EMPLOYMENT TRIBUNALS

Claimant: Mr T Otokiti

Respondent: Controlls Solution Group

Heard at: Manchester **On:** 6, 7 and 8 September 2021

Before: Employment Judge Ainscough
Mr I Frame
Ms H Fletcher

REPRESENTATION:

Claimant: In person
Respondent: Mrs Peckham (Advocate)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal brought in accordance with section 111 of the Employment Rights Act 1996 is unsuccessful and is dismissed.

2. The claims of race discrimination brought in accordance with section 39 of the Equality Act 2010 is unsuccessful and is dismissed.

REASONS

Introduction

1. The respondent provides security services and to Manchester United Football Club at various sites owned by the club and also provides security for the individuals that work for that club.

2. The structure of the respondent's business is such that it is made up of casual and permanent staff. There are approximately 70 full time staff that cover the sites which includes the training ground and the club and then on a match day the respondent can have up to 800 staff on a casual basis to assist with the security at the matches.

3. The claimant was a member of casual staff from 2012 until 2 April 2017. On 2 April 2017 the claimant became a permanent member of staff at the Carrington site and by 2018 he had been promoted to a night-time security supervisor.

4. The claimant brought claims of unfair dismissal and race discrimination following his termination of employment on 1 July 2019.

Evidence

5. The Tribunal heard evidence from Mr Shea, the respondent's operations manager who was responsible for the grievance and disciplinary procedure; Mr Buckley the respondent's CCTV operative, Mr Grant a security supervisor, Mr Rumney, the respondent's managing director who was responsible for hearing the claimant's grievance appeal and the claimant.

6. The parties had agreed a bundle of 156 pages.

Issues

7. The issues were agreed at a preliminary hearing before my colleague Employment Judge Tom Ryan on 5 December 2019 as follows:

Unfair dismissal

a. Was the claimant dismissed? This is admitted.

b. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct alleged against the claimant and that this was the reason for dismissal.

c. Did the respondent have reasonable grounds for that belief?

d. Did the respondent form that belief having carried out a reasonable investigation?

e. Was the decision to dismiss within the reasonable range of responses for a reasonable employer?

f. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?

g. Can the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event and at what point? Alternatively, is there a chance the claimant would have been fairly dismissed?

Section 13: Direct discrimination because of race

h. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

(i) Nathan Buckley deciding to observe the claimant by use of CCTV;

(ii) Nathan Buckley giving a statement to the employer about the claimant's behaviour;

(iii) Callum Grant giving a statement to the employer about his observation of the claimant;

(iv) the managers failing properly to investigate the claimant's grievance about the behaviour of his colleagues;

(v) the dismissal of the claimant?

i. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated a hypothetical comparator?

j. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic of race?

k. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 26: Harassment related to race

l. Did the respondent engage in unwanted conduct as set out in paragraph 5.1.1 to 5.1.4 above?

m. Was the conduct related to the claimant's protected characteristic of race?

n. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

o. If not, did the conduct have the effect of violating the claimant's dignity or creating such an environment for the claimant, having regard to: the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Remedies

p. If the claimant succeeds, in whole or part, the Tribunal will consider remedy.

q. This may include:

(i) reinstatement, re-engagement or compensation for unfair dismissal;

(ii) a declaration in respect of any unlawful discrimination, recommendations and/or compensation for injury to feelings and other loss and/or the award of interest.

r. In respect of complaints of discrimination, the attention of the parties is drawn to the Presidential Guidance on awards for injury to feelings and psychiatric injury available at this link:

https://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

8. Prior to the start of the evidence the claimant confirmed the identity of the actual comparators for the purpose of section 23 of the Equality Act 2010 as Scott Mungis and Mark Fairhurst.

Relevant Findings of Fact

Claimant's employment

9. The claimant's contract of employment was accompanied by a handbook which included disciplinary policy which set out various sanctions and a right of appeal. The disciplinary policy listed examples of gross misconduct which included a refusal to carry out reasonable duties or instructions and the possibility of bringing the company into disrepute.

10. The respondent also operated a grievance procedure which was also set out in the handbook that accompanied the claimant's contract.

11. The handbook informs employees that when employed by the respondent there will be CCTV in all areas and they should expect to be visible on the monitoring system to ensure compliance with policies and procedures.

12. Employees are also aware of the availability of food and drink facilities but also that any customer of the respondent is not obliged to make site services available to the employees. As a result, the respondent provides break rooms for staff.

