



EMPLOYMENT TRIBUNALS

Claimant: Mr M Thomas
Respondent: Rendall and Rittner Ltd
Heard at: East London Hearing Centre
On: 20, 21, 22, 24 June 2022 and 11 July 2022
Before: Employment Judge Burgher
Members: Ms S Harwood
Ms P Alford

Appearances

For the Claimant: Ms L Dixon Williams (Partner)
For the Respondent: Ms B Omotosho (Solicitor)

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

JUDGMENT

1. The Claimant's claim for unfair dismissal fails and is dismissed.
2. The Claimant's claim for direct race discrimination fails and is dismissed.
3. The Claimant's claim for victimisation in respect of the delay in resolving and communicating his disciplinary and grievance outcomes to him succeeds.
4. A remedy hearing is listed for 14 October 2022. This will consider injury to feelings, interest and any adjustments for failures to comply with the ACAS procedures.

REASONS

Issues

1. The issues the Employment Tribunal will be asked to decide at the final hearing were summarised by EJ Housego on 1 February 2021 as follows:

The essence of the claim is this:

5.1. Mr Thomas describes himself as black. He says that his manager, Nigel Evangelista was appointed to the post in January 2016. He is Filipino and wants to pack the site with fellow Filipinos. To that end he has, Mr Thomas says, systematically removed those at the site and replaced them with fellow Filipinos.

5.2. The suspension was simply a pretext to get rid of him too, the last black employee there. He had a great record and had been repeatedly commended over the 3/4 years he had been at the site. This was trumped up, particularly as what he was suspended for was common practice amongst all employees. There was no reason for a "precautionary suspension" when all he was supposed to have done was take too long a break. It was just a device to get him off site.

5.3. He got called to a disciplinary "investigation meeting" on 29 July 2019 hearing and notes were taken by a Filipina who was not even an employee, but a family friend of Nigel Evangelista, Lito Mendoza.

5.4. Nothing was done about his supposed misconduct, and he was just left in limbo.

5.5. Eventually he filed his grievance, on 21 September 2019, to human resources, but that was handled by Luke Stratton, who is Nigel Evangelista's manager, which was not right as this is a big company, and it should have been someone impartial.

5.6. After that nothing happened for months, and eventually the Respondent said that they were not going to do anything about the disciplinary as too long had passed and there wasn't any evidence of gross misconduct. That just goes to show that it really was trumped up.

5.7. But they also said that he could not go back to site, because the client said he was not welcome there. But there was absolutely no evidence that the client had said anything of the sort, or even knew that he had been accused of gross misconduct, and in particular there was no evidence of any client complaint about him, let alone a requirement that he should be removed from site. This was another reason he thought the whole thing just a ruse to get rid of him and replace him with a Filipino.

5.8. There was no communication about his grievance until 26 January 2020.

Eventually he got them to hold a meeting about his grievance, but that was not until 10 February 2020. That was far too long - he had set matters out in full in his grievance. The meeting of 10 February 2020 was a farce. It was at this point that he realised that the Respondent was not going to do anything about the matters he had raised. They were just going to support Nigel Evangelista.

5.9. So he went to Acas almost immediately, on 13 February 2020, got his EC certificate and lodged his claim.

5.10. He was suspended until 04 November 2020, but is still not at work as the company now say they have to find him an alternative role, but they have done nothing about getting him one, and he is just shut out, and while he is on full pay, first it is very demoralising, and secondly he loses out on the substantial overtime pay he would have been earning.

6. From these claims, Mr Thomas claims that:

6.1. He has been the subject of direct race discrimination by Nigel Evangelista in being suspended, with the aim of removing him from site to enable a Filipino to replace him (in which Mr Evangelista has been successful).

6.2. The Respondent is also guilty of direct race discrimination by:

6.2.1. Putting Nigel Evangelista's line manager in charge of the grievance.

6.2.2. Not dealing properly or at all with the disciplinary matter.

6.2.3. Not dealing properly or at all with the grievance of 27 September 2019.

6.2.4. Removing him from site.

6.2.5. Not finding him another role.

6.2.6. And the matters post 21 September 2019 also amount to victimisation for bringing his grievance.

2. It was corrected before us that the Claimant's grievance was submitted on 27 September 2019, albeit that it was dated 21 September 2019.

3. The Claimant made an amendment application to add claims and this was considered by EJ Jones on 29 October 2021 where she held that the Claimant's claim is now of direct race discrimination and unfair dismissal. EJ Jones did not dismiss the existing victimisation complaints that EJ Housego had identified and as such the Claimant's claims are evidently unfair dismissal, direct race discrimination and unlawful victimisation.

4. Further, although not specifically addressed by EJ Jones, we permitted the Claimant to amend his claim to add another protected act, his ET1 claim submitted on 23 April 2020 to the claim of the way his disciplinary and grievance were dealt with and his dismissal as amounting to further acts of detriment. We concluded that the balance of prejudice favoured the Claimant in having these additional matters considered given that they were raised earlier and not specifically addressed by EJ Jones in her amendment decision. The Respondent was able to call evidence to address them if it deemed necessary to do so.

Evidence

5. The Claimant gave evidence on his own behalf.

6. The Claimant sought a witness order for Mr Gerald Rodney, his then fellow black Caribbean security guard to attend to give evidence. However, the Claimant did not formally proceed with the required information to pursue the application for such an order to be granted.

