EMPLOYMENT TRIBUNALS

Claimant: Mr E Yahaya

Respondents: 1. Single Resource Limited
2. J D Sports Fashion PLC

Heard at: Manchester **On** 13-16 December 2021
23 December 2021**:**
and
29 December 2021 (in chambers)

Before: Employment Judge Feeney
Mr S Husain
Mr B Rowan

REPRESENTATION:

Claimant: Miss Akinfenwe, Sister
1st Respondent: Miss I Bayliss, Counsel
2nd Respondent: Miss R Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The first respondent terminated the claimant's assignment.

2. The claimant's claims of direct race discrimination under the Equality Act 2010 fail and are dismissed.

REASONS

1. The claimant was provided on an assignment to the second respondent by the first respondent an employment agency, the first respondent accepts that

it employed the claimant. The claimant's initial assignment was for three months but it was brought to a premature end at some point in November 2019 following an incident where a mobile phone was stolen. The subsequent events are subject to much disagreement as to what happened and when.

The claimant's submissions

2. The claimant submits that either the first or the second respondent decided to dismiss him on the basis of CCTV footage and made assumptions about what that CCTV footage showed because of his race and/or colour. The claimant is a black African man. They failed to advise of the process and any record of the decision to end his assignment.

The first respondent

3. The first respondent has submitted that the second respondent in effect terminated the assignment following the CCTV footage by removing the claimant's pass.. That if the words friend and suspicious were used it was a non-discriminatory assessment of the CCTV footage.

The second respondent

4. The second respondents say that they were awaiting the outcome of the first respondent's investigation into the CCTV footage and the incident and they heard nothing further from the first respondent, that they received a leaver's list with the claimant's name on it and therefore at that point it seemed that either the first respondent terminated the assignment or the claimant had decided not to return to work for them. Whilst they had suspended the claimant's access to site they submitted that was subject to the outcome of the first respondent's investigation.

Both respondent's submissions

5. Both submitted and this was accepted by the Tribunal in the course of the hearing that the issue of whether the second respondent's security guards had isolated the particular CCTV footage because the claimant was black or as a result of assuming he was a friend of the other `accused' because they were both black was not an issue before the Tribunal as the only claim against the second respondent was that they had terminated his employment.

Issues

<u>Detrimental Treatment</u>

6. Has the first and/or second respondents subjected the claimant to the following treatment:-

    a. The early termination of his assignment at J D Sports site;

b. That "Heather" or "Miss Sonnenfeld" in a meeting on or around 29 October 2019 wrongly referred to him as a "friend" of another black worker (alleged against the first respondent only);

c. That Mr Bains in a phone call on or around 18 November 2019 wrongly referred to him as a "friend" of another black worker (alleged against the first respondent only);

d. Mr Bains described his behaviour as suspicious in phone conversations on or around 15 and 18 November 2019 (alleged against the first respondent only).

7. If so, was the treatment in each case detrimental treatment.

8. If so, was that treatment less favourable treatment i.e. did the respondent treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances. The claimant relies on hypothetical comparators.

9. If so, was this because of the claimant's race (specifically his colour) and/or because of the protected characteristic of race more generally.

Issues arising at the hearing

CM's witness statement

10. In addition, the first respondent raised an interlocutory matter right at the beginning of the Tribunal in that they had sent a witness statement to the other parties on Friday of a Mr Craig Marshall. This was even though witness statements had been exchanged in October. This was because when Counsel was considering the matter on Friday she realised that the person identified as undertaking the investigation at the first respondents into what had happened was actually Mr Marshall and not Ms Sonnerfeld as previously assumed. It should be noted that Ms Sonnerfeld's witness statement where she said she did not do an investigation and knew nothing about it but simply bumped into the claimant who was distressed and sought to help him had been stated quite clearly in her witness statement but from October to December this had not been noticed. Whilst the situation was deeply unsatisfactory the other parties wanted to cross examine Mr Marshall and clearly it would assist the tribunal therefore we allowed his witness statement to be added late and for him to appear as a witness.

11. In addition, we allowed the first respondent to amend their response form to include a section identifying that Mr Marshall had undertaken the investigation and removing the section that said Miss Sonnerfeld had done so. We did this as it seemed logical in the light of the new evidence although the second respondent opposed this. The second respondent pointed out that the first respondent had amended its pleadings on at least two other occasions and had submitted a witness statement which was inconsistent with its position in the pleadings in October and therefore they had had plenty of time to seek an amendment. Whilst we understood the second respondent's position we decided on balance that it would be artificial to

proceed with the case without the amendment in place and therefore we allowed it.

Decision to isolate CCTV

12. Later at the hearing the claimant's sister representing him wanted to raise the issue that the decision to isolate the particular CCTV clip was motivated by race discrimination and that accordingly this would mean that the second respondent was responsible for a chain of events that resulted in the claimant's termination or that by itself it was race discrimination. As the second respondent had been added to ascertain when and how the decision to terminate the claimant's assignment was made and that the claim was only in relation to the termination of the assignment we decided we could not allow the claimant to proceed with this point. The second respondent had been added late and one of the considerations was the fact that witnesses may not be available as a year had passed since the incident to when Judge Grundy decided to add the second respondents.

13. In addition, Judge Grundy had refused an amendment in similar terms at her hearing on 12 January 2021

14. Whilst the claimant did not formally apply to amend to include the issue it was likely that if such amendment was granted it would have led to the postponement of the case while the second respondent considered, either appealing or obtaining further evidence to meet the new claim. It was not clear from the paperwork who had isolated that particular CCTV and we did not hear from any witnesses regarding it.

Further issue relating to CCTV

15. The claimant through his sister also raised on the second day of the hearing that when she viewed the CCTV she felt that there was a specific white person stealing a mobile phone later on in the clip however that was not the section of the clip the first respondent were asked to view. Whilst the claimant did not say so in terms this could have been a matter she could have relied on in relation to comparators. However in relation to the first respondent it was likely to be irrelevant as they had only viewed the clip and not the whole video.

16. Again, as this related to the issue above we took it no further and indeed the claimant had had plenty of time to view the whole CCTV. In addition it could have been raised earlier whilst it was provided later than it should have been in acceptable format it had still been available in good time for the hearing having been sent to the claimant on 28 May 2021.The claimant's sister explained she was busy with her university work at that time so had only viewed it at the end of the first day of hearing. Cogently she drew a parallel with the respondent being allowed to present a statement from Craig Marshall. However the claimant and the second respondent had wanted to cross examine Mr Marshall and it would not require any disruption to the proceedings to allow the statement in.

