EMPLOYMENT TRIBUNALS

Claimant: Mr Saleem Tayab
Respondent: Atalian Servest Security Limited

Heard at: Reading Employment Tribunal **On:** 17, 18, 19 October 2022
Before: Employment Judge Shastri-Hurst
Members: Mr Juden
Mr Appleton

Representation
Claimant: In person
Respondent: Mr Bryan (counsel)

JUDGMENT having been sent to the parties on 11 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is a provider of outsourced facilities management. The claimant was employed as a registered security guard, with an SIA licence, from 13 July 2015 until his dismissal on 6 February 2020.

2. The claimant contacted ACAS on 4 March 2020, and completed the ACAS Early Conciliation process on 6 March 2020. He presented his claim form on 8 March 2020, and brings claims of:

   2.1. Unfair dismissal;
   2.2. Wrongful dismissal;
   2.3. Direct discrimination because of race;
   2.4. Direct discrimination because of religion/belief;
   2.5. A claim under regulation 30 of the Working Time Regulations 1998 ("WTR") that the respondent refused to permit him his right to entitlement to holiday under regulation 13.

3. In reaching our judgment, we heard evidence from:

   3.1. The claimant;
   3.2. Alan Ives, the respondent's Account Manager for Align;
   3.3. Martin Harre, Operations Director.

4. We also had the benefit of a bundle of 176 pages.

Issues

5. This case was subject of a preliminary hearing in January 2021, in which Employment Judge Hawksworth set out clearly the issues for the Tribunal to consider - [53].

6. The only addition made to this list during the hearing relates to the holiday claim: the respondent quite properly brought it to our attention that there was a jurisdictional issue in relation to this matter, in that this claim was brought out of time. The Tribunal therefore had to consider, if the claim was brought outside of the three months provided for in regulation 30 WTR, whether it was not reasonably practicable for the claimant to have brought the claim in that window and, if so, was the claim presented within a reasonable time thereafter.

LAW

Unfair dismissal – reason for dismissal

7. The relevant legislation is found at s98(1), (2) and (4) of the Employment Rights Act 1996 (“ERA”).

8. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct. This is not a high threshold for a respondent – Gilham and Ors v Kent County Council (No2) [1985] ICR 233

Unfair dismissal – fairness

Substantive fairness

9. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness:

    9.1. Did the respondent have a genuine belief that the claimant was guilty of the misconduct alleged by the respondent?

    9.2. If so, were there reasonable grounds for the respondent in reaching that genuine belief? and,

    9.3. Was this following an investigation that was reasonable in all the circumstances?

10. In all aspects of a misconduct case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the Tribunal must decide whether the employer acted within the band of reasonable responses open to a reasonable employer in the circumstances. Whether the Tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the Tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

11. In terms of investigation, the ACAS Guide on Discipline and Grievances at work highlights that, the more serious the allegations the more thorough the investigation needs to be. Similarly, there is a line of case-law that makes it clear that, when considering reasonableness of the investigation, the gravity

of the allegations and the potential consequences for the employee are relevant factors – A v B [2003] IRLR 405, in which it was held that there would be a difference in depth of investigation if an employee was facing a warning or dismissal.

12. Secondly, in terms of investigation into mitigating factors, we reminded ourselves of Tesco Stores Ltd v S UKEATS/0040/19 at [42]:

> "In considering whether a particular line of inquiry into mitigation was so important that failure to undertake it would take the investigation outside the *Sainsbury's* band, Tribunals are required to consider *inter alia* the degree of relevance of the inquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee."

Procedural fairness

13. Following the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It was not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy.

14. If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this can render a dismissal procedurally unfair.

15. Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

16. Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the Tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

Wrongful dismissal/breach of contract

17. This claim requires the Tribunal to perform a different exercise than for the unfair dismissal claim. Here, the question is, as a matter of fact, was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?

18. This requires the Tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to terminate the contract without notice. It is for the Tribunal to make findings of fact as to the nature and extent of the employee's conduct.

19. It is only repudiatory breaches by employees that will justify summary dismissal – this can be traced back to the Court of Appeal's decision in Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 1 WLR 698 CA.

20. The reasonableness of actions by the employer is irrelevant. Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful – Enable Care and Home Support Ltd v Pearson EAT 0366/09.

Direct discrimination

21. Direct discrimination is set out at s13 of the Equality Act 2010 ("EqA") and provides that:

> "a person A discriminates against another B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

22. In other words, the claimant must have been treated less favourably than someone who was in the same (or not materially different) circumstances as him. Here, the claimant relies on Abdiwahid Sabriye for his race discrimination claim. In terms of his religious discrimination claim, he relied at one point upon Alex Wabara (a fellow security officer) as being his comparator – [33]. The claimant says that Mr Wabara went home during a shift and yet was reinstated. We note Mr Bryan's submissions that this point raised in the claimant's Further and Better Particulars was superseded by the lengthy discussion in the preliminary hearing in January 2021 in which Mr Sabriye was identified as a comparator for the race claim, but no specific comparator was put forward for the religion/belief claim. This point was not contested by the claimant: we therefore moved forward on the basis of a hypothetical comparator regarding the religious discrimination claim.

