EMPLOYMENT TRIBUNALS

Claimants: **Mr. Albert Uwadiae**

Respondent: **Crystal Services plc**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **1, 2 September, 26, 27, 28 October 2022, 16, 17, 18 January 2023 (8 days)**

Before: **Employment Judge Hallen**
Members: **Ms. M. Legg**
Mr. S. Woodhouse

Representation

Claimant: **In person**

Respondent: **Mr. Toby Jerman- Managing Director**

RESERVED JUDGMENT

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.

The unanimous judgment of the Tribunal is that: -

1. **The Claimant was unfairly dismissed both procedurally and substantively.**

2. **The Claimant was subject to direct race discrimination contrary to section 13 Equality Act 2010 ('EA').**

3. **The Claimant had unlawful deductions made from his wages for an alleged absence from work on 6 and/or 7 October 2021. He had one day deducted from his wages when it should have been only half a day for his failure to attend a disciplinary hearing arranged for one of those days.**

4. **The Claimants claim for unlawful deductions of wages and for**

payment of the National Minimum Wage for the period 8 September 2020 to 26 October 2021 is dismissed as he did not work more than his contractual 42.5 hours per week.

5. The Claimant's remedy claim is listed for hearing for two days on 29 and 30 June 2023 and separate case management directions will be sent out to the parties.

REASONS

Background, legal claims and issues

1. By a Claim Form presented on 23 November 2021, the Claimant brought complaints of unfair dismissal, race discrimination and for other payments. In summary, the Claimant's case was that from 8 September 2020 he was forced to work a new working pattern, from 5am to 10pm with no rest breaks, his grievance was not upheld, and he was unfairly summarily dismissed from his employment as an Area Manager on 26 October 2021. The Claimant said that his new managers from 8 September 2020, Emma Compton and Freddy Correa, treated black members of staff less favourably and that their conduct towards him was similarly due to race.

2. The Respondent denied all of these claims. The Response Form lacked any meaningful detail and consisted of a general assertion that the Claimant was fairly dismissed for gross misconduct and denied any claims of race discrimination. It was not apparent on the pleadings what the alleged gross misconduct was or whether a fair procedure was followed.

3. The claim first came before the Employment Tribunal at a preliminary hearing on 20 June 2022 at which the claims and issues were identified. The parties were content at the preliminary hearing for all matters to be dealt with by documents and witness statements at the final hearing which Employment Judge Russell confirmed would remain listed for two days on 1 and 2 September 2022. As the final hearing was due to start on 1 September 2022, she did not consider it proportionate to require a properly pleaded defence to the claims and as such these two legally unrepresented parties were left to prepare witness statements for the substantive hearing on the dates reserved for the substantive hearing. It was hoped by Judge Russell that the claim would be dealt with in two days with the parties concentrating on the central issues but that turned out to be an optimistic assessment mainly because the parties did not have legal representation. As a consequence, this Tribunal gave both parties assistance and guidance to put their questions as well as advising on procedure and law. Over the eight days of the hearing both parties were given a great deal of latitude which would not normally be given if the parties had legal representation. Employment Judge Russell identified the legal claims as unfair dismissal, direct discrimination due to race contrary to section 13 EA and unlawful deductions from wages and/or whether the Claimant was paid national minimum wages.

4. With respect to the claim for unfair dismissal, this Tribunal was tasked with asking itself the following questions: Did the Respondent dismiss the Claimant because it genuinely believed that he had committed an act of misconduct? If so, was such belief reasonable based upon a reasonable investigation? Was the dismissal fair or unfair in accordance with

ERA section 98 and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'? Should there be any adjustment to any award made to the Claimant to reflect: if the dismissal was procedurally unfair, the possibility that the Claimant would have been fairly dismissed in any event; blameworthy or culpable conduct by the Claimant; unreasonable failure to comply with the ACAS Code on disciplinary and grievance (as the Claimant did not appeal his dismissal).

5. In relation to the claim for direct discrimination due to race, this Tribunal was tasked to ask if the Claimant was subjected to the following treatment: (1) From 8 September 2020, was there a detrimental change to his working pattern; (2) From 4 October 2021, the Claimant's grievance was not upheld and his appeal was rejected; (3) On 26 October 2021, the Claimant's summary dismissal for alleged gross misconduct. If so, was that treatment less favourable because of race? The Claimant relied on the treatment of Mr Olu Omujuwa another black Area Manager and dismissal of other black employees as evidence from which the Tribunal could conclude that a hypothetical comparator of a different race would have been treated more favourably.

6. With regard to the claim for unlawful deduction of wages/payment below the National Minimum Wage, this Tribunal had to ask itself the questions how many hours a day was the Claimant working and for which he was entitled to be paid? Was the Claimant paid in full for the hours worked during the period 8 September 2020 to 26 October 2021?

7. At the outset of the hearing and during the course of the 8 days of the hearing, the Tribunal outlined to the parties that the above claims and issues were the only claims and issues that would be considered and that no other claims/issues would be considered. Any other factual matters raised by the parties would be considered as background evidence only. The parties had attended the hearing before Judge Russell at which these matters were agreed and prior the commencement of this substantive hearing, no applications were made to amend the agreed list of claims and issues. The parties at the commencement of the hearing were content to proceed on that basis.

8. Although by the start of the substantive hearing, the parties had agreed to the content of the hearing bundle, this Tribunal gave both parties a limited amount of latitude to add documents to the bundle. For example, the Claimant was given permission at the commencement of the hearing to adduce a limited number of documents although his application to introduce audio recordings of meetings was refused on the basis that the trial bundle already contained notes of the numerous meetings that had taken place between the parties. The Respondent was given permission to introduce the notes of the Claimants appeal against the first stage grievance outcome which concluded on 25 October 2021. The final trial bundle ran to 404 pages.

9. The Respondent applied at the beginning of the hearing to have the Claimant's claim for unfair dismissal and unlawful deduction of wages claims struck out on the basis that the ACAS pre-claims conciliation certificate at page 3 of the bundle of documents showed the conciliation period between 5 and 7 October which predated the unfair dismissal and unlawful deduction of wages claim and that only arose on the Claimant's dismissal on 26 October 2021. The Tribunal rejected this application as section 18 of the Employment Tribunals Act 1996 only required the Claimant to enter ACAS pre-claims conciliation in respect of any *"matters"* under dispute. The Claimant entered into conciliation between 5 and 7 October 2021 and pursuant to the cases of **Science Warehouse -v- Mills 2016 IRLR 96** and **Compass Group UK and Ireland -v- Morgan 2016 IRLR 924**, the Claimant only

needed to conclude the pre claims conciliation process in respect of a matter in dispute. In this case, the extant matter under dispute was the discrimination complaint. The ACAS certificate obtained in respect of that matter covered any subsequent claims that the Claimant wished to litigate and that were also under dispute. The above cases made it clear that the Claimant did not have to outline each and every cause of action that he wished to bring when going through the pre-claims conciliation process and obtaining a certificate.