7. The Respondent called the following witnesses to give evidence:

7.1 Nigel Evangelista, Estate Manager, Claimant's line manager.

7.2 Luke Stratton, Senior Property, grievance and disciplinary manager.

7.3 Carlos Ornelas, former Divisional Operations Manager and dismissal officer.

8. The Tribunal was also referred to relevant pages of a 528-page bundle and a 66-page supplementary bundle.

Facts

9. The Goodmans Fields development ('Goodmans Fields') is owned by Berkeley Homes North East London Division (Berkeley) and was constructed in late 2015 as a mixed-use residential urban quarter. There are over 1000 units and the total development is approximately 7 acres. It has a selection of shops, cafes, restaurants, a hotel, 2 acres of recreational land and a cinema, gym and spa. Residents benefit from a security team and a large cleaning and operative team is provided during the daytime.

10. The Respondent provides security, operational management services to Berkeley at Goodmans Fields. Berkeley is involved in the day-to-day matters and there were monthly operation meetings on site management including staff updates, open positions weekly providing updates and recruitment.

11. When the development launched in 2015 there were only 10 members of staff provided by the Respondent to provide services at Goodmans Fields out of a building at 57 Newman Street. The number of employees steadily increased as the development expanded.

12. The Claimant is black Caribbean. He was employed as a security guard at the Respondent on 15 February 2016. All of the Respondent's security guards are required to have a Security Industry Authority Licence (SIA) which involves mandatory training on dealing with and managing situations aimed to secure the safety of staff and members of the public.

Policies

13. The Respondent has the following relevant written policy terms

Many employees now have access at all times to recording devices (mobile phones etc.), and may want to covertly record fellow employees, managers, residents, contractors or members of the public, either phone calls or face to face situations.

The Company actively discourages this behaviour. It is not treating other people with trust, dignity and respect to record them when they do not know that recording is taking place. It is understood that employees may want to record a one-off incident which they are involved in or witness, which arises suddenly, in order to have evidence of alleged wrongdoing or breaches of procedure. The expectation then is that this incident will be brought as soon as possible to the attention of line managers or more senior managers. Please note however that it is not necessary for an incident to be recorded for it to be reported or investigated.

It is not expected or appropriate that employees will take it upon themselves to build a file of evidence against an individual over time, without proper attempts to resolve the situation at an early stage. Depending on the content and the length of time, and the reason behind it being produced, it may be felt that an employee has acted in bad faith.

Please be aware that covert recording of colleagues, residents or other individuals may be treated as a disciplinary matter, up to and including potential gross misconduct, depending on the circumstances and purpose of that recording.

Grievance procedure

PURPOSE

By implementing the requirements of this standard it is intended that grievances will be addressed and resolved as near to the point of origin and as quickly and effectively as possible. It is expected that most concerns, problems or complaints that an employee raises with the

Company will be dealt with satisfactorily, in the course of the normal working relationship between the employee and their line management.

This Standard is designed to provide a framework for dealing promptly and fairly with concerns, problems or complaints which have not been resolved within the normal working relationship.

3. GRIEVANCES RAISED DURING THE DISCIPLINARY PROCESS

3.1. Sometimes an employee may raise a grievance during the course of the disciplinary process. When appropriate the Disciplinary Procedure will be suspended until after the grievance has been considered.

6. DEALING WITH A GRIEVANCE

6.1. The matter will be dealt with as near as possible to its origin and within a **reasonable period of time**. Where there are extenuating circumstances to justify a delay in the procedure, e.g., planned annual leave, the employee will be kept informed, and alternative dates will be arranged by mutual consent.

Recruitment

14. Mr Evangelista is of Filipino descent. Only one other employee of Filipino descent was employed by the Respondent in Goodmans Fields prior to this. He transferred to the Respondent's Goodmans Fields site in March/April 2016 as Estate manager. There was an expansion on site and more buildings were constructed resulting in an increase in the number of employees recruited to work at the site and more formal employment and operating practices were developed and implemented. As the site got bigger the requirement for security guards increased.

15. Within the Respondent, employees were recruited by advertisements, through agencies and staff referrals. The Respondent operated a referral policy. The staff referral policy was not in the bundle of documents before us but both parties accepted that all staff were able to make staff referrals and recommendations with the possibility of fee incentive offered and the Claimant accepted that he had made some referrals himself.

16. Mr Evangelista gave evidence that he recommended an employee of Filipino descent to work for the Respondent and she referred someone else who then referred someone else. Mr Evangelista was uncertain in his evidence about who he recommended and when, he gave differing accounts to Mr Stratton as he gave to us. We accept that the passage of time may have affected his evidence and given the passage of time consider the account he gave to Mr Stratton during the investigation as being more reliable.

17. The statistics of recruitment of Filipino staff from Mr Evangelista's move to Goodmans Fields, March 2016 to 27 September 2019 (the date of the Claimant's grievance) is as follows:

17.1 There were 39 hires during this period.

17.2 There were 15 employees of with Filipino or Philippines noted in either of the last 2 columns of the recruitment records table in the bundle, including the 2 Bautista brothers who, it was established, were of Filipino descent.

17.3 Evidently, the majority of staff recruited during this period of time were not of Filipino descent. However, approximately 38.5% of the recruits to the Goodman Fields site were during the period were of Filipino descent.

18. As Estate Manager, Mr Evangelista was able to approve appointments and as such he was involved in recruitment of the staff during the time. However, the evidence was not such that Mr Evangelista encouraged Filipino staff or discouraged staff from other racial backgrounds. We accept that different Filipino staff were more engaged in making recommendations and receiving the financial incentive, but this was not a deliberate or designed state of affairs orchestrated by Mr Evangelista.

19. The Claimant was considered to be a good employee, there were no issues with his performance or attendance, and he received commendations for his work from residents and his employer. The Claimant was ambitious to progress within the Respondent, and he wished to be a night supervisor.