17. In addition there were a number of matters which may explain that situation such as that it was the person's own phone and further, that there was some evidence that the claimant and AB were isolated because AB appeared to be searching the coat from which the mobile phone was stolen. Whilst there was no witness from the second or first respondent to explain this in detail from the email traffic the underlying reason why that particular clip and the two particular individuals were identified was the knowledge of from which coat the phone had been stolen.

18. In addition the issue of the decision to isolate that CCTV was as referred to above not allowed as an amendment. If we had allowed this issue to be canvassed the hearing would have had to be adjourned whilst the parties viewed it and considered whether they could obtain witness evidence. This however was highly unlikely given Mr Varley had left and was one of the matters taken into account when not expanding the case against the second respondent. Further during any adjournment (which may have been several months or longer as 3-4 days would have to be found, currently such cases are being listed in 2023) the claimant would not have been able to speak to his sister about the case as he had already started giving evidence which understandably would have been very difficult.

19. For all these reasons we decided that it was not appropriate to view the whole of the CCTV to ascertain if the claimant's assessment was correct.

Witnesses

20. For the respondent we heard from Ms Sonnenfeld, Team Leader, Mr J Bains, HR Advisor and Mr Craig Marshall, Team Leader. For the second respondent Stephanie Boardman, Operations Director. For the claimant, the claimant himself and Ms Akinfenwa, his sister.

Credibility

21. In our view all witnesses were credible witnesses, however the difficulty was with the accuracy of their recollections and therefore where we do not agree with a witness's recollection this is simply down to faulty memory and not that we believed anyone was seeking to mislead the Tribunal.

Findings of Fact

22. The Tribunal's findings of facts are as follows.

23. The claimant was employed by the first respondent as a flexi worker from 27 September 2019. He was engaged as a Warehouse Operative working at the second respondent's site based in Rochdale. He worked his first shift on 30 September and his assignment was due to last for twelve weeks. The claimant worked a night-time shift finishing around 6/ 6.30 in the morning and starting around 9 o'clock at night .

24. On the early morning of 16 October 2019, a worker at the second respondent's premises reported a mobile phone stolen. As a result, the respondent's security team headed by Andrew Varley (who has since long

left the second respondent's employment) viewed security footage. The security team had some idea of where the phone was stolen from as is evident from a much later email of 7 November where Joanne Murray, the claimant's shift supervisor, sent an email to Sandy Riaar (member of HR) stating the following:-

> "if you could call me to advise … as the colleague he was with who appears to pat down the coat where the mobile phone has gone missing from has now been processed as a leaver due to failing to show up for the investigation on four occasions".
>
> We note she uses the word colleague.

25. From this it appears that the first respondent had information not recorded elsewhere as to why the particular excerpt of CCTV had been isolated, i.e. because AB was in the vicinity of the coat from which the phone had gone missing.

26. On 16 October the claimant and AB were approached during their evening shift around 9.30pm at break time and told that they had to remove themselves from site. This is reflected in an email of 17 October from Anis Syed to Andrew Varley stating that he had managed to track down the two single resource employees and escorted them off site, single resource team leader Andrew Hyland was present at reception, they were not happy about the whole situation, they were told to await a call from their related agency after the investigation is complete, their accesses were revoked and memos were updated.

27. The second respondent's employee Mr Khalid Mahmood was in charge of investigating it from the second respondent's point of view however their actions were limited to isolating relevant CCTV footage. It then appears that they sent the CCTV footage to the first respondent but advised them that the relevant time was 6.35 am, accordingly although the CCTV footage was two hours long there were only one slice of it that the first respondent looked at. This became apparent when one evening during the hearing Miss Akinfenwa looked through the whole of the CCTV and raised the issue which we did not allow to proceed regarding the possibility a white employee may have stolen the mobile phone.

28. The first respondent then had some difficulty downloading the CCTV but eventually did so. There was a further email from Andrew Varley on 18 October to Andrew Hyland, the manager within single resource who was present on site stating:-

> "hello, I requested that Anis from Team A stop the two gents from entering the building as they are under investigation for theft from the locker room. We have both parties on CCTV but need to identify them. Single Resource day shift were sent emails requesting their ID but unfortunately they sent the info after my shift had left site. The investigation is being headed by Khalid Mahmood and overseen by myself, when all the information has been collected we will be requesting you invite them both in for a continued investigation".

29. The claimant said that as he was leaving the site he asked whether he would get paid in the circumstances and the security guard escorting him off site advised that he would be paid as he was suspended. The claimant no longer pursues the matter of being paid during this, but the first respondent's position was that there was no such thing as a suspension as would become clear and the second respondent that the claimant's was not their employee and therefore their disciplinary rules did not apply to him. Accordingly, he would not be suspended with pay as might be the case with their own employee .Neither would it be sensible to expect a security guard (who may well be a contract worker him/herself) to know another worker's terms and conditions.

30. In respect of the claimant's contractual position the claimant had signed terms and conditions. The relevant sections were:-

> 14. The company may terminate your employment by giving you one week's notice if you have been continually employed for one month or more but less than two years or one week for each completed year of continuous service up to a maximum of twelve weeks.
>
> 14.3 If you have been employed for less than one month no notice is required from the company to terminate your employment under this agreement.
>
> 14.5 In the event that you are found to have committed an act of gross misconduct the company will be entitled to terminate your employment without notice or pay in lieu of notice and will not need to comply with any outstanding obligations under Clause 7.2.
>
> 14.6 For the avoidance of doubt the termination of an assignment will not terminate this agreement unless it is expressly stated.
>
> 20.0 The company can cancel any assignment at any time without notice and without liability.

31. There was also an assignment details form which stated that the assignment began on 27 September 2019 and was for twelve weeks at JD Sports Rochdale as a Warehouse Operative and that the normal days of work were four days on, four days off and the times could range from 6 am to 10.30 pm. However, the claimant was working nights and therefore worked 10pm until 6am

32. There was also a, separate document headed "J D Sports employment disclaimer" which stated "on commencing your employment as a flexi worker for Single Resource at J D Sports Rochdale I agree that where I have worked at the site before this has been declared at interview stage with Single Resource, should it be found at a later date that I have worked at J D Sports Rochdale and been dismissed by the client for performance issues I will be dismissed from site without any notice period being offered". This was a form wholly belonging to the first respondent.

33. The claimant declared on this form that he had worked at that site before with a different agency called Assist. It was a strange form to us as it referred to performance issues when if it was meant to cover things like theft which one would imagine would have been relevant that they would have said performance and/or conduct issues, it was the first respondent's case that performance did cover conduct issues in any event.

34. Returning to 17 October Andrew Hyland at 02:02 stated to the four team leaders that covered the different shifts:-

> "Hi all, the two below workers have been removed from site following information that they have worked here previously and were dismissed from stealing from staff locker rooms. Neither of them admitted to any wrongdoing but security were adamant they could not remain on site until this is investigated further".