10. The Tribunal had an agreed bundle of documents in front of it. The Respondent's witnesses gave evidence first and in order were Michele Sabey, General Manager, Pest Control Division, Giovanny Carbali, General Manager, Toby Jerman, Managing Director, Emma Compton, General Manager, Freddy Correa, Regional Manager, Debbie Turner, Payroll and Personnel Manager. Thereafter, the Claimant gave evidence and called three witnesses, Mr Phillip Adeyemi, former Supervisor for the Respondent, Mr Olu Omojuwa, former Area Manager for the Respondent and Wendy Whittington, the Claimant's Trade Union Representative. All of the witness prepared written witness statements and were subject to cross examination and questions from the Tribunal.

Findings of fact

11. The Respondent is a cleaning business that undertakes cleaning of commercial client's businesses on a contract basis. It has a relatively flat management structure made-up of a majority of cleaners based at its various client locations in and around London who are managed by Area Managers, Regional Managers and General Managers who report to the Managing Director. The Respondent employs approximately 700 employees and is not a small employer. It accesses employment law advice from employment law consultants that it retains to provide such advice as and when needed.

12. The Claimant was employed by the Respondent and worked as an Area Manager from 17 May 2010 until 26 October 2021 at which time he was dismissed for gross misconduct. He was first employed in the Dulwich division until he was moved (after taking furlough leave after the first national lockdown due to the covid pandemic) to the Loughton division on the 8 September 2020, to work under Emma Campton (General Manager) and Freddy Correa (Regional Manager). Prior to his move to the Loughton division, his Regional Managers were David Rees from 2010 to 2015 and Jeff Underwood from then until 2020. The Respondent did not call these managers to give evidence to the Tribunal.

13. The Claimant's job description was to manage the cleaning of office buildings on behalf of the Respondent and to ensure that its clients were provided with the highest standard of services from the Respondent. His responsibilities as an Area Manager included preparing cleaners wages, visiting sites to ensure cleaning was done satisfactorily, ordering cleaning materials, attending client meetings/audits and sending/receiving emails, telephone calls between himself, cleaners, clients, line managers and subcontractors. It was agreed by the Respondent that prior to his move to the Loughton division he provided his services under his contract of employment to a generally good standard.

14. The Claimant gave evidence to the Tribunal which was accepted as to his working pattern from 2010 to 2020. This pattern was supported by his witnesses, Mr Omojuwa and Ms Whittington who gave evidence to the Tribunal on his behalf. The Claimant confirmed that daily cleaning of the offices was mostly done between 5am and 9am in the mornings and 5pm to 10pm in the evenings, though there were some sites that were cleaned during the day or had lunchtime cleaners. In 2010, when the Claimant was first employed, his

General Manager (David Rees) explained to him that he should be able to visit sites in the mornings 3 times a week (Monday, Tuesday and Wednesday) and 2 times a week visiting sites in the evenings or vice versa (Thursday and Friday) and then come to the office to carry out the administrative part of the job (sending/receiving emails, making phone calls, ordering materials for sites etc), this work pattern allowed the Claimant to balance both his work and family life.

15. The Claimant's mornings site visits started at 5am, working through the day attending client meetings, receiving, and sending emails, making phone calls, and visiting lunch time cleaners until about 2pm and then he had the evening for his family. When visiting sites in the evenings, he started work about lunch time at the office doing admin work (sending/receiving emails, making calls to clients, cleaners or subcontractors etc) before setting out to visit lunch time cleaners, attending client's meetings, and visiting evening sites until about 10pm as some of his sites closed at 10pm. This working pattern enabled the Claimant to fulfil his contractual hours of 42 ½ per week and worked well for the Respondent for 10 years prior to the Claimant's move to the Loughton division. Although the Claimant did not have written confirmation of this working pattern, the Tribunal accepted his evidence as it was supported by two of his witnesses and was outlined by him in his grievance relating to his working hours at pages 330 and 350 of the bundle. Furthermore, the Respondent did not call either Mr Rees or Mr Underwood to give evidence to cast any doubt on this pattern nor did it interview them or refer us to any notes of interviews in the bundle that dealt with the work pattern. The Tribunal accepted that the reason that the Claimant lodged his first grievance on 30 October 2020 was mainly due to his new managers attempting to change his working pattern without his consent and agreement. The Tribunal found that the Claimant's working pattern as he described to the Respondent was a contractual implied term of his contract of employment. The other reasons for his first grievance to the Respondent related to him being micromanaged by his managers and being obliged to use the newly introduced Outlook calendar so that his new managers could see what he was doing. He gave evidence to the Tribunal which was accepted that he was not required to use the Outlook calendar before his move to Loughton and the Respondent accepted that its use was introduced in 2020.

16. When the Claimant was moved to work in the Loughton division under Emma Compton, she decided to change the Claimant's work pattern, seeking to persuade him to carry out site visits twice a day, mornings and evenings five days a week. For example, she said in an email on 13 July 2021, *'Please ensure you make morning and evening visits to site. Please show this in your calendars for Wednesday and Thursday, by adding your morning appointments for those days. You can visit all your sites in a week, by doing morning and evening visits.'* Further in an email on 13 July 2021 she said, *'I believe it is probably reasonable for a 2 hour response to client emails during the day. You cannot switch off your emails during the day, as clients responses are required'.* The Claimant was required to respond to emails as soon as he received them throughout the day and confirming that he could not switch off from his emails or phone. The Claimant argued that the change in his work pattern did not allow him to balance his family life.