20. In late 2018 Petru Vlad, a white Romanian, was appointed to the position of night supervisor. Prior to his promotion, Petru was one of eight security officers. Mr Evangelista stated that all of the security officers were informed that there would be an advert for the night security supervisor in the future. Some two months later apparently there was an advertisement for the security supervisor role however Mr Evangelista did not inform any of the security officers when this occurred. It was unclear how long the advertisement was posted for. Petru, by luck or design, saw the advertisement and applied for the role and was appointed to the position. This created resentment among the other security officers who queried how Petru was able to get the role.

21. We conclude that there was a lack of transparency in this appointment process which led to a legitimate sense of grievance for the Claimant and other security officers. Petru wrote an email on the 31 January 2019 seeking to justify his appointment and explain the process he followed.

22. On 19 June 2019 Mr Petru sent an email to all staff raising a number of issues he was concerned about including timekeeping, punctuality, recording patrols, dress codes and process for calling in sick and updating SIA certificates. Security staff were required to input the exact locations of where they patrolled even if they used a security tag device.

23. Petru Vlad recorded that a failure to adhere the above processes may lead to disciplinary procedures and if there was no improvement dismissal may result. Security staff were required to sign to acknowledge that they understood the above requirements.

24. The Tribunal reviewed the security logs the weeks commencing 14, 21 and 28 July 2019 and it was clear that staff were still not fully recording their respective patrol times and locations in the log.

25. The Claimant attended a shift on the night of 25 and 26 July 2019 as overtime cover. The completed security log for the night is as follows:

Thursday the 25th of July 2019	
Night Security : 19:00-07:00	Michardo /Gerald
18:55	Michardo and Gerald on site.
19:43	Petru on break.
19:46	Gerald left on patrol.
20:30	Petru on patrol. Back in control-room at 21:30
21:33	Michardo on patrol
23:00	Michardo and Gerald returned to this location off patrol. Visited Catalina House Roof Terrace Re : Loud Noise Assignment from concierge. We went there and spoke to the resident who complied by turning off the music.
23:01	Petru concluded duties.
23:09	Michardo and Gerald left on patrol Re: Perilla House Apt.# 602.
23:42	Gerald returned to office
23:43	Collection vehicle index VN67LCW on site.
00:05	Collection vehicle index VN67LCW off site.
00:30	Gerald on patrol: to assist Michardo
04:04	Gerald returned to office
05:06	Michardo on patrol
05:35	Long vehicle index DL15DUV on site
05:47	Long vehicle index DL15DUV off site
05:55	Michardo back in office off patrol. Areas visited areas as follows; Stable Walk, Piazza Walk, Chaucer Gardens, Alie Street, Goodman Street, Canter Way, Water Featurew area, Leman Street, Gower's Walk, 1st floor Garden linking Perilla / Marula / Pimento / Neroli / Cassia Houes, 7th floor Garden linking Perilla and Kingwood Houses, 1st floor Garden linking Catalina / Meranti / Kingwood Houses, 9th floor Garden,
06:15	Monitoring CCTV.
06:35	Gerald back in office.
07:18	Michardo and Gerald concluded duties.

26. We accept that this matter came to the attention of Mr Evangelista who was informed by Joel Tabudlong, concierge, shortly after the failed refuse lorry incident on the 26 July 2019. Joel Tabudlong report of incident on 26 July 2019 was as follows:

On the 26th of July 2019 @ 1:56am a truck driver called the Satin House Concierge Mobile asking to open the Car Park Basement Gate because he is collecting items from one of the businesses.

There is no Security to open the gate. I radioed Security several times and no response. The Concierge at Leman Street can hear me radioing the Security several times. Called the Security office, no answer. Called the mobile, no answer. Then I called XXX Concierge of Leman Street, if he knows the whereabouts of Security. XXX cannot be able to open the gate because of Health and Safety. While trying to contact Security, XXX told me that the truck has left. We are now concerned in the location of the Security because no one's at the gate. XXX and I discussed that he will view the CCTV to see when the Security will be back at the office. Then [the Claimant] called up and asking if we are calling or contacting them. I said to him that a truck driver has been waiting for a while and left because no one is opening the gate. I ask him why there is nobody at the gate, He told me that they are patrolling. I told him that we radioed and called lots of times and there is no respond. He said that he did not hear or receive any call. I told XXX that [the Claimant] called up and said that they are patrolling and they did not receive any radio call or phone call.

We just acknowledge each other when he pass by at the Concierge desk.

27. Mr Evangelista's main concern at the time was that the security office was left unmanned, and the security guards were uncontactable resulting in the refuse lorry not being admitted and leaving.

28. The security log shows that the Claimant and Mr Rodney was absent from the office for over three hours and did not record where they had patrolled.

29. Mr Evangelista had a meeting with Claimant on the 29 July 2019. The focus of this meeting was the fact that the office was unmanned for three hours and the questions referred to CCTV footage limited to the office only, not the wider site. The Claimant gave answers stating that he was not unwell, there was nothing exceptional about the shift apart from once issue 602 Perilla with the lock when he was patrolling. The Claimant indicated he was aware of the protocols that we required follow and that he was not patrolling with Mr Rodney, but they spoke on the radio mobile. The Claimant agreed that were over three hours and nobody in the office.

30. On 30 July 2019 Mr Evangelista questioned Mr Rodney about his version of events on 25 and 26 July 2019.

31. Mr Evangelista did not consider the position at that time sufficiently serious to immediately suspend the Claimant or Mr Rodney and they continued to work.