35. Andrew Hyland was the first respondent's manager who worked on the second respondent's premises superviing the first respondent's workers . There is no email trail to state where this information came from and we accept the claimant's evidence that in fact he had been led to believe that his assignment via Assist had terminated due to there being less demand for his services than when he was recruited. We had no further information regarding this issue and therefore it appears to be either incorrect information or possibly Chinese whispers. As we did not hear from Mr Hyland or Mr Varley we could not ascertain the truth of this information. However, it is also reflected in Joanne Murray's email of 7 November referred to above and as she was a team leader she had been a recipient of Andrew Hyland's 17 October email. Accordingly, whilst we accept the first respondent believed this to be true we note specifically that we find on the claimant's evidence there was no such allegation against him as described.

36. As to the next events there was a dispute, the claimant was adamant that he had a meeting on 29 October with someone called 'Heather' and another man who may have been Mr Marshall where Heather had called AB his friend which the claimant asserted was race discrimination because they weren't friends and they were just making an assumption because of the claimant and AB's colour. However, the respondents denied that an investigation had taken place on 29 October but submitted that there was a meeting with Ewa Sonnenfeld whose first name can sound like Heather when pronounced in English. We have accepted the respondent's evidence on this not because we do not believe the claimant but because we believe the claimant was confused. We find this in particular as when he sends an email on the 31 October to complain about his treatment he does not mention this meeting and it seems inconceivable that he would not have mentioned this meeting in a memo headed up race discrimination if he was alleging that the word 'friend' was used at the 29 October meeting.. Further he signed the notes of the meeting which gave the date as 29 October . Also the first respondent has no employee called Heather and Ms Sonnenfeld was a female on duty that day. Mr Marshall was not on duty that day and it seems implausible that in addition to the two meetings identified by the first respondent i.e. the 29 October and (below) the 1 November with Mr Marshall that there would be another meeting on 29 October where a male and

female staff member of the first respondent would have been present and of which there are no notes.

37. Accordingly, we have preferred Ms Sonnenfeld's evidence for the first respondent regarding this meeting. Ms Sonnenfeld was a Shift Manager for the first respondent however she was not the claimant's shift manager, but she was the Shift Manager in on 29 October She stated that she was in the Portacabin used by the first respondent when she met the claimant who approached her saying that he was suspended, and he wanted to know about his pay. She said she remembered this as under the terms of the respondent's contracts employees are not suspended, however she stated that after explaining this to him she thought the best way of progressing the matter for him was to take a witness statement from him and leave it for the Shift Manager who would be dealing with any investigation or resolving the claimant's problems.

38. The claimant's expectation was that she would be able to sort this out while he waited, in her view although she explained it to the claimant a number of times he did not understand the situation regarding being paid and the fact that there was no such idea as suspension in relation to his work for the first/second respondent. The notes of the statement proved to be helpful in establishing exactly what happened. The claimant had signed these notes to confirm they were correct. On the first page it stated Eric Yahaya Ewa Sonnenfeld 29 October 2019 at 12:10. It seemed inconceivable to us that this would be filled in in such detail and not actually reflect what took place. Ms Sonnerneld was adamant there was no one else there and that it was not part of any investigation, it was simply a record that might be useful for whoever was undertaking the investigation or to sort out the claimant's pay so she asked the first question "can you tell me what happened on 16/10," the claimant said he was on his first break around 21:32 and he was going through a search when he was asked to leave the premises. He asked why and he said Andy Hyland came and said that they, i.e. the first respondent, had to do an investigation, or it could be the second respondent for alleged theft, the claimant stated he had never taken anything, and he didn't understand why he was suspended. Miss Sonnenfeld replied "for your information any concern needs to be looked into SR doesn't suspend workers, you are not required on site as you are under investigation, you have worked here less than twelve weeks therefore we are not going to offer you any hours until the investigation is finished and the allegations cleared". The claimant said he understood she noted it was at the end of the meeting at 12:28 and she put a line through the rest of the page and on the next page it was signed by herself and the claimant, he agreed in evidence that was his signature. He said however he was very upset, and he did not read the details. However, we rely on that statement to establish the details of what took place on the 29 October.

39. It was Ms Sonnerneld's evidence she knew nothing about the incident before the claimant told her and there was nothing in the interview to indicate that she did know about the incident, neither was there any reference by Ms Sonnenfeld to the claimant and AB being friends as she knew nothing about

this issue, either from the rest of the conversation or from the notes she took from the claimant.

40. It was the first respondents case that Heather was Ms Sonnerneld because of the pronunciation of her name and Ms Sonnenfeld was on shift that day whereas Mr Marshall who later undertook the "investigation" was not on shift that day and therefore he could not have been present at that meeting however both he and Ms Sonnenfeld were adamant that in both their meetings there was nobody else involved. We accepted this on the basis of the documentation, their evidence, and supporting facts (such as the shift dates).

41. On 31 October the claimant sent the following email to the respondent. It was timed at 18:49 and was headed up "racial discrimination". It was actually sent to the second respondent :-

> "Dear Sir/Madam
>
> I received a call today from your office regarding my suspension I requested that the reason for my suspension be put in writing however this was denied during the telephone conversation. During this conversation the lady whom I spoke to stated that my colleague who is also being investigated was "my friend". She believed this to be true because we had took our break at the same time. I am not "friends " with any of my work colleagues and find that she is being discriminatory when she assumes this, because the said colleague is of African descent like myself and takes a break at the same time as myself she wrongly assumed that we are friends. I am disgusted at this type of racial discrimination and would like to issue a formal complaint on this matter.
>
> Furthermore, it is illegal not to pay an employee while they are suspended and under investigation. During the phone call I was told I would be paid for days taken for holiday, I did not take these last few weeks as holiday and it is also illegal to force an employee to take holiday. This series of poor conduct by your office is something I must report to the Employment Tribunal in not corrected. I am entitled to receive payment whilst on suspension and I should be told in writing why I have been suspended. You have 24 hours to respond before I escalate this matter to the Head Office and then the Employment Tribunal".

42. The claimant did not know who had rung him. In the claimant's witness statement, he said that a person had rung him on 25 October to invite him to a disciplinary hearing. It is not clear from the email whether this was the matter the claimant complains of on 31 October. As that email refers to being rung 'today' but regarding his 'suspension' and that he thought whoever it was worked for the second respondent.

43. Mr Marshall thought the person ringing the claimant might be Ms Murray, the Shift Supervisor who was in effect supervising the investigation however we were not able to finalise a finding in respect of this matter and as it was not

part of the actual complaints it is not crucial we do so. It is potentially relevant as it is the first time the claimant raises the 'friends' issue but not in a context he includes in his claims.