17. The Tribunal noted further examples made by the Respondent to attempt to persuade the Claimant to change his working pattern for examples at pages 230 to 235 there were further efforts made in July 2021. On 14 July 2021 the Claimant asked Ms Compton, '*Regarding morning and evening site visits, I'm not sure if this is renegotiating a new contract, however I should be able to turn off my phone in between my morning and evening site visits. Offices are beginning to return and there will be more demand from clients, more*

site visits, more client meetings etc. I have been under tremendous work pressure that I almost lost my family, my phone and tv set destroyed, almost developing mental and physical health issues, going through unnecessary disciplinary hearings just for asking a simple question.' On 14 July 2021, the Claimant said to Ms Compton, *'I can't believe after 11years in a job and less than six months working under you, I only work 2hrs in the mornings and two hours in the evenings and therefore I should keep my phone on all through the day but does not count as Working hours. I believe you were working from home during the lockdown and your hours were counting but unfortunately my hours shouldn't count when I cannot turn off my phone during the day and been monitored. My travelling time has no bearing on my job performance and I cannot stress that enough, You assumed that I only worked 4hrs yesterday but rubbish the hours I did on the 24th June which was just an instance of my daily activities, I already knew why you were trying to frustrate me to resign…….. From next week, I will revert back to my 10 yrs + working pattern and if you are not satisfied with it, you can begin the final stage of your plans'.*

18. On 19 July 2021, Ms Compton responded to the Claimant's email by saying, *'Further to your email, I note you want work your 10 yrs + working pattern. We will monitor how that works. Please ensure you put all your visits in the calendars, so we know what sites are being checked. Please also, as previously requested ensure you make 3 visits to KF Properties and 3 visits to Doughty Street each week when the cleaners are on site'.*

19. Based upon the contents of paragraphs 16 to 18 above, the Tribunal found that the Respondent was attempting to vary the Claimants contractual working pattern but was not doing so by consultation and/or consent. Rather, as can be seen from the Claimant's response to Ms Compton's email on 14 July 2021, was doing so by instigating disciplinary action against the Claimant for raising his grievance in respect of his change to his working pattern.

20. The Respondent did not dispute that the Claimant had a level of discretion in how he organised his working week prior to his move to Loughton but it did not agree with the shift pattern that he outlined as existing by agreement with Mr Rees and Mr Underwood to whom he reported from 2010 to 2020. However, the Tribunal did not accept this evidence. As cited above, neither Mr Rees or Mr Underwood was called to give evidence by the Respondent and nor was the Tribunal directed to any investigation notes with these two managers. The Respondent also accepted that the use of the Outlook calendar for all managers as well as the Claimant started in 2020. It was also not in dispute that the Claimant raised his concerns about his shift pattern being different to the one he undertook whilst working for Mr Rees and Mr Underwood very closely proximate with his return to work after the first national lockdown in September 2020 when he reported to the Loughton office under Ms Compton. The Respondent's position was that there was no change to the Claimant's working pattern albeit the Respondent produced little evidence of what the working pattern was prior to the Claimant's return after the national lockdown to the Loughton office. This was probably due to the fact that the Outlook diary was introduced for general use in 2020 and no evidence existed that the Respondent could refer us to. All that the Respondent seemed to be concerned about was whether the Claimant undertook his duties prior to his first return from furlough leave and there was no evidence produced by the Respondent that indicated that the Claimant did not undertake his duties whilst working for Mr Rees and Mr Underwood. Therefore, on balance, the Tribunal found as a matter of fact the Claimant did undertake the working pattern as set out at pages 330 and 350 of the bundle (referred to above at paragraph 14) and that the Respondent was attempting to change it.

21. The Claimant gave evidence to the Tribunal that when he moved to the Loughton division, on 8 September 2020 until the termination of his employment on 26 October 2021, his working pattern was changed by the Respondent so that he had to work continuously from 5 am in the morning to 10 pm in the evening 5 days per week rather than the shift pattern that he was previously working in Dulwich. In order to support his contention that he was working continuously from 5 am to 10 pm, the Claimant produced diary entries which were at pages 250 to 262. These purported to show the Claimant undertaking morning and evening site visits on a daily basis from June to September 2021. Whilst these diary entries showed daily morning and evening site visits, they did not show any work being undertaken by the Claimant during the day in respect to emails and phone calls. In addition, they were limited to the months July to September 2021 and did not include earlier months. The Claimant also produced examples of days where he undertook many phone calls and emails in evidence. However, he accepted that these documents were available to him at the time of his suspension from work in October 2021 but that he did not produce this evidence to the Respondent at the relevant time and in particular in relation to his grievance to Mr Carbali in October which specifically related to his new work pattern. He also accepted that he only produced this evidence in respect of these Tribunal proceedings during the discovery stage. The Respondent asserted that the documents were not a true reflection of the work that the Claimant undertook and were constructed by him to assist him in his claim for unlawful deductions/National Minimum Wage in these proceedings. Furthermore, the Respondent could not persuade the Claimant to complete the Outlook diary whilst he was working for the company so it is unlikely that he could then produce such a detailed Outlook diary for June to September 2021. The Tribunal concluded on balance that the diary extracts and emails were not a correct reflection of the fact that the Claimant was working continuously from 5 am to 10 pm five days a week. On balance, the Tribunal found that the Claimant was undertaking 42 ½ hours per week during those months that he actually worked for the Respondent in the Loughton division between 8 September 2020 and 26 October 2021. It appeared to the Tribunal that the Claimant was an intelligent man and had he had these documents in his possession at the relevant time, he would have produced them to the Respondent at the time of his grievance appeal in October 2021 so that the Respondent could undertake a proper and reasonable investigation in to whether the Claimant was working continuously as he suggested to the Tribunal.

22. Shortly after his transfer to the Loughton division on 30 October 2020, the Claimant lodged a grievance against F. Correa and the treatment towards him following his transfer in September 2020 which included alleged aggressive conduct towards him and the requirement to use the Outlook calendar which the Claimant had not used before. At this stage the Claimant did not raise the matter of less favourable treatment against him by Mr Correa or Ms Compton although he did say that the use of calendars was to monitor and micromanage him (page 125A). On the same date, the Claimant made a formal complaint to Mr. Jerman about this treatment. Mr. Jerman confirmed that he could not get involved as the matter was being considered by way of the grievance procedure and he may be the point of appeal against any grievance outcome and that he wished to remain independent. He reiterated this evidence to the Tribunal in oral testimony.

23. On 5 November 2020, a grievance meeting took place conducted by Ms Turner, (the first stage grievance adjudicator) where the Claimant also complained about working long hours on his transfer to the Loughton office in addition to the allegations of inappropriate treatment from Mr Correa which included shouting and the raising of his voice against the Claimant and unannounced site visits by Mr Correa which the Claimant thought were arranged to spy on him. The Claimant thought such action was being taken against him to

force him to leave his job at the instigation of Ms Compton or Mr Jerman. The Claimant also asserted that Mr Correa's treatment of him was less favourable treatment due to race and raised the comparative treatment towards Olu Omojuwa who was a black Area Manager who had received similar treatment from Mr Correa and Ms Compton and who had recently resigned from his employment as a consequence of it (pages 130 to 138).