23. In cases of direct discrimination, the ultimate question is "what was the reason for the treatment?" - Stockton on Tees Borough Council v Aylott [2010] EWCA Civ 910. Here, we agreed with Mr Bryan that, although the law recognises two types of cases, inherent discrimination or subjective discrimination, we were dealing with a case of alleged subjective discrimination. In such cases, the issue is whether the protected characteristic operated on the alleged discriminator's mind. Further, the protected characteristic need not be the sole reason for the treatment, as long as it was an "effective cause" – O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1997] ICR 33.

24. The burden of proof in discrimination cases is set out at s136 EqA. The first stage is for the Tribunal to consider whether it has evidence before it to conclude, absent an adequate explanation, that the respondent's conduct could amount to discrimination. For this first stage we can take into account all the evidence before us. If we are satisfied that there is sufficient evidence to overcome that first hurdle, the burden then shifts to the respondent to prove that the reason for the treatment was not discriminatory.

25. The bare facts of a difference in status (i.e. race/religion) 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 – Madarassy v Nomura International plc [2007] ICR 867 CA.

Holiday – jurisdiction

26. The claimant's claim arises under r13 and r30 WTR, which tells us that a claimant wishing to bring a claim regarding refusal to allow an employee to exercise his entitlement to annual leave needs to be presented to the Tribunal within three months of the date when that right should have been exercised.

27. The respondent says that the clock started ticking on 18 November 2019, as that was the day on which the claimant wanted his holiday to start (reg 13(2)), and so the claim should have been presented by 17 February 2020. We agreed with this calculation.

28. The claimant in fact went to ACAS to commence the early conciliation process on 4 March 2020, and then presented his claim on 8 March 2020. The claim was therefore presented some 20 days out of time.

29. We therefore have to consider whether it was not reasonably practicable for the claimant to bring the claim in time, and, if not reasonably practicable, did the claimant bring the claim within a reasonable period.

30. The burden of proof regarding both limbs of this test falls to the claimant.

Reasonably practicable

31. The first question must be why the primary time limit was missed. Then we must ask whether, notwithstanding those reasons, was the timely presentation of the claim still reasonably practicable.

Ignorance/misunderstanding

32. Where the reason for missing the primary time limit is said to be ignorance or mistake, the question remains whether, in all the circumstances, it was reasonably practicable for a litigant to have presented the claim in time.

33. The Court of Appeal has stated, in a case of mistake, that the term "*reasonably practicable*" should be given liberal meaning so as to favour a claimant – Lowri Beck Services Ltd v Brophy (12 December 2019, unreported). One factor of relevance to ignorance/mistake cases will be whether a claimant has instructed a professional adviser. Where a litigant has no professional advice, they need only show that their ignorance or mistake was reasonable – Wall's Meat Co Ltd v Khan [1979] ICR 52.

34. The question becomes whether the mistake or ignorance in itself was reasonable.

Reasonable time period

35. What is considered reasonable depends on the circumstances at the time. It is not just a question of the time period that has passed since the expiry of the limitation period. The length of delay is one factor to be considered, but

not to the exclusion of all other relevant factors in any given case – Marley (UK) Ltd v Anderson [1994] IRLR 152.

36. A claimant must present his claim as soon as possible once the impediment stopping him having presented the claim in the initial three month period is removed.

37. It is necessary to consider the relevant circumstances throughout the period of delay and, at each point, what knowledge the claimant had, and what knowledge he should have had if he had acted reasonably in all the circumstances – Northumberland County Council v Thompson UKEAT/209/07.

Holiday – substantive issues

38. This claim arises from the right under r13 WTR, the entitlement to annual leave. R30 sets out that the claimant may present a claim where his employer refuses to permit him to exercise that right.

39. This has been a topic of much European case law – in King v Sash Window Workshop and anor [2018] ICR 693, ECJ, Kreuziger v Land Berlin Case C-619/16 ECJ and Max-Planck-Gesellschaft zur Forderung der Wissenschaften eV v Shimizu Case C-684/16 ECJ. In short, it is now accepted that an employer must take positive steps to ensure that annual leave is taken during the relevant leave year in relation to the 4 weeks' basic leave (not the 1.6 weeks' additional leave).