44. We also note that in the claimant's witness statement he does not mention the phone call on 31 October which was the basis of his race discrimination complaint to the respondent on that date**.**

45. The second respondent passed this on to the first respondent who emailed the claimant on 1 November back starting "I will look into your concerns below however in the meantime I would just like to clarify a few of your points. In relation to your suspension I would like to confirm that you have not been suspended, your assignment has been ended whilst we look into allegations of theft as per your flexi worker contract (20.1)

> "a company can cancel any assignment at any time without notice or liability, cancelation of an assignment is not termination of employment"
>
> "the ending of an assignment is not subject to the same criteria as a suspension".
>
> "In regard to holidays in your flexi worker handbook, page 5/6 it states "Single Resource may instruct you to take paid annual leave at any time including bank holidays". You were also given notice for any holiday that you are being instructed to take, this is not illegal.
>
> In regard to the comment regarding the lady that you spoke to please could you provide the further details below in order for me to investigate it further.
>
> > "Do you know the name of the person you spoke to?
> >
> > Could you please clarify exactly what she said in relation to your colleague being your friend?.
> >
> > Did you leave, walk or talk to your colleague as you were taking your break?
> >
> > Were there any other colleagues with you?
> >
> > Why do you believe the lady was under the impression that you are friends just due to your African descent?
> >
> > Do you have any evidence to support the above allegation of discrimination".

46. The claimant did not respond to that email.

47. On 1 November we find that the claimant met with Craig Marshall as part of an investigatory process. The claimant denied this however as we have said we have given reasons before why we believe he met with Ms Sonnenfeld on 29 October and with Mr Marshall on 1 November 2019. Mr Marshall again took notes on the same proforma as Ms Sonnenfeld had previously

used, he put at the top the date and time and who was attending so this said "Eric Yahaya, Craig Marshall, 1/11/19 17:45 he said that that would be when he saw people due to the timing of his shift. He did acknowledge the claimant had a previous meeting with his colleague which we presume was ES accordingly these notes corroborate there had been a previous meeting and that a meeting took place on 1 November . In addition the claimant's claim form said the meeting was the 'beginning of November '

48. CM began the meeting by asking the claimant what he thought was the current status of the investigation and the claimant told Mr Marshall that he was under investigation for theft.

49. There were a number of general questions about how he travelled to work, did he travel with anybody and where he kept his coat, he said he didn't socialise with any of the shift colleagues outside of work and he agreed he was aware that he knew that there was CCTV. He was asked is it fair to say from time to time you may remain in the locker room to change or to check your phone and the claimant agreed with that. He was asked whether he had worked there before and stated that he had from October to January with Assist and that he finished as there was no work. The claimant was then asked whether there was anyone he preferred to travel with, and he said there was a guy who was suspended as he was accused of theft, but I believe he is back (there was no exploration as to who this was) There was then a few words crossed out and then it was initialled by Mr Marshall as were all the amendments. Mr Marshall also crossed out any blank space, but he did not put a time on, he said usually such meetings would take place at the end of his shift say 17.45.

50. The claimant then said on the morning of the alleged theft AB who was also being "accused" was 'in the locker room with me, he asked me to hold his gloves whilst he got ready, I took the gloves and continued using my phone, I asked AB to hurry up so I could get my first tram and we left." He was asked did he lose vision of AB at any time and he said he did, did he remain static and he said he couldn't remember, he was asked have you a preferred coat you wear to work, he said "yes a black one", had he had any contact with AB since the incident "no". Mr Marshall said the alleged incident is that a mobile phone may have been taken, how does that make you feel, he replied "I feel angry as I didn't have any involvement in any mobile phone". Mr Marshall said having now reviewed the CCTV (therefore at that point they had looked at the CCTV) can you understand why you were placed under investigation, the claimant said "yes but I am not happy about it". He was asked what he wasn't happy about it and he said "just the whole process as I don't know what this was for". Mr Marshall said do you have anything to add and he said "I just wasn't aware and thought it was a normal day in work" .

51. The claimant said at the end of the meeting Mr Marshall had indicated he had done nothing wrong. However, the claimant had not mentioned this before at all and CM denied it . As we found the claimant an unreliable witness in respect of recall and as it would be unlikely on the balance of probabilities that CM would say this as he had no further role in the process so would not be able to say whether any further action would be taken we

find that he did not say this. CM said he passed the notes on, he believed to Joanne Murray, and he had no idea what happened next, although clearly no disciplinary hearing took place.

52. Therefore, we find this is exactly how this meeting took place on 1 November and that Ms Sonnenfeld if she was Heather was definitely not present as on the 1 November she was not on shift and therefore was not there. We find that Mr Marshall was doing his best and that this how he usually did his investigations, but this was not an investigation as we know it. It was simply an interview, nothing was followed up either with the claimant or others, there was no outcome save that for whatever reason there was no disciplinary hearing.

53. We were uncomfortable with the fact that in the re-examination of Ms Sonnenfeld and in the cross examination of Mr Marshall they both attempted to add facts into the matrix which had not been pleaded in the claim form or recorded in their witness statements. One of which was that where somebody had been accused of theft that the second respondent would never have them back, whatever the outcome of the investigation although no examples were provided , they did refer to the disclaimer referring to performance as evidence of this. This was an SR document and there was nothing to show the second respondent had required or approved it. Secondly it was said also during the proceedings in general although not pleaded that the first respondent knew it could not send back the claimant because he had previously been accused of theft and although the first respondent did not know where this information came from it was clearly recorded in Andrew Hyland and Joanne Murray's emails, although they did not mention any alleged policy.. However it would be inconsistent for the second respondent to expect the first respondent to undertake an investigation of someone they believed had previously been accused of theft if they had such a policy.

54. The claimant then contacted the respondent again on 4 November. On 4 November the claimant emailed the first respondent's helpline stating "Hi, I was put on suspension for no reason and I haven't been paid, I haven't heard from anyone for two weeks now, according to this government website I am to receive full pay during the investigatory period of my suspension or will have to report the conduct of the agency and (shop) for unlawful deduction of wages, I also want in writing the reason why I have been suspended". This was sent to Ewa Sonnenfeld to answer which she did on 6 November. She said "in relation to your suspension I would like to confirm you have not been suspended, your assignment has been ended whilst we look into the allegation of theft and this was also confirmed in your meeting on 21 October 2019, as per your flexi worker contract 20.1 "a company can cancel any assignment at any time without notice or liability, cancellation of an assignment is not a termination of employment, there is no pay while your assignment is ending and any given assignment is not subject to the same criteria as a suspension". Ms Sonnenfeld said she had made a mistake in referring to 21 October 2019 instead of 29 October 2019.

55. We accepted her evidence as there was no obvious reason why she would fabricate the date in the notes that we have relied on to establish that the

meeting took place on 29 October, there was no advantage to the respondent in doing so, neither did the claimant himself refer to any meeting on 21 October.