24. The Tribunal heard directly from Mr.Omojuwa and the Tribunal accepted his evidence as it corroborated the Claimant's evidence of less favourable treatment due to race that he also had to deal with from his managers in the Loughton division, Ms Compton and Mr Correa. Furthermore, the conduct described by Mr Omojuwa predated by several months similar conduct that the Claimant had to deal with when he moved to the Loughton division under the same management in September 2020.

25. Mr Omojuwa confirmed that he joined the Respondent on 20 February 2017 as an Area Manager and he wished to build a career with the company but had to resign because of less favourable treatment from Ms Compton and Mr Correa which he believed was due to him being an African black man. He gave evidence to us that he was managed by Ms Compton, General Manager and Mr Correa, Regional Manager in the Loughton division. Whilst working for them, he said that he was told by another Regional Manager that Ms Compton had called him useless and wanted to get rid of him from the business. In addition, he described how Mr. Correa would micromanage him in a similar fashion to the micro-management that the Claimant had described by the same individual. Mr. Omojuwa described how Mr Correa enjoyed investigating him and making his life hell. He also described how Mr Correa preferred the Spanish employees and how the treatment of the two managers forced him to resign from his employment. He confirmed that he believed that the treatment that he faced from both managers was due to his race and skin colour. His letter of resignation was dated 7 March 2020. Following the letter, Mr Jerman met with him and followed up by e-mail dated 12 March 2020. It was not clear what investigation Mr Jerman undertook with regard to these allegations of racial discrimination as no notes were brought to our attention and no reference was made in the e-mail about any further investigations conducted in to the serious allegations of race discrimination made by Mr Omojuwa. Nevertheless, Mr Jerman concluded that he did not believe, *'based on their discussion'*, that Mr. Omojuwa had been treated *'unfairly or differently'* due to his race by the two managers. Mr Omojuwa also gave evidence to the Tribunal which we accepted that he was aware of the work pattern that the Claimant was undertaking at the Dulwich division as this was common knowledge in the company between Area Managers at the time.

26. On 11 November 2020, Ms Turner dismissed the Claimant's grievance in its entirety (page 139). She concluded that the use of calendars was companywide albeit at the Tribunal hearing the Respondent confirmed that this requirement was only introduced in 2020. The hours that the Claimant worked were not onerous and were no different to what he was doing before his move to Loughton albeit Ms Turner did not interview Mr Rees or Mr Underwood to ascertain what hours/working pattern the Claimant was undertaking prior to his move to Loughton. Finally, she concluded that neither Mr. Correa or Ms Compton bullied or harassed the Claimant. They were only doing their jobs in managing him.

27. It was clear to the Tribunal that Ms Turner's view of the race discrimination allegations was based upon her view that none of the alleged perpetrators could have discriminated against the Claimant on a conscious level. It did not occur to her that such discrimination could occur on a subconscious level. Furthermore, she did not undertake a reasonable investigation into the Claimant's serious allegations of discrimination at all. No notes of such

investigation were produced to the Tribunal by the Respondent of such investigations. Furthermore, although the Claimant raised the example of comparable less favourable treatment of Mr Omojuwa, a black Area Manager who had resigned as a consequence of similar less favourable treatment by the same managers, no effort was made by Ms Turner to investigate the voracity of such assertions by the Claimant. Instead, of properly investigating the allegations of race discrimination, Ms Turner blamed the Claimant for raising what she called *'unsubstantiated'* allegations of race discrimination against Mr Correa and Ms Compton which could amount to the Claimant bullying these managers. She warned the Claimant that such unsubstantiated claims if they were to continue could lead to disciplinary proceedings against the Claimant. Ms Turner was concerned about the Claimant's allegations of racism which she found to be *'inappropriate'*. It was not clear to the Tribunal how she could come to that conclusion without properly investigating the allegations.

28. On 18 November 2020 a disciplinary investigatory meeting was called by Ms Compton a little under a week after the Claimant's grievance was dismissed by Ms Turner. The Tribunal noted that the disciplinary investigation was instigated by Ms Compton following Mr. Jerman's email to the Claimant of 18 November at page 143. As this email greatly troubled the Tribunal, we set it out in full, *'Hi Albert, I hope you are well. Further to the emails, I believe the grievance process has been concluded without you appealing the decision to me. Following the process, I see no reason for you feel unsafe or that you are working under a hostile environment. I believe working in Emma's division is a good working environment. You have worked for Emma before and therefore it is difficult to understand your comment that you feel you now work for a different organisation. I believe Emma will hold an investigatory meeting following the grievance process and hope any issues can be resolved. Regards. Toby Jerman'*

29. The Respondent gave evidence to the Tribunal that Mr. Jerman, the company's Managing Director, was only involved in the Claimant's disciplinary process to advise on procedure. It was asserted that he had to keep himself away from direct involvement as he may have been the appeal officer and thus had to remain independent. However, the email sent by Mr Jerman to the Claimant on 18 November 2020 made it clear to the Tribunal that he was not independent of the disciplinary process as he asserted to us. In his email he referenced that Ms Compton was to instigate disciplinary proceedings against the Claimant based on the issues raised by the Claimant in his grievance which Ms Turner had found to be unproven and which the Claimant chose not to appeal. The Tribunal found that this intervention by Mr Jerman to be wholly inappropriate and which tainted the disciplinary process against the Claimant from the outset as it showed quite clearly that neither Mr Jerman nor Ms Compton (the soon to be investigating officer) were independent. Furthermore, it was clear to the Tribunal that the Claimant was being punished for raising his grievance in the first place. Even if the Claimant's grievance was dismissed, the Tribunal did not find that it was right or appropriate to commence disciplinary action against Claimant for matters arising from it.

30. On 20 November 2020, Ms. Compton held an investigatory meeting with the Claimant into allegations of insubordination, failure to check payroll numbers, unsupported allegations of racism, unacceptable behaviour and uncooperative attitude (page 145). This was the first stage of the disciplinary investigation after the Claimant's grievance was dismissed without the Claimant appealing. The allegations of insubordination, abusive behaviour towards managers and unsupported allegations of racism arose directly out of the Claimant's initial grievance which the Tribunal found were not properly investigated. Following the

investigation meeting held by Ms. Compton, the matter was referred to a disciplinary hearing to be conducted by Ms Sabey in respect of the allegations outlined above. The Claimant was warned that the result may be the termination of his employment.