32. Following these interviews, Mr Evangelista reviewed the CCTV records for the whole site. The CCTV log for the whole site for the 25 and 26 July 2019 is as follows:

DATE	TIME	EVENT	CAMERA	MICHARDO FOB ACTIVITY	GERALD FOB ACTIVITY
25/07/2019	22:05	Michardo & Gerald visible entering welfare room with a bag of KFC - Remained in welfare room for 30 mins	Basement	22:09 Fob Activity Basement welfare room	
				01:08 Meranti House Lift Lobby Ground Floor	01:11 Satin House - Enter to staff back office
26/07/2019	01:32	Michardo & Gerald visible on Piazza Main Camera walking towards Stable Walk with 3 females and a male	Piazza		
26/07/2019	01:32	Michardo & Gerald visible on Stable Walk Camera walking with 3 females and male	Stable Walk		
26/07/2019	01:34	Michardo, Gerald, 3 females and male visible on Car Park ramp camera walking from Stable Walk to top of car park ramp.	Car Park Ramp		
26/07/2019	01:35	Same camera & footage - All the above now at top of car park ramp conversing	Car Park Ramp		
26/07/2019	01:35	Michardo and one female walk down car park ramp, shortly after the other 2 females follow down the ramp. Gerald at top of the ramp conversing with male	Car Park Ramp		
26/07/2019	01:35	Michardo walks down towards main car park gate and enters car park, female waits at middle of ramp outside security office	Car Park Gate	01:08 Fob activity enter car park gate	
26/07/2019	01:35/01:36	Michardo runs into car park towards his car	U-bend		
		Michardo takes out baby car seat from the back seats of his car and puts it into the boot.			
26/07/2019	01:36		Perilla basement entrance external		
26/07/2019	01:36	Michardo enters his car, starts his car and drives out of the car park	Car Park Main Access Road		
26/07/2019	01:36	Michardo drives fast out of car park and brakes to where females were standing. Car stops	Car Park Gate		
26/07/2019	01:37	three females and male are on car park ramp and go out of visibility once Michardo's car arrives	Car Park Gate		GERALD LOCATION UNKNOWN
26/07/2019	01:38	Michardo drives off site	CAR PARK Gate/Car Park		
26/07/2019	01:38	Male walks up the ramp. 3 females are no longer on ramp and do not enter car park	Car Park Ramp		
26/07/2019	01:38	Female collection bins removed at car park gate. Female visible in office	Car Park Ramp		
26/07/2019	01:38	Driver of collection bins cannot get to top of car park because no sign. Michardo returns	Car Park Gate		
26/07/2019	01:52	Refuse lorry leaves site - failed collection due to nobody opening gate	Car Park Gate		
26/07/2019	02:06	Michardo returns to car park, drives in and then parks up very quickly	Car Park Gate		
26/07/2019	02:07	Gerald can be seen walking from the top of the ramp back into estate, at the same time the 3 females can also be seen walking down Gowers Walk towards Hooper Street. 10 seconds later you can see Michardo driving back into estate down the ramp	CCTV		
26/07/2019	02:07	Gerald seen tapping his fob against Perilla House Main Entrance door - but continues down to Satin House	Perilla House		02:07 Fob Activity Perilla House Ground Floor Entrance W
26/07/2019	02:07	Michardo proceeds to Satin House	Car Park main Access Road	02:08 Fob activity - Basement Lift Lobby to Satin House 02:08 Fob Activity - Call for lift Satin House	
				02:35 Fob activity - Satin House Main Entrance (entering again)	02:35 Fob Activity Satin House enter to staff back office
				02:35 Fob Activity - Call lift Satin House	
				02:36 Fob activity - Basement corridor	GERALD LUNCH 1 HOUR
				02:36 Fob Activity - Enter basement welfare room	
				MICHARDO LUNCH 1 HOUR & 30 MINUTES	02:37 Cashmere House Main Entrance W

33. We find this CCTV log is an accurate representation of the movements of the Claimant and his fellow security guard, Mr Gerald Rodney, on the night of the 25 and

26 July 2019. This was not disputed at the time, in particular, the Claimant's assertion before for us was that the refuse lorry was actually admitted to site was not raised at the time and the Claimant did not challenge that there was a failed collection. During the internal investigation the Claimant did contend that the refuse lorry would have been admitted to the site by concierge but had no evidence that this actually took place.

34. The Claimant was entitled to an hour break, but it was clear from the from the CCTV that he had taken 2 1/2 hours breaks over three different periods on the shift.

35. Mr Evangelista was now sufficiently concerned from his further review to suspend the Claimant. On 15 August 2019 the Claimant was suspended on full pay. The suspension letter stated:

Dear Michardo,

Following your conversation with Nigel Evangelista, Estate Manager, I am writing to confirm that you are suspended from work until further notice pending investigations into serious allegations of gross misconduct as follows:

Alleged deliberate and/or wilful breach of your contract of employment. Specifically, during your shift on 25-26 July 2019, you left the office unattended for over 3 hours, from 00:30 to 04:04, which put at risk the health, safety and security of the residents and the development as well as being a breach of Company procedures;

Alleged deliberate and/or wilful breach of your contract of employment. Specifically, during your shift on 25-26 July 2019, you took multiple breaks during your shift, in excess of your one hour's permitted break, thus stealing time and not working your contracted hours or carrying out your contracted duties:

22:05 for approximately 30 minutes

01:38 for approximately 30 minutes, when you left site, potentially with a work colleague and 3 to obtain access and therefore logged it as a missed collection

02:36 for approximately 1 hour and 36 minutes;

- Alleged deliberate and/or wilful breach of your contract of employment. Specifically, you informed Concierge that both you and your work colleague were on patrols, when in fact you were off site at the time;

- Alleged deliberate and/or wilful breach of your contract of employment. Specifically, you have falsified the handover log by not reporting the above movements accurately

These allegations, if proved, would be gross breaches of the Company's values of Trust and Responsibility, Working Together, Communication, Professionalism, Quality and Integrity.