56. In the claimant's witness statement, he says that he was told for the first time on 29 October why he was suspended on 16 October, however according to ES's notes he told her this on 29 October advising that this is what Andy Hyland had told him. There was no mention of AB or any reference to 'friend' in the notes.

57. The claimant in his witness statement stated that at the meeting on 29 October Heather called AB his friend on numerous occasions, even though he corrected her by saying the colleague was not a friend, but she carried on to say this. Unfortunately, we have to find that this was not an accurate statement on behalf of the claimant, we believe the claimant may have elided this meeting not only with the meeting he had with Craig Marshall but with the telephone call he complained of on 31 October. On 31 October the claimant did not mention the meeting on 29 October at all even though he says the term friends was used in that meeting by 'Heather' when he complained about not being paid during his suspension and complained about the telephone call in an emailed headed up "racial discrimination". It is inexplicable why he would not do so as on the claimant's evidence by this stage 2 people had used the same expression even though he had told them not to do so. Again, we find the claimant has become confused about the different meetings and we find that the term was used in the phone call of 31 October as he clearly documents this almost contemporaneously.

58. The claimant alleged that Mr Marshall had told the claimant he was suspected of theft during the meeting on 29 October and he completely denied that he had attended a meeting on 1 November, he said he had been told not to return to the premises after 29 October . Again, we cannot accept this evidence as Ms Sonnenfeld's notes and Mr Marshall's are clear as to what was discussed, and it was the claimant who related that Mr Hyland told him there would have to be an investigation into alleged theft.

59. On 14 November the claimant and his sister who was trying to help him with this matter called the HR Department of the first respondent to ask what was happening, they were told to ring again the next day. It was understandable that they were anxious about this not least because since the 1 November, incomprehensively, the claimant had heard nothing at all about what was happening from the first respondent. They rang on 15 November and spoke to Mr Jay Bains and requested an investigation report, they explained to him the issues which he seemed unaware of and was told the matter would be looked into. It was Ms Akinfenwa's evidence to the tribunal (although not raised before in her witness statement) that Mr Bains had been friendly in this conversation but subsequently was not friendly. In addition, there was evidence that Mr Bains had had some involvement in this issue already as Joanne Murray refers to speaking to him about it in her email of 7 November. Mr Bains had to agree in cross examination that he was wrong when he said he knew nothing about it until these telephone calls.

60. In the second telephone call on 18 November the claimant and his sister stated that Mr Bains had told them the contract was terminated due to their suspicious behaviour i.e. the claimant and AB seen on CCTV . They alleged Mr Bains called AB the claimant's friend twice during the call and that he had stated that he had seen the CCTV and did not have to send it to the claimant with an investigation report.

61. In Ms Akinfenwa's witness statement she supported that Mr Bains had said the claimant had behaved suspiciously in the CCTV footage and that AB was referred to as his friend, while she said Mr Bains could not explain why the claimant's behaviour was considered suspicious she also said when asked he explained the claimant was seen interacting with a colleague on CCTV and walking together so they must be friends. Accordingly, on her own evidence he gave an explanation why the claimant might be described as a friend of AB at least.

62. Mr Bains could not remember the conversation in any detail, and he had not kept notes of it. He agreed that he had explained that the reason why the claimant's assignment had been ended was because the claimant's behaviour was considered suspicious as Ms Akinfenwa said, and that this had been a view originally taken by the second respondent who had identified the CCTV for the first respondent to consider . He did not believe he would have referred to the claimant and AB as friends,but as colleagues as that was his usually practice, that he believed the claimant and his sister had raised this as a complaint and he was explaining why someone might have considered that they were friends which was due to the way they interacted on the CCTV.

63. Mr Bains believed that the claimant had been advised the investigation had been concluded but that he was not dismissed by the first respondent but remained employed, just not on assignment to the second respondent. Mr Bains recalled explaining the situation regarding suspension as explained previously. However the claimant had not been told this before at all and the respondent had no evidence he had been told this.

64. Mr Bains said that once he had seen the CCTV footage he could see a view might have been formed that they were more than merely acquaintances. Ms Akinfenwa cross examined Mr Bains forensically regarding what constituted a friend and the conclusion of that was that there was nothing evident from the CCTV which would meet a normal social definition of friends, however, Mr Bains would still say that they were more than mere acquaintances from the CCTV. He also believed that it had been put to him by Ms Akinfenwa that the claimant was acting suspiciously and assumed the claimant was guilty and he tried to explain that that was due to how they had been acting in the footage that they were seen to communicate with each other and one of them appeared to be going through bags or coats and that they had moved into the locker room which allegedly was a blind spot. He had asked her to put something in writing to request a report. but this never happened. Accordingly, he did not send anything to the claimant, however no report was ever completed as is evident from the bundle.

65. On 17 November 2019 Ms Murray had sent an email to the second respondent including a leavers list. There were nine names on this, the claimant was at the top and recorded that he along with all the others had left as of 16 November. We did not hear from Joanne Murray, the speculation was that following Mr Marshall's interview with the claimant she made a decision that the claimant would not go back to the second respondent, or that because she was still under the impression that the claimant had been accused of theft before he should not go back to the second respondent. However, this had never been argued in the pleadings and the claimant was never asked about it by Mr Marshall and if that was correct why would the first respondent bother having an investigatory meeting with the claimant.? Accordingly, whether it was considered decision or a mistake the decision was made to put the claimant on the leavers list as of 16 November.

66. As far as the second respondent was concerned there could have been any reason why he was on that leavers list, it could be he didn't want to go back, it could be because the first respondent had decided he shouldn't go back, whether generally or as a result of their investigation.

CCTV

67. We viewed the CCTV a number of times. In the panel's view it was understandable that the behaviour was viewed as suspicious and that they were friends because of the following matters - that there was a belief that the mobile phone had been taken from a coat in the area where AB was at least touching the coats if not patting them down, that the claimant appeared to be waiting for him, that the claimant appeared to be handed something(although he said it was gloves which it may well have been of course, it was not possible to tell what this was at the time),that there was some interaction between them, that there was no explanation as to why the claimant was waiting for AB if they did not travel home together, there was no explanation for the activity the claimant undertook with AB, they did appear to be communicating and clearly if he held his gloves and said "hurry up I need to get my tram" there was an element of communication which would not take place with a colleague who one had no knowledge of the claimant also agreed they took their breaks together; that it was believed they moved into an area where there was no CCTV.

68. So, it is our view that in fact there was sufficient evidence on the face of it given the positioning of the coat to isolate the two individuals, particularly as something was handed to the claimant. The claimant had an innocent explanation for this and possibly that may have been corroborated by AB if he had been interviewed however AB never turned up for any interview.