31. On 30 November 2020, Ms. Sabey conducted the disciplinary hearing with the notes of the meeting commencing at page 161. Again, it was not clear to the Tribunal what the nature of the investigation was that Ms Sabey conducted prior to the disciplinary hearing apart from reading the notes of the investigatory meeting conducted by Ms Compton against whom the Claimant had partly raised complaints of discrimination about in his grievance. No notes were produced by the Respondent of such investigation. The Claimant maintained his position that he was not insubordinate to Mr Correa or Ms Compton, that he was undertaking a different work pattern on his transfer to Loughton, that he was made to complete an Outlook calendar that he was not required to undertake before the move and that he felt he was the subject of race discrimination from Mr Correa. He also raised the example of Mr Omojuma who had suffered similar less favourable treatment from the same managers. He confirmed that he perceived that he was the victim of discrimination to which Ms Sabey, (making the same mistake as Ms Turner) said at page 171 and 172, *'Perception is not evidence and without evidence is discrimination. You appear to be making accusations based on your discrimination of others. False, unsupported or dishonest accusations are unacceptable in any workplace'.* At page 171 the Claimant said *'his behaviour towards me is the way somebody who is racist would behave. His shouting at me, his behaviour, he aggression.* Ms Sabey said in response at page 172 *' I do not think these issues make him a racists do they. They are unacceptable behaviour if indeed true but not a racist. What you are claiming here is a very serious accusation'.* Once again, no evidence was produced by the Respondent of what investigation was undertaken by the Respondent in to whether the discrimination asserted to have occurred by the Claimant could have been unconscious.

32. On 7 December 2020, Ms. Sabey issued a final written warning against the Claimant as she found all the allegations against the Claimant proven (page 174). The Tribunal found that she made no serious effort to investigate the Claimant's allegations of racism against Mr Correa and Ms Compton properly or at all. Her view was that the perception of racism raised by the Claimant in respect of the conduct of his managers towards him as a black worker could not be less favourable treatment due to race. In her email of 7 December 2020 she said, '*You have made unsupported claims of racism…. which you suggest we should investigate without any evidence. You refer to shouting as racism, with witnesses saying it was you who were shouting. …….These type of unsupported claims are unacceptable behaviour and appear to be a deliberate unnecessary attack.'* The Tribunal found that once again the Respondent was showing by these comments a lack of awareness of how discrimination can arise in the workplace. The Claimant was given a right of appeal against the final written warning to Mr Jerman who the Tribunal have already found not to be an independent officer of the company and inappropriate to be conducting such an appeal. As it turned out, the Claimant did not appeal the final warning given by Ms Sabey on this ocassion.

33. Between December 2020 to 10 May 2021, the Claimant was on furlough leave due to the second national lockdown as a consequence of the covid pandemic.

34. On 6 May 2021 (at page 180), shortly before the Claimant was to return to work from furlough leave, an email was sent to him from Mr Jerman that the Tribunal also found troubling, and which showed that Mr Jerman was not an independent person as he had

asserted to the Tribunal in evidence in respect of the disciplinary action conducted against the Claimant by the Respondent. Again, we reproduce it in full, *'Hi Albert Further to our group WhatsApp call, including Freddy and Emma, I am writing to confirm we are keen for your return to your area to work well. As we discussed this will be a team effort between Freddy, Emma and yourself to improve communications and working practices. I referred to improvements raised in your disciplinary conclusion of December 2020 and asked that you work to improve on those issues raised:1 Accepting reasonable instruction from Freddy and Emma, including using calendars. 2 Avoid trying to force your will on Freddy and Emma so avoiding any possible insubordination. 3 Communicate in a reasonable way, like the other managers do. 4 Accept Freddy will attend your sites, as he wishes without any warning. 5 You will be required to attend sites in the morning and evening, like the other managers. 6 Albert to avoid negative and divisive comments to Natalie, or anyone else, replying to emails only when you considered it necessary, raising your voice to Freddy and possibly intimidating him, making unsupported claims of racism and behaving in front of our HR Manager is an inappropriate manner. I have asked you to work with Freddy, trying to avoid conflict and avoid any unsupported claims. You did raise in our whatsapp call that cleaners told you Freddy was telling them you would not be coming back to work. He denied this. You did say you did not want me to investigate these claims any further. <u>These type of unsubstantiated claims were raised in your disciplinary process and I would ask you be careful making such claims. Other managers have not had these problems and we hope you can overcome any previous issues to return to work effectively and acceptably.</u> You did say the contracts are the important issue and I agree with this. However, I have asked the 3 of you to work together constructively, following the chain of command, in supporting the contracts effectively. Despite the impression you gave, I hope you can take our call as our genuine attempt to improve things, following the disciplinary process in December. We look forward to you returning to work on Monday 10th May 2021. Regards, Toby Jerman'*. The Tribunal was concerned that the Managing Director would write such an email to the Claimant as he had previously told the Claimant he would not be involved in the process as he may be called to be the appeal officer and had to remain independent. It was clear to the Tribunal on reading this email that Mr Jerman had already reached conclusions about the Claimant in respect of his grievance, his work pattern and in respect of the disciplinary process that had so far been conducted against him. Furthermore, the Claimant was being warned not to 'raise' what were perceived by Mr Jerman, to be unsubstantiated allegations of race discrimination against Mr Correa, Ms Compton or others. We have already found that the allegations raised by the Claimant in this regard were not properly investigated by the Respondent because it appeared to the Tribunal that this Respondent did not believe that subconscious discrimination could occur in the workplace.

35. Within the period of just over a month from the Claimant's return from furlough leave, on 16 June 2021 an investigation meeting was conducted by Debbie Turner into allegations against the Claimant of insubordination, abusive and intimidating behaviour, unacceptable attacks on superiors, uncooperative attitude, wilful negligence and malicious allegations (page 206). The Tribunal found that this disciplinary action was instigated by the Respondent just over a month after the Claimant's return to work after his second furlough leave for similar reasons as were raised against the Claimant as before. The officer conducting the disciplinary investigation was Ms Turner, who undertook the original grievance and the disciplinary officer conducting the disciplinary hearing would again be Ms Sabey. The Tribunal found that neither of these two individuals was independent having been involved with the subject matter of the disciplinary and grievance process before and having reached conclusions on some of these matters already. No reasonable explanation was given to the Tribunal as to why these officers had to be involved again. We noted above

that this employer was not a small organisation and had the resources to ensure that alternative officers could be used. In addition, at least three of the six allegations made against the Claimant arose with respect to his assertion that he had been the victim of race discrimination from Mr Correa and Ms Compton. The Respondent as we previously found did not investigate such allegations properly and was now turning the matter around and punishing the Claimant for raising them on a continued basis. The Tribunal find that the Claimant was quite entitled to raise his concerns about less favourable treatment due to race against him if he was of the view that they had not been properly dealt with by the Respondent.