36. A formal investigation meeting was held on 21 August 2019. Mr Evangelista questioned the Claimant, and the Claimant provided a very different account to that provided on 29 July 2019. He now stated that he was ill and that there was a group of women being harassed and he need to take them off site.

37. Mr Evangelista clearly did not believe the Claimant's updated version of events and recommended to Sarah Jones HR and his line managed Luke Stratton by email 27 August that:

Michardo knowingly left site to get food and also failed to double check the office was being monitored, despite being with Gerald at 01:38. The path of events that followed contributed to

the office being left unmanned for over 3 hours which also resulted in a missed refuse collection. I believe the allegation is warranted. **Michardo's actions indicate serious negligence or failure to follow Company or Client Health and Safety Standards and other relevant Statutory or Regulatory requirements which causes or has the potential to cause unacceptable risk, loss, damage or injury. POTENTIAL GROSS MISCONDUCT**

After reviewing the notes taken from the formal investigation meeting, Michardo claims to have been sick on two of the above periods of break time. He claims to have vomited and was feeling nauseous. On the second break he also claims to have had diarrhoea. **These illnesses were not mentioned in our previous conversation, nor was it mentioned to any of the other team members on duty at the time (except Gerald who is also under investigation) and if this was the case, Michardo had continued to attend to work despite being unfit to do so without a reasonable excuse. We must also consider that this could be viewed as stealing time from work if he had knowingly taken multiple breaks. POTENTIAL GROSS MISCONDUCT**

This is potentially a breach of confidence and trust. The fact that Michardo had left site outside of his contracted lunch breaks, indicates he may have also been stealing time from work. POTENTIAL GROSS MISCONDUCT

There is a large gap in the handover where numerous events were not entered (male harassing 3 females, going to Mcdonald's with the 3 females, specification of areas patrolled). This is a falsification of real time events and also a failure to carry out contracted duties. POTENTIAL GROSS MISCONDUCT

38. HR asked Mr Stratton to deal with the Claimant's disciplinary hearing and 18 September 2019, the Claimant was invited to a disciplinary hearing scheduled for 20 September 2019 to deal with the suspension allegations. The meeting was subsequently rearranged to 27 September 2019.

39. On the 27 September 2019 prior to the disciplinary meeting the Claimant raised a grievance and sent it to Catherine Orezzi (HR Director). He was concerned that Sarah Jones was unresponsive to most of his emails and perceive that she only communicated with him when the company wished to sanction him. He raised allegations of race discrimination and victimisation amounting to breach of the Equality Act 2010.

40. The Tribunal find that a number of the Claimant's grievances were unfounded, based on misperception and inaccuracies. The Claimant maintained that Mr Evangelista worked at the Filipino embassy and recruited people to work from there. We accept that Mr Evangelista did not work at the Filipino embassy. We also accept that Mr Evangelista did not personally know all the Filipino workers recruited prior to their recruitment. In summary the Claimant was maintaining that there was a Filipino family gang. We have not found that this is the case and accept that the perception could be seen as discriminatory in itself, in same way as if it was asserted, without evidence, that all black Caribbean employees were related.

41. The Claimant's concerns about not being provided with uniform were misguided. There was communication to all staff regarding this and we accept that there were initially supply problems that resulted in only 2 individuals being supplied with uniforms.

42. The Claimant asserted that he was subject to unfair disciplinary sanctions, and he referred to covert video recordings of a Filipino member staff sleeping on duty and

not being sanctioned. As well as being contrary to the Respondent's policies, the covert recording related to events in 2016 /2017 and was not brought to the attention of management by the Claimant at the time, only during his grievance.

43. The Claimant also referred to a Filipino employee who was not dismissed but was allowed to resign instead for sleeping at work as being subject to more favourable treatment. We do not find the comparison appropriate as the Claimant did not offer to resign.

44. Mr Stratton was not impressed with the Claimant's accounts and on 17 October 2019 he emailed Sarah Jones in HR

As you know they [the Claimant and Mr Rodney] turned up together, which I was concerned about as they were both being investigated for the same things. However, in the interest of not prolonging this any further agreed to see them both together after agreeing with you.

In my view there is enough for dismissal for both, there are clear inconsistencies with the stories and previous meetings. The extended breaks have been taken and they have gone off site with 3 members of the public and in Michardo's car, this should never have happened. They could have said any number of things.

It's also clear that they are playing the system in terms of patrols whereby they are just tapping the system and not actually doing the patrols of the buildings.

45. However, Mr Stratton was advised to consider the Claimant's grievance before giving the disciplinary outcome. The grievance process was delayed because of work pressures and to accommodate the Claimant's availability. Mr Stratton questioned Mr Evangelista about the Claimant's grievance on 3 December 2019. He failed to question him on the Claimant's allegation relating to a threat to Mr Rodney in an alleged off the record conversation.

46. Mr Stratton eventually met the Claimant for a grievance hearing 10 February 2020. On 27 February 2020 Mr Stratton wrote an email to Ms Jones attaching the notes of the grievance meeting. He believed that the grievance was submitted as a consequence of disciplinary allegations and stated:

Please bear in mind that this grievance is a consequence of the disciplinary action taken against both Michardo Thomas and Gerald Rodney, they have not refuted any of the allegations in previous meetings (which is in the minutes).