First respondent's reply to further particulars request

69. On 4 December 2020 in response to further and better particulars which coincidentally had been sent by myself after holding a Preliminary Hearing with the first respondent they answered the questions posed. The first question was:-

1.1.1. does the first respondent say that the second respondent terminated the claimant's assignment completely or did the second respondent indicate the assignment was to be suspended pending the first respondent's investigation, if neither please set out what was communicated.

Answer: The first respondent understood the instruction from the second respondent to be that the claimant should be removed from this assignment pending an investigation taking place. The respondent did not receive any indication that the assignment was merely suspended, and it was clear to the first respondent that the claimant would not be welcome back, irrespective of the outcome of its investigation.

1.1.2 Did the first respondent understand that the attention was to reinstate the claimant if the investigation exonerated him, if not what did they understand was the position.

Answer: As confirmed above the first respondent understood that the claimant's removal from the assignment was intended to be permanent and that he would not be welcome back irrespective of the outcome of the investigation.

1.1.3 How was any suspension or terminating communicated? When and by whom?

Answer: The claimant received instructions to leave the site by the second respondents security office on 15 October, the date of the incident (dates are wrong). The second respondent's security office made contact on 15 October 2019 with one of the first respondent's Team Leaders Andrew Hyland who was no longer employed by the first respondent. The matter was then passed to the first respondent's Shift Managers so that they could investigate the incident. During the investigation meeting with the claimant on 29 October 2019 the claimant first raised the issue of suspension to the first respondent and the first respondent confirmed that the claimant was not under suspension and his assignment had been terminated.

1.1.4 Does the first respondent say that the termination was by the non-renewal of the assignment. If so, how was that communicated.

Answer: They didn't argue that.

1.1.5 Did the first respondent complete their investigation? If not, why not?

Answer: The first respondent did complete its investigation; the outcome of the investigation was that there was insufficient evidence to establish whether the claimant has actually stolen anything although his behaviour as evidenced in the CCTV footage was found to be suspicious.

1.1.6 Did the first respondent send to the second respondent a list of leavers with the claimant's name on it?

Answer: The first respondent accepts that the claimant's name was on the list of leavers sent to the second respondent on 17 November 2019, a month after the incident occurred. A list of leavers is regularly sent to the second respondent to detail workers that are no longer assigned with the second respondent. This process is undertaken to ensure that the second respondent's security team can block access to the site accordingly.

1.1.7 Did the first respondent offer the claimant further assignments, if so, when.

Answer: The first respondent did not offer the claimant any further assignment where work seekers are encouraged to contact the first respondent to confirm their availability to work the claimant did not contact the first respondent to confirm his availability.

1.1.8 Did the claimant refuse those assignments and if so how did the claimant refuse and did the claimant give reasons for doing so. If so, please say what those reasons were.

Answer: The claimant did not refuse any assignments as he did not confirm his availability to work.

The second respondent relies on the answer to the first question to establish the termination of the assignment was undertaken by the first respondent based on an assumption 'that he would not be welcomed back'..

Decision to Terminate

70. There were a number of decisions taken in this case which we will deal with in our conclusions:-

(i) Was the second respondent's initial decision to remove the claimant and AB's access to site whilst the first respondent investigated a termination of the assignment?.

(ii) If the first respondent terminated the claimant's assignment when did the first respondent end the claimant's assignment on or around 16 October? Or

(iii) was it when the first respondent sent out the leavers list on 17 November.

Summary of the parties' closing submissions

Both counsel presented very detailed written closing submissions therefore below is a summary only.

Second respondent's submissions

71. The only decision R2 made was for the claimant to be removed from site to allow for an investigation to take place. The investigation was undertaken by R1. R1 made the decision to terminate the assignment. The only R1 had the power under Clause 20.1 to terminate the assignment in accordance with its contract with the claimant.

72. Respondent 2 submitted that R1 cancelled the claimant's assignment pending investigation and terminated it by virtue of the leavers list.

73. The second respondent referred to the requirement to consider the conscious and subconscious mental processes as recognised in **Nagaryan -v- London Regional Transport 1999 HL**. It also referred to **IPC Media Limited -v- Millar 2013, Civis (UK) Limited -v- Reynolds 2015 Court of Appeal, Owen and Briggs -v- James 2082 Court of Appeal** and cases referred to burden of proof **Madarasesy -v- Numura International Plc 2007 Court of Appeal, Appia -v- Governing Body of Bishop Douglas Roman Catholic School 2007 Court of Appeal, Investec Henderson Crossthwaite Securities 2003 EAT and Igen Limited and Others -v- Wong and other cases 2005 Court of Appeal and Hewage -v- Grampian Health Core 2012 Supreme Court.**

74. They rely on the following matters to establish that R2 did not make the decision to terminate the assignment.

(i) R1 clearly took the decision and communicated to the claimant via J Bains. In claimant's evidence paragraph 22 and his sister at paragraph 6 this was agreed by Mr Bains around 18 November.

(ii) That Jo Murray was in discussion with the R1's HR department having already spoken to J Bains. It referred to processing AB as a leaver which supports the fact that R1 made the decision on terminating assignments, and accordingly on the balance of probabilities it is plausible that R1 did exactly the same thing vis a vis the claimant. It was agreed by ES that shift leaders made such decisions and processed them as leavers.

(iii) That the respondent did process the claimant as a leaver which is consistent with what J Bains told the claimant and his sister the next day.

(iv) The leavers list is the first respondents document.

(v) Jo Murray has not given evidence regarding any other explanation.

75. There is no written evidence that suggests R2 made any decision or instructed R1 to do anything.

76. Also, in the answer to the further and better particulars R1 stated that "it was clear to the first respondent that the claimant would not be welcome back, irrespective of the outcome of the investigation. " This establishes that the first respondent made an assumption without any other input from R2.

77. There was never any feedback to R2 about the outcome of an investigation, therefore it is clear R2 played no part in the decision making.

78. It seems clear Jo Murray made the decision on termination as she had with AB

79. The fact that R1 believed R2 wouldn't let the claimant back on site does not change the fact that it was R1's decision. This was not pleaded in any event and was not in the witness statements.

80. No information was passed onto which it could make a decision anyway.

81. The claimant chose not to bring the claim initially against R2 because he had been told consistently by R1 that R2 had nothing to do with it, this was reported at the case management hearing before Judge Feeney.

82. There was no communication at any time for R2 that the claimant's engagement had been terminated. In addition, R2 relied on R1's changing inconsistent positions, one that ES did the investigation even after the ET3 had been amended on at least two occasions and after witness statements had been exchanged three months prior to the hearing. R1's position lacked credibility.