40. This line of thinking was followed in England in Smith v Pimlico Plumbers Ltd [2022] IRLR 347 CA, in which it was held that the effect of King was that the worker must be encouraged to take paid annual leave before the end of the leave year. The right to paid leave can only be lost if the employer can show:

    40.1. It gave the worker the opportunity to take paid leave;
    40.2. It encouraged the worker to do so;
    40.3. It informed the worker that the right would be lost at the end of the leave year.

41. If the employer cannot prove on the balance of probabilities that it did these three things, then the right to annual leave is not lost at the end of the relevant leave year, but accumulates until termination of employment.

Findings of fact

42. We have not made findings on every point on which we have heard evidence, we have focused on the findings we need to make in order to answer the list of issues relevant to this case.

43. The respondent is a provider of outsourced Facilities Management, including cleaning, catering and security. The claimant commenced working for the respondent on 13 July 2015 as a security officer. It is common ground that it is a fundamental duty of a security officer to staff his or her post and that leaving it unstaffed is a dereliction of duty

44. The claimant's employment went along without issue until February 2019. Up until that point, the claimant was assigned to a contract for which the end client was Tesco.

45. The claimant received a final written warning on 19 February 2019, which was due to expire a year later (19 Feb 2020) - [91]. This warning was given for:

    "*leaving site and abandoning your post without informing your line manager, resulting in a position being left unmanned*" and a "*serious verbal assault and behaving in an extremely unprofessional and aggressive manner towards your colleagues*" - [91].

46. Following this warning, the claimant was placed on a different contract, the end client being Align. He was positioned at the Chalfont Lane entrance of the HS2 site at Rickmansworth. This assignment was subject to the Assignment Instructions ("AIs") at [61], which the claimant signed as having read on 1 January 2020 – [90]. The claimant's evidence was that he was given the AIs just before going on shift and was told that he had to sign them before commencing his first shift on this new placement. This evidence was not challenged. Given the detail included, and the length of those AIs, we consider it was not acceptable to expect the claimant to have adequately read those AIs before commencing his shifts.

47. The AIs include instructions on the use of the Daily Occurrence Book ("the DOB"): at [73], the AIs state the DOB is to be used "*daily to log change over breaks, incidents and any information that the guard may deem important*". In terms of breaks, at [69] of the AIs, it states "*Security Officers are expected to take meal and welfare breaks when duties allow*".

48. The Claimant worked on 12-hour shifts, and regularly worked alongside his two colleagues, Mohamed Mohamed and Abdiwahid Sabriye. There were busy times of the day, particularly morning and evening, when all three officers would be on the gate. The rest of the time there would be one security officer on the gate, the other two officers being inside the cabin by the gate, effectively on standby. Theoretically, the security officers had all the facilities they needed in their cabin by the gate they were employed to guard. However, for three months or so prior to the incident that kick-started the disciplinary proceedings, the toilet and water facilities in that cabin were not operating. The security officers therefore had to go to Align's facilities room, further away from the gate (but still within sight of it) to use the toilet, or get a refreshment and so on.

49. There was no hard and fast rule as to how breaks were to be taken throughout the working day. Security officers had a one hour paid lunch break, and were left to their own devices to sort out breaks throughout the rest of the day. Mr Ives' evidence was that generally breaks were in line with the Working Time Directive, however, there appears to have been no clear framework implemented by supervisors as to when security officers should take breaks, or for how long those breaks would be.

50. In the claimant's case, he and his two colleagues arranged their breaks amongst themselves, dividing up the working day between the three of them. When working with Mr Mohamed and Mr Sabriye, the claimant's twelve-hour

shift tended to follow the same pattern, unless one of the three were away, or it was a weekend. The claimant's shift was 0600-1800: he worked 0600-1000, had a break 1000-1100, worked 1100-1200, then went on break 1200-1400, worked 1400-1500, had a break 1500-1600, then worked the last two hours of his shift – 8 hours on, 4 hours off in total.

51. We note that 4 hours does seem like a lot of break times, however no supervisor appears to have been checking the breaks taken by these three security officers, they were simply left to get on with it.

Holiday request November 2019

52. The claimant made a request for ten days' holiday from 18 – 29 November 2019, on 17 September 2019; that is clear from the Timegate system print out at [139], and the detail on [171]. From [139] it is clear that the holiday request was simply never dealt with: it appears to have fallen through the cracks. We can see in that document that other requests have been positively rejected or permitted, but the request on 17 September has just gone unanswered.

53. The claimant took holiday on 23 December for six days: this is agreed. The claimant told us that he had been allocated this leave, and in fact the reason he wanted November dates was so that he could work over Christmas: this evidence was not challenged.