13. The respondent operates an equal opportunities and harassment policy.

Claimant's employment at the Carrington site

14. During the claimant's employment at the Carrington site, his colleague, Mr Jummer, made a complaint about a night-time supervisor, Mr Hambleton. The essence of that complaint was that Mr Hambleton had been racist towards Mr Jummer.

15. The claimant told Mr Shea about concerns he had with Mr Hambleton but didn't make a formal complaint. Mr Hambleton's employment was subsequently terminated.

16. Shortly thereafter, Mr Grant was asked to monitor Mr Jummer due to concerns about Mr Jummer's performance. Following these observations Mr Jummer was also dismissed.

17. Prior to 9 May 2019, Mr Shea described the claimant as his "go to guy".

18. On 9 May 2019 the claimant was invited to meet with Mr Shea to discuss an allegation that he had neglected his duty by watching television in a coach's office. The claimant was also informed that his approach to the Manchester United member of staff who had made the allegation could bring the company into disrepute.

19. On 10 May 2019 the claimant was informed that he was not allowed to watch television in that area and that in light of his approach to the member of Manchester United staff, Manchester United didn't want the claimant working on the Carrington site.

20. By a letter of 16 May 2019 Mr Shea confirmed to the claimant that his new place of work from 12 May 2019 would be the Old Trafford Ground.

21. On 23 May 2019 Mr Shea informed the claimant that he would receive a first and final formal warning for serious misconduct which would be on his record for twelve months.

22. The claimant was therefore aware that a repeat of this conduct or any other misconduct in the next twelve months could lead to his dismissal. The claimant was given a right of appeal but did not exercise that right.

Claimant's employment at the Old Trafford site

23. The Old Trafford site has a North, East, West and South Stand. The East stand is known as the "Tower of Power" as it comprises of the directors' offices and the executive boxes.

24. At the time the claimant moved to the Old Trafford site, Mr Mungis, the claimant's colleague, was allowed to use a hospitality box in the North Stand to manage a medical condition when on site.

25. The North Stand has a thoroughfare and allows access to all areas of the stadium. The claimant was unaware of Mr Mungis medical condition until he attended a grievance hearing on 20 June 2019.

26. On the night of 31 May 2019, the claimant was working at Old Trafford. During his shift, the claimant went into one of the executive boxes in the East stand and watched television.

27. At that time the claimant was being monitored on the CCTV by Nathan Buckley. Nathan Buckley asked a cleaner, Miss Dutton, who worked for Manchester United, to check the box in the East stand. Miss Dutton found the claimant in the box and asked him to leave.

28. Following this discovery Mr Buckley continued to monitor the claimant over various shifts. On 8 June 2019 Miss Dutton submitted a witness statement setting out what had happened on 31 May 2019. On 10 June 2019 Mr Grant submitted a statement setting out what he had observed on Friday 7 June 2019 and Saturday 8 June 2019. Mr Grant also submitted a statement from Mr Buckley about what he too had observed Friday 7 June 2019 and Saturday 8 June 2019.

Disciplinary and Grievance procedure

29. On 10 June 2019 Mr Martin, the Assistant Operations Director asked the claimant to join him in a meeting. The claimant was subsequently informed that he was attending an investigation meeting as provided for in the respondent's disciplinary procedure.

30. When the claimant was asked about his presence in the executive box in the East stand on 31 May 2019, he admitted he should have known better and apologised. The claimant was also asked about his attendance in the control room, the duration of time away from the office and whether he had fallen asleep on duty. The claimant was suspended following that meeting.

31. On 11 June 2019 the claimant received a letter setting out the allegations of a serious neglect of duty by watching television in a restricted area whilst not on a permitted break and because he had allegedly been seen sleeping in the control room on 7/8 June 2019. The letter also confirmed the claimant had been suspended.

32. On the same date the claimant was invited to a disciplinary hearing on 13 June 2019 chaired by Mr Paul Rumney. The claimant was provided with three witness statements from Miss Dutton, Mr Grant and Mr Buckley.

33. On 12 June 2019 the claimant submitted a grievance. The claimant contended that he had been subject to a witch hunt and race discrimination. The claimant identified Mr Mungis as a comparator because he saw Mr Mungis watching television in the North stand hospitality box. The claimant also disclosed his medical condition of Sleep Apnoea. At the end of the grievance document the claimant informed the respondent of his resignation and told the respondent he was contacting ACAS to take things further.