Covering;

Taking multiple breaks - well in excess of the permitted 1-hour lunch break

Disappearing from the site and I saving the site office unattended for a period of 3 hours (resulting in a missed collection thus complaints from the client and residents)

Taking 3 women from site in their car (although a story was provided - there are protocols to follow, and the police should have been called) they have put themselves and the company at risk by doing what they did here which should not have been done in any circumstance.

Not carrying out their security patrols properly - after advising other site staff that they were on patrol when in fact they were offsite

-Proof obtained by CCTV and fobs access, (security patrols are a fundamental part of their job role the tags and not going into the buildings and patrolling).

Taking photos of the staff from the security cameras - which is not permitted as it's a breach of data protection, so they are not following the correct protocols here either, thus further putting the company at risk for Data breach.

Having possible evidence of staff resting on duty and not reporting it to any members of staff or management team.

Not reporting on the security log, their whereabouts and the incidents from the night before.
-in making sure the building/residents is/are secure, they were tapping

All of the above is completely unacceptable both procedurally from a company perspective (putting their colleagues and residents at risk) and morally. This creates a complete lack of trust and I feel as a company we have no choice but to dismiss both members of staff for the above matters, especially as they have not refuted the above.

I do not believe there is any evidence of racial bias at Goodmans Fields and from the estate manager, I have spoken to Alex Gooden Facilities manager ; and the EM's 2nd in command who is of the same ethnic background of both MT and GR, I have asked him specific direct questions, if he has ever witnessed anything like this, he has not, and I asked if he had what would he do and he said he would report it to me, which he hasn't.

47. We find that Mr Stratton must have notified Berkeley of his views about the Claimant at this time at one of the monthly meetings at the time.

48. The Claimant commenced the early conciliation process to start a claim on 13 February 2020 and this was completed on 27 March 2020.

49. Covid lockdown commenced in March 2020 and the Respondent furloughed some staff.

50. The Claimant submitted his claim to the Tribunal, alleging race discrimination and unlawful victimisation on 23 April 2020.

51. The Claimant's grievance outcome was not communicated to him at this time.

52. The Respondent responded to the claim on 7 August 2020. It proceeded to recruit another night security guard, Asian, at the Goodman Fields site on 25 August 2020.

53. On 8 September 2020, Jose Vasques from Berkeley responded to an enquiry Mr Stratton must have made about the possibility of the Claimant returning to Goodman Fields. Mr Vasques wrote:

I am surprised to hear this matter is still ongoing, as far as I was aware that this had all been resolved back at the start of the year. Those staff members are R&R our staff and it will be up to R&R to deal with the matter as seemed fit. Having said that, our instruction is very clear - We will not have them back at Goodmans Fields - in case that was ever even considered.

54. The Respondent recruited another night security guard, black Caribbean, at Goodmans Field on 22 October 2020. By this stage the Claimant remained on full pay but still had not been informed of the outcome of the disciplinary process or of his grievance.

55. On 4 November 2020 Josie Ofori, the HR Manager, wrote to the Claimant as follows:

Dear Michardo,

I am writing to advise you that the Company wants to remove you from your suspension which has been effective from 15 August 2019.

Unfortunately, the client at Goodmans Fields have now advised that the current position is untenable and that they do not want you to return to the site.

Therefore, the Company are actively working on finding you a Concierge role within an alternative site. In the interim period whilst we are in the position of finding a suitable role for you, the Company have agreed that you will be placed onto paid leave as opposed to suspension.

I propose to keep you updated on a bi-weekly basis to advise on the current recruitment landscape and to advise if there are any viable vacancies across the Company. This will be via email and I would also ask that you keep abreast of any vacancies also on the internal website. In relation to your disciplinary as a result of the timelines involved, I can advise that there is essentially no further action, In response to your grievance case that has remained outstanding a separate response will be given by Luke Stratton, Property Team Manager.

56. On 14 November 2020, the Claimant wrote to Ms Ofori for further clarification of the reasons for delays and why he could not return to the Goodmans Fields site. He stated that the outcome didn't take away the stress, anxiety and torment that the company had put him through over the last 15 months. The questions in this letter were not specifically addressed by the Respondent until 27 January 2021 after being repeated by the Claimant in an email of 21 January 2021.

57. The Claimant was offered alternative roles and his excuse for refusing the roles was based on travel distance. However, save for Stanmore Place the roles offered were of comparable travel distance from the Claimant's home address. The alternative roles were:

- 57.1 Chelsea Bridge Wharf was 5 miles away from his home address;
- 57.2 Peninsula Heights was 4 miles distance
- 57.3 Holland Green was 7.5 miles distance;
- 57.4 Stanmore Place was 16 miles

58. On 18 November 2020, HR asked the Claimant to confirm if the Chelsea Bridge Wharf job he was offered was something he wished to proceed with. The Claimant responded stating he was not interested in the position.

59. On 30 November 2020 the Claimant was finally sent a grievance outcome, rejecting his grievances. The Claimant was offered a right of appeal.

60. On 30 November 2020 the Claimant was informed of the other vacancies in addition to the one at Chelsea Bridge Wharf. These were rejected by the Claimant.

61. On 16 December 2020 HR reminded the Claimant about the terms of his contract of employment. He was also informed that other roles had been offered to him which he declined.