54. Mr Ives was unable to assist us with how this December holiday had come about. The supervisors were immediately responsible for holiday requests: Mr Ives tried to empower them by encouraging them to make decisions rather than simply passing the decision up to him as Accounts Manager. We have not heard from the supervisor or scheduler who dealt with the claimant's holiday request, but Mr Ives did comment that it was unusual for holiday to be taken over the Christmas period. We therefore accept that the December leave was imposed on the claimant, as opposed to being his choice.

Disciplinary incident

55. On 17 January 2020, the claimant was on duty with two other security guards over the course of the day, Mr Mohamed and Mr Sabriye, following their usual shift pattern.

56. At this juncture, we note that the only evidence we have as to what happened on 17 January is from the claimant: we have no evidence from the respondent as to the facts of (for example) when the claimant left his gate, or the arrangements for breaks that day. We found the claimant credible in his evidence, and therefore accept his account of what happened on 17 January – namely as follows:

    56.1. The claimant was due to have a break between 1200 and 1400;
    56.2. At 1200 the claimant went on his hour lunchbreak until 1300, leaving his two colleagues on the gate, and then went to pray at 1300;
    56.3. The claimant and his two colleagues had an agreement with Align staff that someone from Align would cover them on the gate when they had to go and pray. The claimant needed to perform Friday prayers once every three weeks;

56.4. The claimant went to the facilities room to pray at 1300. In the facilities room the other two security officers joined him: none of them returned to the gate at that point;

56.5. The claimant told us he returned to his post at 1400, as per his agreed break.

57. We note the witness statement of Kassem Khalifeh, the respondent's Mobile Supervisor, at [102] states that "*at 1330 prayers have finished and guards came back to position*". However, there is no detail as to which guards returned. We also note that the claimant's interview was at 1436, not earlier. We therefore accept the claimant's account that he returned at 1400 as opposed to earlier.

58. Mr Khalifeh attended the site whilst the claimant was absent. An investigation interview was undertaken with the claimant by Mr Khalifeh, who then provided his own witness statement regarding the aftermath of the incident.

59. We note the claimant's assertion that Mr Khalifeh was "unprofessional" and "incompetent". In the claimant's cross-examination, it appeared to be the position that this assertion was based on Mr Khalifeh's repeated error in recording the date as "17.11.20" instead of "17.01.20". Although we do not place a great deal of weight on this point, it is an indicator that Mr Khalifeh's mind was not really focused on the job in hand.

60. Mr Khalifeh also conducted interviews with Mr Mohamed and Mr Sabriye: we have not seen the interview notes from these two individuals.

61. Following Mr Khalifeh's investigation, the claimant was invited to a disciplinary hearing by letter of 27 January. The invitation letter did not set out what facts the respondent was relying upon, simply the bare allegations (e.g. "gross misconduct – gross negligence").

62. The disciplinary meeting was rescheduled once, for the claimant's availability, and went ahead on 6 February 2020. Mr Ives was the disciplinary officer, and the notes of that meeting are at [112].

63. Mr Ives had in front of him whilst making his decision the investigation notes at [103], Mr Khalifeh's statement at [101], the DOB at [106] and the investigation notes from the other two officers involved. That last item was not within the bundle, despite being highly relevant to the decision-making exercise. Also, the claimant was not given a copy of those investigation notes to view during the internal process.

64. Mr Ives also had the mitigating email sent by Mohamed Sufyan, of Align – [108] – which set out that the South Portal, where the claimant was based, had 11-12 Muslims working on site in different roles. Mr Sufyan explained that he was content for the respondent's security guards to carry out their prayers with the Muslim staff from other employers (Align, HS2, RoadBridge, Socotech, and KVJV), and he provided cover for the gate from the Align staff. Mr Sufyan set out that he accepted fault in not speaking to a security supervisor at the respondent, but that "t*he matter would have been resolved by properly requesting and arranging a cover during the time of Friday prayer*

going forward". In short, Mr Sufyan accepted full responsibility for what he says was a misunderstanding between Align and the respondent – [108].

65. At the end of the meeting, Mr Ives took a short break of 5 minutes or so, to check his decision making with Human Resources, and then reconvened the meeting to inform the claimant that he had taken the decision to dismiss him.

66. The disciplinary notes were signed by the claimant immediately after the meeting. He confirmed to us that the notes were accurate, although he told us in evidence that he had mentioned CCTV to Mr Ives, and that although he had signed the notes, they had been placed under his nose at the end of the meeting and he did not read them before signing them.

67. Dismissal was confirmed in the outcome letter at [115]. Again, we note that there is very little detail as to what the factual basis of the allegations were: although Mr Ives sets out his reasons, he simply confirms then that "*I have therefore found you guilty of gross misconduct allegations*".