36. On 30 June 2021, the second disciplinary hearing was conducted by Ms. Sabey into the above allegations (page 212) and on 6 July 2021 Ms Sabey provided the Claimant with the outcome which was the issuance of a further final disciplinary warning to stay on his record for 12 months. Ms Sabey found all allegations proven (page 222) with a right of appeal to Mr Jerman. It is to be noted that the Claimant raised his allegation of race discrimination against him and stated that other black Area Managers (Mr. Omojuwa) and other Supervisors had been forced out of their jobs by these managers during the course of the disciplinary hearing. He also maintained his position with regard to his working pattern being changed and that he was being bullied by Mr Correa and Ms Compton. Nevertheless, Ms Sabey did not undertake a serious investigation of these allegations. This was not surprising to the Tribunal as she had already decided previously that subconscious discrimination could not occur in the workplace. It was also not surprising to the Tribunal that she concluded that the Claimant continuing to raise these matters amounted to, *'wilful negligence and malicious allegations,*' '*unacceptable attacks on senior management,*' *and 'uncooperative attitude*,' for which she issued a final written warning.

37. On 13 July 2021, the Claimant appealed against the final written warning (page 236) and this appeal was conducted by Mr. Jerman. The appeal was considered and dismissed by email dated 23 July 2021 (page 244A). Mr Jerman exhibited the same view as the other officers of the company believing that the Claimant's raising of his perception that he was being treated less favourably due to his race by his managers amounted to an attack on his managers and was inappropriate. It is not clear what investigations Mr Jerman conducted into the allegations of discrimination as this evidence was not produced to us.

38. On 23 September 2021, the Claimant raised a further grievance in respect of his long hours (page 330) and reiterating his work pattern had been changed from when he worked at Dulwich prior to his move to Loughton division. He asserted that since the move he was continually undertaking working days from 5 am to 10 pm. He requested that the pattern that he worked at Dulwich be reinstated.

39. On 4 October 2021, the Claimant was suspended from work on full pay pending the conclusion of an investigation into his alleged misconduct. It was alleged that the Claimant had not undertaken his role properly by arranging for proper cleaning cover at sites under his management prior to going on holiday in September 2021. On 5 October 2021, the Claimant was informed that the Respondent would consider the Claimant's grievance about working hours before it considered the misconduct allegations against him. He was asked to attend a grievance meeting on either 6 or 7 October 2021 at 10 am. He confirmed that he could not attend the meeting on these dates in the morning and as a result the Respondent deducted a day's wages from him. There was no prior written consent from the Claimant for this to be done. The Respondent asserted that as he was on paid suspension

he should have been available to attend the grievance hearing as directed by the Respondent. In the end, the grievance meeting took place on 12 October (notes at page 351) and lasted at most for half a day.

40. On 12 October 2021, Mr G. Carbali conducted the Claimant's grievance meeting in respect of working hours. The Claimant maintained that his work pattern had changed since his move to Loughton from Dulwich and that he was working inordinate hours albeit he did not produce the Outlook calendars which were at pages 250 to 265 of the bundle to Mr Carbali. Mr Carbali maintained the Respondent's position that the Claimant's work pattern did not change and that he was doing the same hours as he was always doing. Mr Carbali did not interview Mr Underwood who was the Claimant's manager whilst at Dulwich and no explanation was given to us for this failure. Mr Carbali also referenced that Mr Jerman had told him that the Claimant's hours and work pattern had not changed. We found this surprising as we had previously been told by Mr Jerman that he was keeping himself out of the process. We were shown no notes of any investigations conducted by Mr Carbali into the Claimant's grievance.

41. On 13 October 2021, the Claimant appealed against the grievance outcome reached by Mr Carbali. The appeal was conducted by Mr Jerman in October 2021. On 14 October 2021, the disciplinary investigation into the Claimant's misconduct in failing to arrange for adequate cover before he went on holiday was conducted by Debbie Turner. The additional allegations that were also to be considered repeated the earlier allegations against the Claimant which were insubordination in his failure to complete calendars, abusive and intimidating behaviour, unacceptable attacks on management, uncooperative attitude, wilful negligence and malicious allegations (notes at page 361). As Ms Turner had had earlier extensive involvement in the grievance and disciplinary process, we found that she was not an independent officer who should have undertaken this investigation. She had already previously made judgments on the Claimant which no doubt influenced her conduct of this investigation.

42. On 15 October 2021, the Claimant was invited to a disciplinary hearing to be conducted by Mr. Jerman (page 368) in respect of the above allegations. On 26 October 2021, Mr Jerman conducted the disciplinary hearing (notes at page 368A). By letter dated 28 October 2021, Mr Jerman dismissed the Claimant for gross misconduct as of 26 October without notice as all allegations against the Claimant were upheld (letter at page 381). It was clear to the Tribunal that Mr Jerman did not make a reasonable effort to consider the Claimant's allegations of less favourable treatment due to race as he, like the other officers tasked with considering them, had already concluded that discrimination could only occur on a conscious and not unconscious level. Therefore, based on this perception, Mr Jerman took the erroneous view that the Claimant's allegations were unsubstantiated and therefore 'negligent and malicious.' Indeed, these were the basis of four out of the five reasons that the Claimant was dismissed for gross misconduct by Mr Jerman.

43. On 25 October 2021, Mr Jerman (who we have found was not independent from the outset of the process), undertook the Claimant's appeal against Mr Carbali's grievance outcome. Mr. Jerman dismissed this appeal by letter dated 25 October 2021. He did not interview Mr Underwood the Claimant's previous line manager and no notes of the interview were produced to us. There was a brief mention of Mr Underwood in the letter, as follows, *' Jeff said when you worked for him from 2016 to 2020, you went out mornings and evenings, answered the phone whenever he called you, called back in 5 minutes, or sent a text to say he was in a meeting. He said you were always available.'* The Tribunal was not satisfied

that this was an adequate investigation as it did not adequately deal with the detail of the Claimant's work pattern which he had explained in detail to the Respondent as set out above. The Tribunal also noted that Mr. Underwood was not called to give evidence before the Tribunal and no adequate reason was given to us for his absence.

The law to be applied

Unfair dismissal

44. Section 98(1) Employment Rights Act 1996 provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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. If the Respondent fails to do so the dismissal will be unfair.

45. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

46. Section 98(4) ERA provides: -

> "the determination of the question whether the dismissal is fair or unfair (having regards to the reason shown by the employer) – 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 shall be determined in accordance with equity and the substantial merits of the case.

47. In the case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 EAT**, guidance was given that the function of the Employment Tribunal was to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band, it is unfair.

48. In the case of **Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23CA**, guidance was given that the band of reasonable responses applies to both the procedures adopted by the employer and the sanction, or penalty of the dismissal.

49. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer (**London Ambulance NHS Trust v Small [2009] IRLR 563**).