34. On 13 June 2019 the claimant did not attend the disciplinary hearing. Mr Shea sent the claimant a letter and asked him to reconsider his resignation and was offered the opportunity to attend a grievance hearing on 20 June 2019.

35. The claimant attended the grievance hearing on 20 June 2019. During the grievance hearing the claimant stated that Mr Hambleton was the cause of the treatment and the reason the claimant had been subject to race discrimination. It was the claimant's belief that Mr Hambleton and Mr Grant were friends and Mr Grant was exacting revenge on the claimant for his part in the termination of Mr Hambleton's employment.

36. The claimant reiterated that Mr Mungis had been treated more favourably and explained his own medical condition. Following the grievance hearing the claimant retracted his resignation.

37. On 24 June 2019 Mr Shea provided an outcome to the grievance. Mr Shea took the view that the disciplinary procedure was valid because the claimant had admitted the incidents. Mr Shea determined that the claimant should have spoken to Mr Grant about the issues that Mr Grant may have had with the claimant. Mr Shea accepted Nathan Buckley's statement because the claimant has admitted he fell asleep in the control room and that Mr Buckley's monitoring of the claimant was ok

because Mr Buckley was concerned about the claimant's whereabouts. Mr Shea determined that there was no racial element to the allegations made about the claimant.

38. On 25 June 2019 the claimant received an invite to a disciplinary hearing to be chaired by Mr Shea on 27 June 2019. On the same date the claimant appealed his grievance and in so doing contended that he had been subject to race discrimination, that Mr Mungis had been treated more favourably and that Mr Buckley was wrong to monitor him. The claimant also made reference to submitting an application to the Employment Tribunal.

Claimant's dismissal

39. On 27 June 2019 the claimant attended the disciplinary hearing. Mr Shea made it clear that he was not there to discuss the grievance.

40. During the hearing the claimant admitted to falling asleep in the control room as a result of his Sleep Apnea, he also denied that he knew the East stand was a restricted area and made reference to Mr Mungis as the comparator. The claimant reiterated that he had been set up and that he was being subject to race discrimination.

41. During the hearing the issue of Mr Hambleton was discussed, and Mr Shea attempted to justify the CCTV monitoring of the claimant. Mr Shea told the claimant that the incident in the East stand was very similar to that for which he had previously received a written warning at the Carrington site.

42. On 28 June 2019 Mr Shea sent a dismissal letter to the claimant. The letter was received by the claimant on 1 July 2019. The claimant was dismissed without notice for entering a box in the East stand and watching television on duty. The letter gave the claimant details of how to appeal.

43. On the same day the claimant received an invite to the grievance appeal to be chaired by Mr Rumney and to take place on 2 July 2019. The claimant did not attend the grievance appeal hearing.

Relevant Legal Principles

44. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

45. The primary provision is section 98 which, so far as relevant, provides as follows:

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

> **(2) A reason falls within this sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> > **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> >
> > **(b) shall be determined in accordance with equity and the substantial merits of the case".**

46. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

47. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal.

48. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

49. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

50. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

<u>Discrimination</u>

51. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**

> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

52. Harassment during employment is prohibited by section 40(1)(a).

53. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

Direct Discrimination

54. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(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".**

55. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

56. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

57. That case endorsed the approach taken by the House of Lords in **Nagarajan v London Reginal Transport (1999) IRLR 572**. In **Nagarajan** the House of Lords determined that a respondent may treat a claimant less favourably as a result of a subconscious intention and commented:

> "**All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover we do not always recognise our own prejudice. Many people are unable or unwilling to admit even to themselves that actions of theirs may be (racially) motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's (race). After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not (race) was the reason why he acted as he did."**

Harassment

58. The definition of harassment appears in section 26 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are …race".

Code of Practice

59. The Code of Practice on Employment issued by the Equality and Human Rights Commission on 6 April 2011, provides a detailed explanation of the legislation. The Tribunal must take into account any part of the code that is relevant to the issues in this case. In particular the Tribunal has considered:

(a) paragraphs 3.11 – 3.16 – "because of a protected characteristic".

(b) paragraphs 7.6 – 7.11 – "harassment related to a protected characteristic".