Appeal

68. The claimant appealed on 10 February [117]; his appeal was heard by Mr Harre on 17 February 2020. During the appeal, the claimant asked Mr Harre to check with Mr Khalifeh as he would confirm that the claimant was on a break at the time of the incident. Mr Harre also wanted to check whether there was any further evidence around the claimant's suggestion that he was on a break.

69. During Mr Harre's deliberations, he considered the statements provided by Mr Mohamed and Mr Subriye. Again, we highlight that these documents are not in the bundle, so we have not had the benefit of seeing what they record, despite Mr Harre (and Mr Ives) relying upon them in making his decision.

70. Mr Harre spoke to Mr Khailfeh. There is no note of this conversation, and the detail does not appear in Mr Harre's witness statement. We were told in evidence that Mr Khalifeh confirmed that Mr Mohamed and Mr Sabriye both said that they too were on a break at the relevant time. Mr Harre did not speak to Mr Mohammed and/or Mr Sabriye directly, but relied upon Mr Khalifeh's word – [MH/WS/7].

71. The appeal decision took some three weeks to be written, due to Mr Harre wishing to speak to Mr Khalifeh who was on leave. The claimant states he never received the outcome letter that we now have dated 10 March 2020 at [124] until he had it in the bundle. We have nothing to demonstrate that this was in fact sent to the claimant on or around 10 March 2020. Mr Harre's evidence was that usually such a letter is emailed and sent in the post. If that is the case, we would expect to see the email with an attachment in the bundle. There is no such document before us; we therefore accept that the claimant did not get the appeal outcome letter.

72. We note that the appeal meeting notes are not signed by anyone; this was due to the printer breaking down on the day of the appeal, meaning that they could not be printed and checked that day. It was the claimant's evidence that he did not receive a copy of these notes until receipt of the Tribunal

bundle. Although the appeal letter at [125] records that the appeal notes are enclosed, given we have found that the letter was not sent to the claimant, we accept that he did not receive a copy of the notes either. We do however note that the claimant accepted that the appeal notes were accurate in his evidence to us.

Other disciplinaries

73. The amended Grounds of Resistance at [58] state that the claimant, Mr Mohamed and Mr Sabriye were all subject to disciplinary sanctions regarding 17 January. Mr Bryan's opening note points us to the relevant outcome letters for Mr Mohammed and Mr Sabriye at [172] and [174] respectively.

74. Mr Mohamed's letter sets out the same allegations as the claimant's letter: the outcome was that Mr Mohamed was summarily dismissed.

75. Mr Sabriye's letter, on closer inspection, turns out to be for a separate disciplinary matter. We understand that Mr Bryan had been instructed originally that this letter was relevant to the 17 January incident, however Mr Ives explained in supplementary questions that Mr Sabriye was already subject to separate disciplinary proceedings come January 2020, but then raised a grievance which had the effect of halting any disciplinary process. Mr Sabriye then went off sick: on his return to work he was informed that the disciplinary process would be picked up again and include the incident of 17 January, at which point he resigned. So, although Mr Sabriye attended an investigation meeting in relation to 17 January, his disciplinary process did not get off the ground beyond that due to his departure from the respondent's employ.

CONCLUSIONS

Unfair dismissal

<u>Issue 1 – what was the reason (or principal reason) for dismissal</u>

76. We accept that the reason for the claimant's dismissal was misconduct. Although the burden of proof is on the respondent to prove the reason for dismissal, this is a relatively low threshold, set in order to avoid sham dismissals.

77. It is clear from Mr Ives' and Mr Harre's evidence that they genuinely believed that the claimant was guilty of the allegations he faced regarding straying from his post and not recording breaks in the DOB. There is no good evidence to undermine or contradict that the reason for dismissal was conduct.

78. The reason for dismissal is therefore a potentially fair one.

<u>Issue 2 – having regard to that reason, did the respondent, in the circumstances, act reasonably or unreasonably in treating it as sufficient reason for dismissing the claimant? Did the respondent have reasonable grounds on which to base its belief that the claimant had committed the misconduct? If so, at the stage at which the</u>

<u>respondent formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances</u>

79. Firstly, we note that in the bundle there is a dearth of evidence that we would normally expect to see provided by the respondent, given the facts of this case and the evidence we have heard. For example:

    79.1. Mr Ives says he spoke to Mr Khalifeh – we have no notes;
    79.2. Mr Harre says he spoke to Mr Ives and Mr Khalifeh – we have no notes;
    79.3. Both Mr Ives and Mr Harre say they took into account the investigation notes of Mr Mohamed and Mr Sabriye – we do not have those notes;
    79.4. Mr Harre says he checked a couple of months' worth of the DOB – we do not have those pages.