83. Disclosure was late even though this claim had been continuing for nearly two years. There was no witness evidence or documentary evidence supporting an instruction had been given by R2 to terminate the assignment. There was no evidence from R1's witnesses regarding this either, there was no reliable record keeping. A relevant witness Jo Murray neither tendered a witness statement nor gave evidence.

84. The HR officer who was more involved in this SR was not called to give evidence. That there was no report on the investigation, that the respondents witness J Bains lacked credibility as he said he was only aware of this once it had been communicated the assignment had ended, however, Jo Murray's email of 7 November shows that she had discussed the case with him in early November.

85. In respect of Ewa Sonnenfeld she tried to suggest in completely new evidence that R2 would not take people back, whereas before she had agreed that the leavers list was a decision to terminate. Again, the respondent's case had shifted.

86. The second respondent's witness was credible, and her position was that just because someone was removed from site this did not equate to terminating

the assignment. The assignment was terminated when the leavers list was produced, and whatever the assumptions one made about what R2 did or did not want these were simply assumptions and although it was not part of the case R2 was justified in isolating the two workers as their behaviour on the CCTV was suspicious.

First Respondent's Submissions

87. That the claimant's assignment ended when R2 removed him from the premises and revoked his access pass. That errors in the evidence i.e. identifying ES as the person doing the investigation were unfortunate mistakes and there was nothing inferences to be drawn from it.

88. Regarding the claimant's evidence the claimant's evidence was extremely inconsistent and his position was not clear. In relation to the use of the word "friend" he alleged that three people use it, ES, CM and JB to describe him and AB. On the balance of probabilities this was simply not reasonable, it was only put in cross examination to Mr Bains that he used it once as a slip of the tongue. The claimant had no actual comparator and there was nothing from which inferences could be drawn regarding a hypothetical comparator, the claimant presented nothing more to establish that race discrimination had taken place.

89. In relation to issue B, given that the notes signed by both parties did not refer to the ES using the word friend and given that ES's evidence was credible it is simply not correct that ES used the word friend, there was no reference to any other worker in her interview which is reflected in the notes.

90. The claimant's evidence is further undermined by the allegation that someone used the word friend on 31 October, however this was not included in the claimant's witness statement and also it was identified as a woman but ES was not working that day so it could not be ES.

91. Issue (c) JB referring to him as a friend of the worker It is the claimant and his sister's evidence is unreliable on the use of the word friend as they appear to have accused a number of people of using this word starting with ES on 29 October, the anonymous woman on the 31 October, Mr Marshall on 1 November and then Mr Bains later on in November. JB's evidence was that he was just trying to explain why it might be concluded that AB and the claimant were friends rather than actually than using the word itself.

92. Issue (d). Mr Bains described the claimant's behaviour as suspicious. Mr Bains accepted that he said this.

93. Whilst suspicious could be detrimental it is not accepted the word friend could be detrimental.

94. The words were used because the first respondent had been told by the second respondent that the claimant was under an allegation of current and previous theft, that the behaviour on CCTV was consistent with potentially having been the theft and the behaviour on the CCTV showed they were

linked to one another. There was no evidence that had all those facts applied to two white males that different language would have been used.

95. It was suggested in evidence that Mr Bains' attitude changed in the second conversation however supports the fact that there was no race discrimination as Mr Bains was aware of the salient facts in the first conversation, by the second conversation he had seen the CCTV but he accepted that he did think from having seen the CCTV that they were acting suspiciously. Accordingly, any difference in response was due to having viewed the CCTV and nothing to suggest he would have taken a different view had the two people involved been white.

Issue A – The termination of the assignment

96. R1 believed that R2 had suspended the assignment when they referred the workers to R1 and revoked their security access. The leavers list did not have any contractual status, it is up to JD who they have back on site. The clear reason why R1 acted as it did was because the claimant was not allowed on site, it was not connected with the claimant's race.

97. R1 also believed that there had been a previous theft, see the emails from Andrew Hammond and Joanne Murray, it is likely this information came from JD.

98. In respect of whether any termination was because of race, accordingly the factors that were relevant to any determination by the first respondent were that:-

> He had been escorted off site with another male for alleged theft, that he had previously been dismissed from theft while working for another agency, that the CCTV footage showed suspicious behaviour.
>
> There was nothing to suggest anyone white would have been treated differently. The use of the word "friend" has not been established; or that if it was used that it would not have been used if the workers were two white males or a black and a white male.

Claimant's submissions

99. Being not legally represented the claimant' submissions were sparse, the claimant submitted that the use of the word friends and suspicious was based on the subconscious motivation of stereotypical assumptions that two black males were more likely to be working in collusion, to be friends, to be acting suspiciously and more likely to commit a criminal offence. The claimant who did not know who had terminated his assignment would leave that to the Tribunal but the use of the word's friends and suspicious without proper cause did show subconscious bias.

100. In respect of inferences we discussed with the claimant's representative what could be used, the lack of notes from the first respondent, the lack of information regarding their process, the use as identified above of the word

friend and suspicious, the lack of any report setting out what had happened and the lack of communication from R1.

The Law

101. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (1) A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others.

102. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a court could decide in the absence of any other explanation that a person (A) contravened the provision concerned the court must hold that the contravention occurred.

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

103. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation … they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that' if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.' At the same time, he also said' the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to "let form rule over substance". ' this is now called 'the reason why' test as shorthand. This was also confirmed by the EAT and the CA in the case of **London Borough of Islington vs Ladele (2009) EAT** citing **Brown vs Croydon LBC (2001) CA**

104. So, if the matter is not clear on the reason why test a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

105. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee as well

qualified as a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.

106. The question was asked in **Madarassy v Nomura International Plc [2007] CA,** is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that "The statutory language seems to us plain. It is for the complainant to prove the facts from which the Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act … The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.

107. In the recent case of **Efobi v Royal Mail [2017] EAT** it was suggested that there was no burden on the claimant to establish a prima facie case before looking to the respondent's explanation, and that the Tribunal was required to look at all the facts of the case and draw its own conclusions as to whether the burden had shifted. However, in another recent case **Ayodele vs Citylink Ltd (2018) Court of Appeal** decided that the correct position was as stated in **Madarassy**.

108. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided then discrimination would follow.

109. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this, and it not just be an assertion, and likewise with unexplained unreasonable conduct.

110. Inference can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Conclusions

111. In relation to the issues outlined above our conclusions are as follows.

112. **Issue (a)**

(a) The claimant's assignment came to an end between 16 and 17 October at the behest of the first respondent as they are the only organisation who had the power to bring that assignment to an end. There was no instruction from the second respondent and the emails show that the second respondent simply referred the claimant to the first respondent for investigation. There was no evidence or pleadings directly that this meant in practice that the claimant would not be going back to the second respondent. No emails from the second respondent said this to the first respondent, no evidence in chief said this, no pleadings said this and there was no documentation to support that the first respondent made this decision because the second respondent would not have the claimant back. In respect of the argument that the claimant would not be allowed back because he had been accused of stealing before, again, this was a matter not in the pleadings and was referred to only in two emails from individuals we did not hear from, the claimant's primary evidence was that this was completely false and that he had been let go by Assist from JD Sports previously because the work had run out.