Burden of Proof

60. The burden of proof provision appears in section 136 and provides as follows:

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

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

61. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ commented:

"In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in Igen v Wong:

"28…it is for the complainant to prove facts from which…the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination."

62. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination.

63. In the case of **Qureshi v Victoria University of Manchester and another (2001) ICR 863** the Employment Appeals Tribunal warned against a Tribunal looking at a claim in a piecemeal fashion and commented:

> **"It was not however necessary for the Tribunal to ask itself in relation to each incident or item whether it was itself explicable on racial grounds' or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on 'racial grounds."**

Submissions

Respondent's submissions

64. The respondent submitted that because the claimant admitted misconduct, similar to that which had occurred previously, dismissal was within the range of reasonable responses.

65. The respondent maintained that the claimant was not subject to less favourable treatment but rather treated more favourably following the incident at Carrington.

66. The respondent acknowledged that the claimant's behaviour was not gross misconduct but following the Carrington incident, both incidents combined, did amount to gross misconduct and the respondent was entitled to dismiss.

67. The respondent disputed that the claimant had identified an appropriate comparator for the purposes of the race discrimination claim. It was submitted that the claimant had not met the first stage of the burden of proof and the race discrimination claim should fail.

68. The respondent maintained that the claimant had been dismissed because of two similar acts of misconduct not because of his ethnicity.

69. The respondent submitted that monitoring of the claimant by CCTV was justified and not harassment related to race. The statements that followed this observation, the respondent submitted, were also similarly justified.

Claimant's submissions

70. The claimant submitted that he had been treated unfairly by the respondent because the respondent failed to properly investigate the alleged misconduct. The claimant maintained he was on a break and entitled to sit down.

71. The claimant contended other colleagues committed misconduct but were not monitored on CCTV. The claimant disputed he had put respondent's contract with Manchester United in jeopardy.

72. The claimant submitted that he was subject of a witch hunt because the witnesses had colluded over their evidence. The claimant complained the collusion was because of his ethnicity and the respondent's failure to investigate his grievance was further evidence of this.

73. The claimant maintained that the use of the box was not serious as it occurred off season in the early hours of the morning.

Discussion and Conclusions

Unfair Dismissal

74. The claimant was dismissed on 1 July 2019 on receipt of the dismissal letter. The reason for the claimant's dismissal was conduct.

Reasonableness of dismissal

75. The Tribunal considered the case of **Burchell** to establish whether the claimant's dismissal was reasonable in all the circumstances and within the range of reasonable responses.

76. Mr Buckley contended that the claimant was neglecting his duties and therefore he was justified in monitoring the claimant's whereabouts. Following the discovery of the claimant in the East stand, Mr Buckley continued to monitor the claimant. On 8 June 2019 Miss Dutton had submitted her statement and this was followed by a statement from Mr Buckley and Mr Grant giving an account of what they had witnessed on 7 and 8 June 2019.

77. By 10 June 2019 the claimant had been asked to attend an investigation meeting and admitted that he had been in the box watching the television. The Tribunal determines therefore, that there was a reasonable investigation.

78. The Tribunal determines that any reasonable person would know that the East stand, was a restricted area in light of the fact that it was known as the "Tower of Power" because it contained the Directors' offices and the Executive boxes. At the very least, the claimant knew it was not a place to watch television whilst on duty.

79. The claimant had a mistaken view that, out of season, the importance of the East stand was downgraded in seeking to justify his conduct. A mistaken view, however, is no defence when a previous warning set out clearly that watching television in any restricted area was forbidden.

80. The Tribunal considers that in order to avoid such views being held the respondent should during induction, set out clearly the restricted areas and further, have a clearer policy on the taking of breaks and the location of those breaks.

81. The claimant also admitted his conduct at the disciplinary hearing and therefore the respondent had a genuine belief based on reasonable grounds as to the claimant's conduct.

82. The first incident at Carrington was, Mr Shea said, misconduct in accordance with the respondent's policy and this is why the claimant only received a warning. By the time of the incident at the Old Trafford ground the claimant's behaviour

amounted to gross misconduct in accordance with the disciplinary procedure because the claimant had failed to follow a reasonable instruction.

83. The Tribunal finds that the claimant would have known from the wording of the warning he received at Carrington, that watching television in a restricted area was grounds for dismissal. The dismissal, the Tribunal finds, was within the range of reasonable responses. The warning given to the claimant was clear and he understood that similar conduct could lead to his dismissal.