62. The Claimant was invited to a meeting on 17 December 2020 to discuss the role that was assigned to him, and he was informed to return to work at Stanmore site to meet with Natalie Cole (Property Manager) and Micky Bonner (Estate Manager). The Claimant was informed that it was a reasonable management instruction for him to attend the meeting and that a failure to adhere to the instructions would be considered as an unauthorised absence and a potential disciplinary matter.

63. On 22 December 2020 the Claimant was invited to attend a disciplinary hearing to discuss his rejection of the roles offered and his failure to adhere to management instructions. He was informed that Mr Ornelas would be chairing the meeting. The Claimant was informed that during the time the Respondent was seeking an alternative role for him, he was on authorised and paid absence however now that alternatives roles had been offered to him which he declined, he was being considered as being on unauthorised leave. He was also informed of the risk of his employment being terminated.

64. Before us the Claimant was clear that he had lost trust in the Respondent and unless there was return to the Goodmans Field site he was not prepared to work at a different location. We find that this was his state of mind at the time, and it dictated his response to the alternative work that was being offered.

65. On 23 December 2022 Mr Ornelas met with the Claimant to discuss his absence. The Claimant stated he could not understand why he was not sent to his original site, and it was explained why to him. The Claimant then suggested alternative roles were concierge roles and not security. Mr Ornelas pointed out that the duties of both roles were basically the same and also that the Claimant had a mobility clause in his contract, and the Claimant changed his reasoning to state that it was due to distance and due to childcare arrangements.

66. Following this meeting the Claimant was sent a letter dated 30 December 2020 dismissing him with immediate effect and paying him in lieu of notice on grounds of failing to return to work or accept alternative roles offered to him. He was offered a right of appeal.

67. On 8 January 2021 the Claimant appealed against his dismissal and the grievance outcome.

68. Ms Ofori sought to arrange a convenient date for the appeal and provided the Claimant with further requested clarification provided on 27 January 2021. The Claimant did not respond to agree a date to attend an appeal hearing. He stated to us that he did not pursue this further because he had lost trust in the Respondent and did not believe he would be given a fair appeal hearing.

Law

Unfair dismissal

69. Section 98 of the Employment Rights Act 1996 states:

General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case

Direct race discrimination

70. Section 13 Equality Act 2010

Direct discrimination

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex—

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

Victimisation

71. Section 27 Equality Act 2010

Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

72. For the Equality Act claims the burden of proof provisions are found at section 136 of the Equality Act 2010. This states:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

73. The burden is on the Claimant to prove, on a balance of probabilities, to establish a prima facie case of discrimination. The Court of Appeal, in Madarassy v Nomura International Plc [2007] EWCA Civ 33, at paragraph 56. The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination), confirmed that a Claimant must establish more than a difference in status (e.g., race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed.

74. Even if the Tribunal believes that the Respondent's conduct requires explanation, before the burden of proof can shift there must be something to suggest that his treatment was due to the Claimant's colour or race.

75. When considering causation Lord Nicholls stated In Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at [29],

'Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in **Nagarajan** ..., a causation exercise of this type is not required either by s.1(1)(a) or s.2. **The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.**

Conclusions

Unfair dismissal

76. In view of the facts and law outlined above, the Tribunal's concludes that the Respondent has established a potentially fair reason of conduct and or some other substantial reason, in that the Claimant failed to attend work and failed to accept alternative roles offered to him.

77. The Claimant had lost trust with the Respondent but did not resign and claim constructive dismissal, he maintained his employment continuing to be paid whilst requiring a return to the Goodmans Fields site. It was explained to him that this was not permitted by the client, he was invited to a meeting to discuss this but the Claimant maintained his position despite having being offered reasonable alternative roles. In these circumstances dismissal was inevitable.

78. The Claimant's claim for unfair dismissal therefore fails and is dismissed.

Race Discrimination

79. We conclude that the Claimant was suspended on 15 August 2019 based on the reasonably held concerns by Nigel Evangelista about the Claimant's conduct on shift on 25 and 26 July 2019. The Claimant was not immediately suspended following discovery that the rubbish truck lorry was unable to collect, he was suspended following a later and fuller review of CCTV that indicated, on any view, that the Claimant took excessive breaks and acted inappropriately in taking 3 unknown, possibly intoxicated, women in his car off site in the middle of the night whilst on shift. This was irresponsible from a business point of view creating unnecessary reputational risks and also unacceptable risk from a personal point of view give the SIA training and safety protocols the Claimant should have followed.

80. We conclude that suspension was a reasonable step for Mr Evangelista to take in the circumstances and there is no evidence to suggest that Mr Evangelista would have treated a person of any other race or colour differently. The Claimant has not established that Mr Evangelista suspended him to enable a Filipino to replace him. The Claimant was not replaced by a Filipino person. The Claimant's race discrimination complaint in this regard therefore fails.

81. The Claimant has not established that putting Mr Stratton (Mr Evangelista's line manager) in charge of the grievance on 18 September 2019 was an act of race discrimination. This was a normal part of the Respondent's grievance process and there is no evidence to suggest that the Claimant was treated less favourably in this regard. His race discrimination complaint in this respect therefore fails.

82. Mr Stratton took a robust and dismissive view of the Claimant's conduct. Mr Stratton was quick to conclude, in October 2020, that the Claimant ought to have been dismissed for misconduct but he was required to deal with the grievance before notifying the Claimant of the outcome.

83. Mr Stratton repeated his view that the Claimant be dismissed on 27 February 2020 and the matter was handed to HR.

84. The Respondent intimated that the change of HR personnel and the Covid – 19 pandemic affected how matters were communicated. During the intervening period this time the Respondent was able to give instructions to respond to the ET1, recruit replacement for the Claimant and Mr Rodney and liaise with Berkeley about the viability of the Claimant's return to Goodmans Fields. However, the Claimant was not informed until 4 November 2020 that disciplinary action would not be pursued against him.