50. In the case of **British Home Stores v Burchell [1978] IRLR 379 EAT**, guidance was given that, in a case where an employee is dismissed because the employer suspects or believed that he has committed an act of misconduct, in determining whether the dismissal was unfair, an Employment Tribunal has to decide whether the employer who discharged the employee on the grounds of misconduct in question and obtained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involved three elements. First, there must be established by the employer the fact of

that belief, that the employer did believe it. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage on which he formed that belief on those ground, must have carried out as much investigation into the matter as was reasonable in all of the circumstances of the case.

Direct race discrimination

51. By s39(2) Equality Act 2010, an employer must not discriminate against an employee by subjecting him to a detriment or dismissing him. By s39(7) EqA dismissal includes constructive dismissal. By s40 EqA an employer must not harass his employee.

52. Direct discrimination is defined in s13 EqA 2010 and harassment is defined in s26.

53. The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

54. Direct discrimination is defined in s13(1) EqA 2010: "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

55. By s9 EqA 2010, race is a protected characteristic and race includes colour; nationality; ethnic or national origins.

56. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," s23 Eq A 2010. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators, as highlighted in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11.**

57. In **Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065** (at para 29) Lord Nicholls explained that outside the field of discrimination law:

> "Sometimes the court may look for the 'operative' cause or the 'effective cause'. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [1999] ICR 877, 884-885, a causation exercise of this type is not required either by section 1(1)(a) [direct discrimination] or section 2 [victimisation]. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminatory act as he did?"

58. In Khan the Chief Constable had withheld a reference from a police officer who had brought race discrimination claims against the force. The Chief Constable could not give a reference because the proceedings were still live, and he did not want to be prejudiced by any reference given at that stage. Thus, as a matter of "but for" causation, had it not been for the race discrimination claims, a reference would have been supplied. At paragraph 77 Lord Scott observed under the heading 'The causation point':

> "Was the reference withheld "by reason that" Sergeant Khan had brought the race discrimination proceedings? In a strict causative sense it was. If the proceedings had not been brought the reference would have been given. The proceedings were a causa sine qua non. But the language used in s.2(1) is not the language of strict causation. The words "by reason that" suggest, to my mind, that it is the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified."

59. In **Amnesty International v Ahmed [2009] ICR 1450**, Underhill P explained at para 3

> "We turn to consider the "but for test" [...] This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed, if it were there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment."

60. In relation to the direct discrimination claims based on race, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened, and discrimination did occur. We also considered the well-known provisions of **Igen Ltd v Wong [2005] IRLR 258** in this respect, which we do not repeat here.

61. The burden of proof provisions are contained in s.136(1)-(3) EqA: *'(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.'* The effect of these provisions was conveniently summarised by Underhill LJ in **Base Childrenswear Ltd v Otshudi [2019] EWCA Civ 1648 (**at para 18): *'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows: (1) At the first stage the Claimant must prove "a prima facie case"*. That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving *"facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination*". As he continued (pp. 878-9): "*56. … 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. 57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"* If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "*He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim.*" He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court held (at para 32) that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

Unlawful deductions from wages

62. Under Section 13 of the Employment Rights Act 1996, "(1) An employer shall not make a deduction from wages of a worker employed by him unless –(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or(b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

63. Section 14(1)(a) permits deductions in respect of ' an overpayment of wages'.

64. Section 13(3) ERA provides: "Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion."

65. Section 23 ERA gives a worker the right to complain to an Employment Tribunal of an unauthorised deduction from wages. Where a tribunal finds a complaint under section 23 ERA well founded it shall make a declaration to that effect and shall order the employer to pay the worker the amount of any deductions made in contravention of section13 ERA (s24(1)(a) ERA).

66. The essential characteristic of wages is that they are consideration for work done: **Delaney v Staples [1992] IRLR 191**.

Conclusion and Findings

67. In the first instance the Tribunal considered that in order to determine the relevant claims and issues in this case, we had to decide what the Claimant's working pattern was prior to his move from the Dulwich division to the Loughton division in September 2020 as many of the issues in this claim would be determined by the answer to this question. As set out in the facts section of this judgement, the Tribunal found that the shift pattern that the Claimant undertook whilst working for Mr Rees and Mr Underwood between 2010 to 2020 was a contractual shift pattern. Although it was not an express term of his contract of employment, the Tribunal considered that it was an implied term. This was because on the Tribunal's objective assessment of the Claimant's working pattern prior to his move to Loughton, we concluded that the work pattern described by the Claimant was necessary to give 'business efficacy' to the contract. Furthermore, the Claimant had worked that pattern for 10 years under two separate managers so that work pattern was in the Tribunal's finding so obvious that it went without saying (the 'officious bystander test'). In addition, the Respondent produced no time sheets or other records that could be relied upon by us to show us what the Claimant's work pattern was if indeed it was different to what he told the Respondent it was.

68. As the Tribunal made the finding that the Claimant's work pattern between 2010 and 2020 was contractual, if the Respondent was seeking to vary a contractual term in the Claimant's contact of employment, the Respondent should have undertaken consultation with the Claimant prior to his return to the Loughton office to agree the new work pattern that he would be undertaking out of the Loughton office. It should not in the Tribunals view have pursued disciplinary action against the Claimant for misconduct for not agreeing to the new shift pattern. Rather, it should have gone through the correct procedure to seek to vary

the contract of employment by consent which would have involved consultation with an attempt to come to an agreement. If agreement could not be obtained from the Claimant as to the proposed new work pattern, the Respondent could have terminated the contractual shift pattern of the Claimant upon statutory notice (10 weeks) and offered the Claimant a new contract of employment with the new proposed shift pattern. The reason for termination of the Claimant's contract of employment in such circumstances would have been some other substantial reason under section 98 (1)(b) ERA and it could have been argued by the Respondent that the reason for the change was a legitimate business need. If the Claimant pursued a claim for unfair dismissal in such circumstances the Tribunal would have considered the process and procedure that the Respondent applied, and the legitimate business reason given for the change. This Respondent is not a small employer and had the resources to take proper advice in respect of changing the Claimant's contract of employment and the correct procedure to follow at the relevant time.