The claimant's six specific points of fairness

80. At the beginning of the hearing, we established that the claimant was relying on six specific points to argue that his dismissal was unfair:

    80.1. There were personal differences between the claimant and Mr Khalifeh (Point 1);
    80.2. The respondent failed to look into the CCTV evidence for the relevant time frame (Point 2);
    80.3. The respondent did not establish who was responsible for staffing the gate (Point 3);
    80.4. The claimant was on a break at the time (Point 4);
    80.5. Mr Khalifeh did not record anything in the DOB (Point 5);
    80.6. There was a delay in providing the appeal outcome (Point 6).

81. Point 1: personal differences were not raised in the internal process, and so the respondent could not reasonably have looked into this issue internally. This point does not render the dismissal unfair.

82. Point 2: although this is not recorded in the disciplinary meeting notes as having been requested by the claimant, he now says he may have mentioned it. CCTV evidence is something that has been considered in other disciplinary hearings; see reference to CCTV in the anonymized outcome letter at [141] and the letter at [143].

83. Mr Ives and Mr Harre did not even explore whether the gate in question was covered by stationary CCTV, although it was routine for a security officer to wear a body camera.

84. We accept that ownership of the body camera and therefore the data produced by that body cam switched at some point from the respondent to the client, Align. However, no attempt was made by either Mr Ives or Mr Harre to even explore obtaining any CCTV.

85. The claimant says the CCTV would have shown him with his PPE kit off, meaning he was going for his break. We have no reason not to accept this evidence; there is no evidence before us to challenge it.

86. Such CCTV evidence, we find, could have affected the decision of Mr Ives as it would have provided supporting evidence for the claimant's contention that he was on a break (detail of which we cover in the third point). Mr Ives specifically asked the question of the claimant in his disciplinary hearing as to whether he was on a break; therefore, we are satisfied that whether or not the claimant was on his break at the time of going for prayers was something that materially weighed into Mr Ives' decision-making and was a relevant factor to be taken into account.

87. Points 3 & 4 we take together. Although we accept that David Eke and Peter Day were not the respondent's employees (but employees of Align) and were not keen to be involved, it does not appear that the respondent did much to explore whether they would be willing to discuss the incident, given that three employees' jobs were on the line and one colleague from Align had given a voluntary statement which took the blame. They were witnesses who could have shed some material light on the issue of the agreement around prayers, and also who of the three security officers left the gate first on 17 January, and who was on an agreed break. This information could have materially affected Mr Ives' decision-making.

88. This is particularly relevant given that the claimant in the disciplinary told Mr Ives about the arrangement the security officers had with Align. The claimant was relying upon this in mitigation, and is a point for which Mr Ives had supporting evidence in Mr Sufyan's email at [108], which Mr Ives told us he discounted.

89. The claimant also set out to Mr Ives in the disciplinary hearing that he was on a break and could prove it – [113]. We note that paragraph 7 of Mr Ives' witness statement states that "*it was not possible to verify [who was on a break] without the DOB*", however there was more that Mr Ives reasonably could have investigated to get to the bottom of this, which was clearly a material issue in his mind, given this remark in his statement.

90. We remind ourselves that it is an employer's responsibility to gather all the available evidence. Although we accept that there is a limit to the steps an employer should be expected to take to investigate (<u>Miller v William Hill Organisation Ltd</u> EAT 0336/12) we have to bear in mind the nature and gravity of the case, the state of the evidence, and the potential consequences of an adverse finding to the employee. There was more evidence that Mr Ives (and Mr Harre) could reasonably have explored to be able to determine whether it was true that the claimant was on an agreed break.

91. Although the respondent's case is that the essential facts of misconduct were admitted, we consider that who was on a break and who left the gate first would, by any reasonable employer, be considered to be essential facts.

92. We find that the claimant was consistent in stating that he was on his break, for example:

    92.1. [113] – "I thought I could leave during my break";
    92.2. [113] – "were you on a break" "yes and I can prove it". If the issue of breaks was not relevant to Mr Ives' decision making, there was no reason to ask that question.

93. Mr Harre's appeal did not remedy the failures in the investigation and disciplinary processes, as his actions of speaking to Mr Khalifeh and reading the notes of Mr Mohamed and Mr Sabriye's interviews were just to repeat activities undertaken by Mr Ives, as opposed to plugging any holes within the disciplinary process up to that point.

94. Point 5: it is common ground that the handwriting in the DOB at [106] for 17 January is the claimant's. It therefore appears that Mr Khalifeh did not write anything in the DOB. Given that the claimant's own case is that no-one really wrote routinely in the DOB, we are not satisfied that we can draw an inference from this lack of writing by Mr Khalifeh that he was set upon getting the claimant dismissed. This point therefore does not render the dismissal unfair.