85. We conclude that the Respondent did not communicate properly with the Claimant in respect of the disciplinary outcome. Whilst the conclusions and reasoning of Mr Stratton, who recommended dismissal would have been more detrimental to the Claimant if implemented at the time, the delay in communicating with the Claimant was also detrimental. Having said that we have no evidence to conclude that the delay

in communicating the outcome of the disciplinary was because of the Claimant's race. His race discrimination complaint in this regard therefore fails.

86. Whilst Mr Stratton simplistically believed that the Claimant's grievance was a reaction to the disciplinary Mr Stratton considered the evidence against the Claimant and the coincidental timing of the Claimant's grievance as relevant. We do consider that conclusions in this regard were on grounds of race.

87. The Claimant was informed on 4 November 2020 that he would not be able to return to the Goodmans Fields site. This was a decision of Berkeley and there is no evidence to suggest that this was because of the Claimant's race. Indeed, a black Caribbean security guard was appointed in October 2020 to work at Goodmans Fields. His race discrimination complaint in this regard therefore fails.

88. We conclude that the Respondent did not communicate properly with the Claimant in respect of his grievance outcome. The Respondent intimated that the change of HR personnel and the Covid – 19 pandemic affected how matters were communicated. During the intervening period this time the Respondent was able to give instructions to respond to the ET1, recruit replacement for the Claimant and Mr Rodney and liaise with Berkeley about the viability of the Claimant's return to Goodmans Fields. However, the Claimant was not informed of the outcome of his grievance until 30 November 2020. Having said that we have no evidence to conclude that the delay in communicating the outcome of the grievance was because of the Claimant's race. His race discrimination complaint in this regard therefore fails.

89. The Respondent sought to find alternative work for the Claimant. The Claimant refused and required a return only to Goodmans Fields. His race discrimination complaint in this regard therefore fails.

90. In these circumstances the Claimant's claim for race discrimination fails and is dismissed.

Victimisation

91. It is accepted that the Claimant's grievance submitted on 27 September 2019 and his ET1 submitted on 23 April 2020 amount to protected acts for the purposes of section 27 of the Equality Act 2010.

92. Mr Stratton took a robust and dismissive view of the Claimant's conduct. He was quick to conclude in October 2020 that the Claimant ought to have been dismissed for misconduct but he was required to deal with the grievance before notifying the Claimant of the outcome.

93. Mr Stratton repeated his view that the Claimant be dismissed on 27 February 2020 and that the grievance was unfounded and the matter was handed to HR.

94. We conclude that the Respondent did not communicate properly with the Claimant in respect of the disciplinary and grievance outcomes on 4 and 30 November 2020 respectively. Whilst the conclusions and reasoning of Mr Stratton who

recommended dismissal would have been more detrimental to the Claimant if implemented at the time, the delay in communicating with the Claimant was also detrimental.

95. The Respondent's policies indicate that grievances should be dealt with within a reasonable period of time. Mr Stratton was clear that he believed that he had concluded his part of the process in February 2020 but the outcomes were not immediately communicated to the Claimant.

96. The Tribunal had to consider the reason why the outcomes were not communicated. The Respondent did not advance any direct evidence about this but intimated, though Mr Stratton that the Covid- 19 pandemic, and change of HR affected the communication. During the intervening period this time the Respondent was able to give instructions to respond to the ET1, recruit replacement for the Claimant and Mr Rodney and liaise with Berkeley about the viability of the Claimant's return to Goodmans Fields. The Tribunal was not provided with a timeline of HR handover and operations in the interim despite Ms Ofori, HR Manager, being in attendance throughout the hearing but not being called upon to give evidence.

97. Given that Mr Stratton initially delayed the disciplinary process to consider the Claimant's grievance and that he believed that he completed his part of the process in February 2020, that HR was able to function following this (by recruitment and engaging with the ET1) and that there was no direct evidence about why the Claimant was not provided with the outcome earlier than he was, we conclude that the Claimant's ET1 was the reason for the delay. In particular, the ET1 created a problem for the Respondent to resolve in respect of managing the Claimant and resulted in inertia. This inertia in concluding the Claimant's disciplinary and grievance processes therefore amounting to unlawful victimisation. The Claimant's claims in this regard therefore succeed.

98. The Claimant was informed on 4 November 2020 that he would not be able to return to the Goodmans Fields site. This was a decision of Berkeley and as such we do not conclude that this was because he had made protected acts. His victimisation complaint in this regard therefore fails.

99. The Respondent sought to find alternative work for the Claimant. The Claimant refused and required a return only to Goodmans Fields. His victimisation complaint in this regard therefore fails.

100. We do not conclude that the Claimant's dismissal was an act of victimisation. The Respondent sought to offer the Claimant alternative work so his employment could continue, he refused this and was dismissed. His victimisation complaint in this regard therefore fails.

Remedy steps

101. A remedy hearing is listed to take place on 14 October 2022 to consider compensation for the Claimant's successful claims. The Tribunal will consider issues of injury to feelings, interest and any adjustment to compensation for failure to comply

with the ACAS process.

102. The Claimant must provide a revised schedule of remedy by 16 September 2022.

103. The Respondent must provide a counter schedule of remedy by 23 September 2022.

104. A remedy bundle must be agreed by 30 September 2022 and witness statements relevant to remedy must be exchanged by **7 October 2022**.

**Employment Judge Burgher
Dated: 22 August 2022**