84. Mr Shea denied that the dismissal amounted to race discrimination. Mr Shea gave evidence that he had similarly dismissed a white member of staff for sleeping on duty. Mr Shea accepted the claimant's medical condition was a mitigating factor for falling asleep in the control room, but that it was not a mitigating factor for watching television at work in a restricted area.

85. The claim of unfair dismissal is unsuccessful.

Race Discrimination

86. The claimant brought a race discrimination claim on the grounds of either direct discrimination because of race contrary to section 39 of the Equality Act 2010 or harassment related to race contrary to section 40 of the Equality Act 2010. If the Tribunal makes a positive finding on one of those grounds, section 212 precludes the Tribunal from making a positive finding on the other ground.

Direct Discrimination claim

87. Nathan Buckley observed the claimant by the use of CCTV. Mr Buckley gave a statement to the respondent about the claimant's behaviour. Mr Grant also gave a statement to the respondent about his observation of the claimant.

88. The burden of proof in a discrimination case is whether the claimant has proven facts from which the Tribunal can conclude in the absence of any other explanation that there has been discrimination. If the claimant proves such facts, then the burden of proof shifts to the respondent to establish the explanation for the treatment.

89. The claimant gave evidence about Mr Mungis and said at the outset of the hearing that he was the appropriate comparator to establish the burden of proof. Section 23 of the Equality Act 2010 provides that when identifying a comparator there must be no material difference between the comparator's circumstances and that of the claimant.

90. There was a material difference between Mr Mungis and the claimant. Mr Mungis has a medical condition and had authority to use a box in the North Stand. The North Stand contained boxes for use by private individuals and companies. It was not deemed as important as the East Stand, which was commonly known as the "Tower of Power", which housed the Executive boxes and the Directors offices. Whilst the claimant had a medical condition, he did not have authority to use a box to manage that condition. Mr Mungis was not the appropriate comparator.

91.

92. The claimant has not proven facts from which the Tribunal can conclude that there was less favourable treatment because of his ethnicity. The Tribunal determines that the claimant was not treated less favourably by Mr Buckley, Mr Grant or because he was dismissed.

93. The Tribunal determines that the respondent did not properly investigate the claimant's grievance. There was no follow up by Mr Shea after the meeting on 20 June 2019, he did not speak to Mr Grant or Mr Buckley, either before or after that meeting and certainly not before he reached his conclusion.

94. At the time Mr Shea was nominated as the grievance handler, Mr Rumney was responsible for chairing the disciplinary hearing and therefore it was appropriate at that stage for Mr Shea chair the grievance.

95. Mr Mungis was not the appropriate comparator and whilst we didn't hear submissions from either side on a hypothetical comparator, such a comparator would be a night-time supervisor who was facing a disciplinary hearing who was white.

96. The claimant hasn't proven facts that another supervisor would have been treated more favourably in the investigation of a grievance. The burden of proof therefore does not shift to the respondent and for these reasons the direct race discrimination claim is unsuccessful.

Harassment claim

97. The actions of Mr Buckley and Mr Grant were unwanted conduct. The respondent's failure to investigate the claimant's grievance also amounted to unwanted conduct.

98. The Tribunal accepts that such conduct would have been hostile and degrading for the claimant. The claimant had been monitored at work and he was subject to complaints and a disciplinary hearing. However, in order for this claim to amount to harassment related to race the claimant has to prove facts from which the Tribunal could conclude that the reason for the unwanted conduct was related to his race. The Tribunal determines that the claimant has not proven such facts.

99. Mr Buckley and Mr Grant had suspicions that the claimant was not doing his fair share and chose to monitor him to prove that. Following their observations on 7 June 2019 and 8 June 2019 they finally felt they had enough evidence to take their concerns to management. Mr Grant said he was compelled to do this after the cleaner, a member of Manchester United staff, had submitted her statement rather than deal with the matter himself.

100. Mr Rumney had been concerned after the first incident that the claimant was jeopardising the contract with Manchester United, but was wiling to give the claimant a second chance. However, after a second and similar incident within weeks of the first, the respondent had no appetite to investigate the claimant's grievance. This lack of appetite was caused by the claimant's admissions during the investigation, not his ethnicity.

101. The claimant's claim of harassment on the grounds of race is also unsuccessful.

Employment Judge Ainscough
Date: 22 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
26 April 2022

FOR THE TRIBUNAL OFFICE