95. Point 6: Mr Harre's evidence was that usually the appeal outcome letter is emailed and sent in the post. We would expect to see the email with an attachment in the bundle. No such document before us. We accept that the claimant did not get the appeal outcome. Although this is undesirable and clearly led to the claimant suffering more distress by having his appeal unanswered, we find that, although a procedural error, this does not of itself render the dismissal unfair.

Burden of proof in the internal disciplinary procedure

96. It appears to us that Mr Ives and Mr Harre effectively reversed the burden of proof. At Mr Ives' statement, paragraph six, he states "*the claimant provided no other evidence before or during the Disciplinary Hearing other than his verbal account of the incident*", as if expecting the claimant to provide evidence of his innocence.

97. Further, Mr Ives in evidence numerous times said he did not investigate certain matters because "*I felt I had more than sufficient evidence to go ahead*" and "*I felt I had enough information for the investigation and disciplinary*". This was his answer as to:

    97.1. Why we have no statement from Peter Day;
    97.2. Why we have no statement from David Eke;
    97.3. Why he did not explore the possibility of CCTV.

98. The ACAS guidance sets out that investigations should be aimed at finding out if there is an issue, rather than attempting to prove guilt. Further, A v B [2003] IRLR 405 highlights the need to spend no less effort looking for exculpatory evidence than for evidence confirming guilty

R's propositions

99. As already mentioned, we accept that it is a fundamental duty of a security officer to staff his post and leaving it unstaffed is a dereliction of that duty, and that abandonment of post is taken very seriously. This is said by the respondent both to justify the reasonableness of the investigation and the sanction of dismissal.

100. In terms of the investigation, it is in fact common ground that the claimant did not leave *the site*, and we have found that, at the time of the claimant leaving for his two-hour break, he did not leave the gate unstaffed, he left his colleagues in charge.

Conclusion on unfair dismissal

101. We therefore conclude that the investigation was not reasonable in all the circumstances, so as to undermine the grounds for the genuine belief held by the decision-makers, meaning that there were no reasonable grounds for that belief.

102. We find that the failures in the investigation were such as to render the dismissal unfair.

103. Therefore, we find that the claimant's claim of unfair dismissal is well-founded. He was unfairly dismissed.

Wrongful dismissal

Issue 3 – did the claimant's conduct amount to gross misconduct such that the respondent was entitled to dismiss him without notice?

Issue 4 – If not, should the claimant be awarded damages and, if so, how much?

104. We have found the facts as to what happened on 17 January regarding the claimant leaving to go on his break, we do not repeat those findings, other than to add:

    104.1. The arrangement the three security officers had regarding breaks, although the respondent says is unusual, was unsupervised by any senior management. How breaks were taken, or the length of them, were not monitored by the security officers' management, and there is no evidence to show that such arrangements were or were not taking place elsewhere on any other of the 19 sites under the respondent's remit.

    104.2. Given the lack of proper investigation and lack of paper work from the respondent, the only evidence before us of what happened on 17 January when the claimant was away from the gate is from the claimant. As stated above, we found his evidence credible, and there is no good reason not to accept it.

105. In determining whether the claimant's actions as we have found them to have been on 17 January amounted to gross misconduct, so as to release the respondent from its contractual obligation to pay notice pay, we take into account the following:

    105.1. When the claimant left his post at 1200, he left his two colleagues at the gate;

    105.2. The claimant's agreed break was between 1200 and 1400. He returned to his post at 1400;

105.3. The end client, Align, had approved and in fact facilitated the security officers leaving their post for prayer time;

106. We therefore conclude that the claimant's actions were not so serious as to amount to gross misconduct. The claimant was therefore not in fundamental breach of his contract. As such, the respondent acted in breach of contract by not paying the claimant his notice pay.

107. The claimant's wrongful dismissal claim succeeds.

Discrimination

Issue 7 – was the claimant's dismissal because of race and/or religion/belief

108. We have already found that the reason or principal reason for the claimant's dismissal was his conduct. The question we have to consider under this head of claim is whether the claimant's race or religion was an effective cause of his dismissal.

109. We note that the claimant's own evidence to us was that Mr Khalifeh set him up for dismissal because of personal animosity between the two gentlemen. A personal dislike or personality clash does not, of itself, provide the basis for a discrimination claim.

110. The only facts we have regarding the claimant's race and religion and their impact on his dismissal are:

110.1. Religion – the fact that the claimant left his post to pray; and,
110.2. Race – the fact that Mr Sabriye was not dismissed, and he was not African-Asian;
110.3. The fact that both Mr Ives and Mr Harre both deny robustly that the claimant's race or religion had any impact on their decision making.

111. In terms of the fact that the claimant left his post to pray, we accept Mr Bryan's submission that this is background as opposed to being in any way the cause of the claimant's dismissal.

