative reason to discipline him. We find that the respondent had no issue with the claimant not wishing to work in a red Covid positive zone and this was not the reason for his dismissal.

127. At the end of closing submissions the Judge asked the claimant if there was anything he wanted to say about the reason for his dismissal. He said he thought it was about getting Mr Ransome back to work and issues surrounding this. He said nothing about the reason being connected to a refusal to work in a red Covid positive zone in the hospital and we find that this was not the reason for his dismissal. It was for the reasons given by Mr Coleman.

The appeal against dismissal

128. The claimant appealed the decision to dismiss him by letter dated 27 July 2020 (page 248). The appeal was heard remotely via Teams by the respondent's Chair Mr Ian Jackson on 11 August 2020. The claimant was accompanied by his union representative Mr Akinola and Mr Jackson had a notetaker present.

129. At the appeal hearing the claimant complained that Mr Coleman had been an witness to the incident on 14 July 2020 so he should not have conducted the disciplinary hearing. Mr Jackson took the view that Mr Coleman was not a witness. We find that Mr Coleman as not a witness to the incidents on 14 July. He was present at the suspension meeting but he was not a witness of fact to the disciplinary incidents.

130. The claimant said that the situation with Mr Ransome was not resolved. We have found above that the claimant was not dismissed for matters concerning Mr Ransome. We also find that the dismissal was not done to facilitate Mr Ransome's return to the workplace. Our finding is that the dismissal was solely due to the claimant's gross misconduct on 14 July 2020.

131. The claimant told Mr Jackson that he was not speaking loudly or aggressively but that the way he spoke was a cultural matter. Mr Jackson did not accept this. He said that his own experience of the claimant in the appeal hearing was that he frequently spoke over him and in a raised voice. Mr Jackson told the claimant that he would have to end the hearing if the claimant would not allow him to speak. Mr Jackson's view was that the way the claimant behaved was not connected with his race but was inappropriate behaviour and that he did not demonstrate professional conduct or treat his colleagues with respect. As the claimant did not acknowledge that he had done anything wrong, Mr Jackson did not believe that the claimant would change his behaviour in the way he acted towards people in the future.

132. Mr Jackson also concluded that the claimant had unreasonably failed to follow health and safety procedures on the dermatology ward on 14 July 2020.

133. Mr Jackson took the view that the disciplinary process had been fair and he upheld the decision to dismiss. His view was that the claimant had behaved in an aggressive manner towards colleagues and clients, which was completely inappropriate and had brought the respondent into disrepute and his belief was that the claimant had wilfully failed to comply with reasonable instructions relating to health and safety procedures.

134. We find that Mr Jackson's decision to uphold the dismissal was for the reasons he gave and was not because of the claimant's race.

The relevant law

Automatically unfair dismissal

135. Section 100(1)(d) provides that a dismissal shall be regarded as unfair if the reason or principal reason is that in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work

or any dangerous part of his place of work.

136. Section 100(1)(e) provides that a dismissal shall be regarded as unfair if the reason or principal reason is that in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

137. For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

138. Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

Direct race discrimination

139. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

140. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

141. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

The burden of proof

142. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if the respondent can show that it did not contravene that provision.

143. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

144. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

145. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status and a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

146. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

147. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

148. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

<u>Time limits</u>

149. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable.*
>
> *(3) For the purposes of this section—*

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

150. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

151. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

152. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

153. The tribunal can find that some acts should be grouped into a continuing act, while others remain unconnected: ***Lyfar v Brighton and Sussex University Hospitals NHS Trust 2006 EWCA Civ 1548***.

154. In ***Aziz v FDA 2010 EWCA Civ 304*** the Court of Appeal said that one relevant but not conclusive factor was whether the same or different individuals were involved in the incidents. The CA said that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs (paragraph 36 of the judgment).

155. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

Conclusions

Direct race discrimination

156. On allegations (a) and (b) we found that the allegations were not made

because of the claimant's race but because of the way in which he had behaved.

157. On allegation (c) we found that the disciplinary action in October 2019 was not because of the claimant's race but because the respondent then had 2 incidents of threatening behaviour his part which needed to be addressed.

158. On allegation (d) we found that Ms Morgan's comment did not include the word "*aggressive*" and that the comment she made was in an HR supportive manner and was not made because of the claimant's race. She would have made the same comment towards a white employee in the same or similar circumstances.

159. On allegations (e) and (f) we found that there was a matter which needed to be investigated, in that the respondent found a claim for overtime from the claimant for a date on which he did not appear to be at work. The claimant accepted that it was reasonable for Mr Bosher to raise the question. We found that the respondent did not instigate this investigation because of the claimant's race but because of the discrepancy they discovered. We have also found that it was a reasonable part of that investigation to make enquiries of the subcontractor who manages the electronic access system and this was not done because of the claimant's race.

160. Allegations (g) and (h) were the claimant's suspension and the terms of that suspension which we found was consistent with the respondent's disciplinary policy and was not done because of the claimant's race. The claimant was not flatly denied access to the site or contact with colleagues; he could do so if he obtained consent whilst he was suspended.

161. On allegation (i) we found that Mr Haigh and Mr Burke did not unreasonably perceive the claimant as aggressive so this allegation failed on its facts.

162. On allegations (j) and (k) we found that Mr Haigh and Mr Burke did not make false accusations about the claimant so again these allegations failed on their facts.

163. On allegation (l) we found that the claimant was not dismissed because of his race but because of his gross misconduct.

164. As all the allegations of race discrimination failed, it was not necessary for us to consider the time point.

165. On the burden of proof we find that on all the allegations, the claimant failed to show facts from which we could conclude in the absence of any other explanation, that the respondent discriminated against him. We find that in this case the burden of proof did not shift to the respondent.

166. The claim for direct race discrimination fails and is dismissed.

Automatically unfair dismissal

167. Our finding is that the reason for dismissal was gross misconduct. It was not because the claimant refused to work in a red Covid positive zone of the hospital.

168. The claim for automatically unfair dismissal fails and is dismissed.

_____

Employment Judge Elliott
Date: 27 October 2021

Judgment sent to the parties and entered in the Register on:27/10/2021

For the Tribunal