(b) Whilst the contract used the word cancel it made clear it referred to the assignment and that the employment was not terminated accordingly we find it was a termination of the assignment. We do not think the word cancel means anything different than termination in this context. The assignment might have been reinstated but at the point the investigation process began there was a termination.

(c) If we are wrong on this then we find that by including the claimant on the leavers list on 17 November the claimant's assignment with the second respondent was brought to an end by the first respondent also.

(d) We have found that the first respondent terminated the claimant's assignment with the second respondent, we then have to examine whether or not this was less favourable treatment – clearly it was but was a less favourable treatment because of the claimant's race. We considered what we might draw an inference from and the surrounding circumstances were that the claimant was interviewed but there was no disciplinary hearing, there was no overt termination of the claimant's employment and there was no other action taken by the first respondent save to add the claimant to the leavers list, we had no evidence regarding this matter. However, it is strictly not relevant as we found the assignment was terminated on 16 or 17 October for the purposes of undertaking an investigation. The reason why was to

conduct an investigation. If the two workers had been white or white and black the first respondents would have taken exactly the same action as with the claimant. The decision that the activity was suspicious was made by the second respondent and we have found there was enough evidence on the CCTV to justify an investigation of the claimant and AB.

(e) It would have been clearer if we could have had an explanation as to why if the matter was not progressed to a disciplinary hearing the claimant was still added to the leavers list . Was that gap in the evidence a matter from which we could draw an inference? We decided not as the decision to terminate the assignment was on 16/17 October and that was the claim made, accordingly events after this were not strictly relevant.

(f) If the termination took place in relation to the leavers list and not earlier as we have found there was no explanation from any witness or in the pleadings why the claimant had been put on the leavers list accordingly the first respondent could not rely in respect of that on the reason why test and the Tribunal would have considered the two stage test. There was no actual evidence regarding a comparator to assist the claimant in surmounting the burden of proof. However there were matters from which an inference could be drawn – the failure to explain the process to the claimant, the failure to put anything in writing to him about the investigation, the inadequacy of the investigation, failure to explain why the claimant was on the leavers list, the failure to call Ms Murray when she still worked for the respondent, the attempt to bring in evidence 'by the back door' regarding an assertion that R2 would not have taken back anyone accused of theft even if R1 had exonerated them. We have not made a decision in respect of this as we found the contract was terminated earlier but it is clear there would have been a real argument to be had at this stage

Regarding issue (b) we find that we have found there was a meeting on 29 October 2020 with Ms Sonnenfeld but that she did not refer to him as the friend of another black worker as she did not know these details at the time and there is no record of them in the minute of the meeting. We believe the claimant has mixed this meeting up with the telephone call he refers to in his email of 31 October.

Regarding (c) whether Mr Bains in the phone call on or around 18 November referred to the clamant as a friend of AB we find that Mr Bains used this term reflecting back the claimant's complaint. We find this because the claimant had complained about this already on 31 October and we find that references to friends developed from that allegation, we do not question the veracity of that original allegation. We also find this because ,as exemplified by JM's email of 7 November it was customary to use the term colleagues in the first respondent's business. If we are wrong on this and Mr Bains did refer the claimant as a friend on the basis of his own decision rather than reflecting back what the claimant had said or in the context of explaining why an issue had arisen we find that this was not race discrimination as it was a

reasonable assumption to make on the basis of the CCTV. We have given many reasons above why the claimant might have been regarded as a friend of AB. In our view someone can be a work friend and that is not inconsistent with not being social friends outside work.

Regarding issue (d) In respect of Mr Bains describing the claimant's behaviour as suspicious we find that he did not do so on 15 November but that he did describe the behaviour as suspicious on 18 November 2019 when explaining why the claimant was no longer on an assignment with the second respondent. Again, if we are wrong on this and Mr Bains says suspicious of his own volition and of his own view on 18 November we find this was as a result of the CCTV which we unanimously found there was sufficient in that CCTV clip to raise suspicions although this is far from saying that the claimant was guilty of anything at all. Accordingly, as it was a reasonable description of the CCTV and the action within that therefore that characterisation was not race discrimination.

113. The reasons for this are that AB was behaving suspiciously around the coat where the mobile phone disappeared from, was communicating with the claimant during the CCTV clip and therefore it was not unreasonable for those viewing the CCTV clip as assuming to assume that there was some activity that was going on that was joint. There was nothing to suggest that had AB been white he would not have been regarded as acting suspiciously. There were a number of other people in the room at the time but there was no communication between AB and other people to the same extent as with the claimant or at all.

114. We pressed the claimant on what we could draw an inference from but in the absence of any assistance we suggested a number of matters such as the fact that Ms Murray was not called when Mr Marshall advised that she still worked for the respondent, the lack of any paper trail regarding the decision not to hold a disciplinary hearing **.** However at the end of the day we have decided not to draw any inferences as the respondent has satisfied the reason why test in relation to the claims.

115. Accordingly, we find that the claimant's claims of race discrimination fail and are dismissed.

116. We note that had the claimant complained about the telephone call of 31 October or if the assignment was terminated by the leavers list the claim may have succeeded in the absence of any explanation from the respondent regarding those events. The respondent must surely have been able to identify who called the claimant to arrange the interview on 1 November and as Joanne Murray still works for the respondent she could have explained a number of matters we have described as gaps in the evidence. There was an inexplicable inability to explain what happened by the first respondent that was first evident at the PHCM I conducted on in October 2020 which resulted in my formulation of a number of questions to the first respondent's solicitors, which is an unusual event partly explained by the fact the claimant was unrepresented. There was a failure too to take notes which proved unhelpful to the first respondent and we were particularly surprised Mr Bains did not

have any written notes of his conversations with the claimant and his sister, surely he must have been aware a possible grievance or claim could ensue where race discrimination was being alleged and how serious that could be.

117. We have no doubt that the situation was dealt with badly with the claimant not being advised of what was happening and what the next steps would be, the lack of a clear audit trail when decisions were made and the lack of notes, the lack of clarity over who made the decision to dismiss or even who did the investigation was extremely surprising.

118. The claimant did not assist when he failed to reply to the email asking for more details of the person he spoke to on 31 October 2020. However as that related to a complaint not pursued as a claim it is not as egregious as the first respondent's failings.

Employment Judge Feeney
21 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
1 February 2022

FOR THE TRIBUNAL OFFICE