112. Regarding the comparison to Mr Sabriye, firstly, we do not know what would have happened to Mr Sabriye had his disciplinary procedure been concluded in relation to the 17 January matter. In any event, there is nothing other than a difference in race between Mr Sabriye and the claimant: there is nothing more (as required by Madarassy) to enable us to conclude that the dismissal could be discriminatory.

113. We therefore have insufficient evidence to demonstrate that, without adequate explanation, the claimant's dismissal could be discriminatory. We therefore conclude that the initial burden of proof is not met and so the burden of proof does not move to the respondent.

114. Should we be wrong on that, and the burden has shifted to the respondent, we are satisfied that the respondent has demonstrated a non-discriminatory reason for the dismissal, namely the claimant's misconduct. We accept Mr

Ives' and Mr Harre's evidence that the claimant's race and religion did not operate on their minds when reaching their decision.

115. Both the race and religion/belief direct discrimination claims therefore fail.

Holiday – jurisdiction

116. The claimant gave evidence that he did not have any professional advice or assistance in bringing his claim. He told us that his main concern was his dismissal, and he was waiting to hear the outcome of his appeal. Whilst waiting, his uncle mentioned to him that he may have a claim regarding his dismissal, and to contact ACAS.

117. The claimant did no research about his rights, other than to find ACAS's contact details. He was ignorant of the time limits set out to present claims to the Tribunal, and was not offered any advice by ACAS regarding either time limits or holiday claims.

118. The claimant's evidence was that the first time it occurred to him that he may have some sort of right relating to his November holiday request was when he saw the tick boxes on the ET1 form.

119. We therefore accept that the claimant was ignorant of his right to bring a claim relating to that holiday request, until the time of seeing the ET1.

120. The issue next is whether that ignorance was reasonable in the circumstances. We take into account that the claimant has been a security guard for many years, and appears not to have progressed up any promotional ladder. Although there are many skills involved in being a security officer, it is not a role one would expect to require analysis, investigation or research.

121. We bear in mind that the claimant has not had any professional advice during the course of this litigation, and has no friends or family who have been through the Tribunal process previously.

122. We accept that the claimant had access to the internet and therefore could have accessed the various resources available on the internet. However, in the round, taking into account all the circumstances, we conclude that in the claimant's position his ignorance was reasonable, and that it was therefore not reasonably practicable for him to enter his claim in time.

123. Turning to whether the claim was then entered in a reasonable period thereafter. As we have stated, the claimant only became aware of his right on seeing the ET1 form, at which point he ticked the box for a claim for holiday pay, and then did not delay in submitting the ET1. The claimant therefore entered the claim as soon as the impediment preventing him from doing so (i.e. his lack of knowledge) was removed.

124. We therefore conclude that the claimant presented his claim in a reasonable period and we have jurisdiction to deal with the claim.

Holiday pay – substantive

Issue 8 – did the respondent fail to allow the claimant his full holiday entitlement for the holiday year January 2019 to December 2019?

125. From the facts we have found, we conclude that the respondent did not fulfil the steps required by the Pimlico case. We particularly take into account the following:

    125.1. the lack of evidence from the respondent as to the reason for the lack of response to the claimant's request in September 2019;
    125.2. the lack of explanation as to how the December holiday was imposed;
    125.3. the lack of evidence regarding what steps the respondent took to encourage the claimant to take holiday.

126. In other words, the respondent has not proved on the balance of probabilities that:

    126.1. It gave the claimant the opportunity to take paid leave in 2019;
    126.2. It encouraged the claimant to do so;
    126.3. It informed the claimant in 2019 that the right would be lost at the end of the leave year.

127. On that basis, we conclude that there was a refusal to entitle the claimant to his right to take his holiday in the leave year 2019.

128. The difficulty we face on this claim is that we are unclear as to what the claimant's holiday entitlement would have been. We understand that it is calculated on a pro-rata basis, according to the shifts undertaken by employees. We note that the claimant had taken ten holiday days within the calendar year January 2019 to December 2019 (which is the leave year absent of any express leave year being set out in the contract of employment), and note that the Timegate calendar print out demonstrates that the claimant worked the majority of possible days in 2019. We therefore conclude that there would be some holiday entitlement remaining in 2019 that the claimant was prohibited from taking, however a remedy hearing will have to cover the detail of how much holiday the claimant was in fact entitled to in 2019.

129. The claim under regulation 13 of the Working Time Regulations 1998 regarding holiday pay is therefore successful.

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Employment Judge Shastri-Hurst

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Date 6 January 2023

REASONS SENT TO THE PARTIES ON

31 January 2023

FOR THE TRIBUNAL OFFICE