69. In this case, the Respondent did not pursue the procedure that is described above. Rather, it insisted that the Claimant was undertaking exactly the same working pattern that he had undertaken prior to the move to Loughton division without properly considering what the Claimant's work pattern was prior to the move by interviewing Mr Underwood for example. Instead, the Respondent after dismissing the Claimant's grievance on 11 November 2020, almost immediately on 18 November 202 instigated disciplinary action against him for raising his grievance in the first place. This disciplinary action commenced in November 2020 and continued to October 2021 at which stage the Claimant was dismissed for gross misconduct. The Tribunal viewed the sequence of events from the date of the Claimant raising his grievance in October 2020 to his dismissal on 26 October 2021 almost as a punishment against him for seeking to remind the Respondent that his work pattern was being changed without his consent. The Tribunal did not consider that the Claimant's refusal to work a new shift pattern in such circumstances amounted to misconduct let alone gross misconduct. As the Respondent had to show the reason for dismissal and was unable to show that misconduct was the genuine reason for dismissal, the Tribunal found that the Claimant's dismissal was unfair. The Tribunal did not have to consider the procedure that the Respondent adopted to terminate the Claimant's employment as the Respondent failed to show that misconduct was the genuine reason for dismissal.

70. Nevertheless, if we were wrong in reaching the conclusion that misconduct was not the genuine reason for dismissal, we went on to consider the procedure to dismiss the Claimant for misconduct. After doing so, it was our conclusion that the Claimant's dismissal was procedurally and substantively unfair as the procedure adopted by the Respondent to dismiss the Claimant was wholly inadequate, unfair and biased from the commencement of the disciplinary process to the conclusion of it. Mr Jerman gave evidence to us that he was not influencing either the grievance or disciplinary process in the background as the Claimant had alleged in the course of these proceedings before us. However, it was clear from our consideration of the e-mail from Mr Jerman to the Claimant on 18 November 2020 almost immediately after the first grievance had been adjudicated upon by Ms. Turner (11 November 2020) that a disciplinary process was being commenced against him for issues arising from the grievance, that he was directly involved in influencing the process. This was supported by a further e-mail from Mr Jerman to the Claimant on 6 May 2021 just four days before the Claimants return from his second furlough leave that the Claimant should effectively not raise any further complaints as they had already been adjudicated upon and that he must follow the instructions of his managers or he was likely to face further disciplinary action again. In addition, we found in the fact-finding section of this judgment

that Ms Turner and Ms Sabey were not independent officers as they had continued involvement in the disciplinary process and grievance process both as adjudicating officers and investigating officers at various stages of it. We could not see how they could have remained independent and unbiased as such continued involvement in the process in our view must have impacted their collective judgments due to such continued involvement in the process. For these reasons, the Tribunal came to the conclusion that the disciplinary process was not independent or fair. Furthermore, for this reason, the disciplinary procedure conducted against the Claimant had, in our view, an inherent predetermined outcome as the individuals involved in the process had already made up their minds. In addition, the Tribunal was not satisfied that a fair investigation was properly conducted by this Respondent at each stage of the disciplinary process against the Claimant. We were not shown details of the investigation that was being conducted by the individuals charged with dealing with the process. The witnesses made reference to oral discussions that may or may not have occurred with other employees in respect of the allegations but no notes of this these discussions were produced to us. In the circumstances, we found that dismissal for gross misconduct was outside the band of reasonable responses open to this employer.

71. With regard to the claim for unlawful deduction of wages/payment below the National Minimum Wage, this Tribunal had to ask itself the questions how many hours a day was the Claimant working with respect to his transfer to the Loughton division from September 2020 to October 2021 and for which he was entitled to be paid? Was the Claimant paid in full for the hours worked during the period 8 September 2020 to 26 October 2021.

72. The Claimant gave evidence to the Tribunal that when he moved to the Loughton division, on 8 September 2020 until the termination of his employment on 26 October 2021, his working pattern was changed by the Respondent so that he had to work continuously from 5 am in the morning to 10 pm in the evening 5 days per week rather than the shift pattern that he was previously working in Dulwich. The Tribunal found that on the basis of the evidence that he produced he did not prove on balance that he was working these hours. The Tribunal did not consider that evidence to be reliable as set out at paragraph 21 of this judgment. In the Tribunal's view it was more likely than not that the Claimant continued to work 42 ½ hours per week and continued to object to the Respondent's efforts to force a variation of his contract of employment by changing his previous work pattern by way of disciplinary action against him. Furthermore, his evidence to the Tribunal was that he did not consistently complete the Outlook diary that was introduced by the Respondent for completion by managers in 2020 so the Tribunal found it contradictory that he later produced extracts from that same diary in support of his claim for additional pay to this Tribunal. In such circumstances, the Tribunal concluded that on balance he did work his contractual hours and his claim for payment for any additional hours over those contractual hours was dismissed.

73. However, his claim for unlawful deduction of wages in respect of a days wages being deducted for his non availability to attend a grievance appeal meeting which was fixed in front of Mr Carbali for either the morning of 6 or 7 October 2021 succeeded. The Respondent deducted a day's wages from the Claimant for his non availability to attend in the morning of those days. However, the meeting did eventually take place on 12 October and lasted for no more than half a day. The Respondent gave no reasonable explanation to the Tribunal as to why a whole day's wages were deducted from the Claimant's wages by way of an overpayment of wages to the Claimant. At most, it was the Tribunal's conclusion that the Respondent could legitimately deduct half a day's wages by way of an overpayment as a consequence of the Claimant's non availability to attend on either of the days in

question. Therefore, the Tribunal found that the Claimant was owed half a day's pay by the Respondent in respect of this unlawful deduction.

74. Finally, the Tribunal had to consider the Claimant's claim for direct race discrimination. We reminded ourselves that we were tasked to ask if the Claimant was subjected to the following treatment: (1) From 8 September 2020, was there a detrimental change to his working pattern; (2) From 4 October 2021, the Claimant's grievance was not upheld and his appeal was rejected; (3) On 26 October 2021, the Claimant's summary dismissal for alleged gross misconduct. If so, was that treatment less favourable because of race? The Claimant relied on the treatment of Mr Olu Omojuwa another black Area Manager and dismissal of other black employees as evidence from which the Tribunal could conclude that a hypothetical comparator of a different race would have been treated more favourably.

75. With regard to each of the above three questions, we found that there was a detrimental change to the Claimant's working pattern, the Claimant's grievance in respect of his working pattern was not upheld at two separate appeals on 11 November 2020 and 15 October 2021 and the Claimant was summarily dismissed for gross misconduct. We then had to consider whether the less favourable treatment was because of the Claimant's race. The Tribunal reminded itself that with a claim for direct race discrimination, the Claimant must show that he was treated less favourably than a real or hypothetical comparator. In this case, there was no real comparator as no white Area Manager had been treated in the same manner as the Claimant by this Respondent. So, we had to consider if a hypothetical white Area Manager in the same circumstances as the Claimant who raised a grievance about the change in his work pattern upon a move to the Loughton division would have been treated in the same way as the Claimant was. The question for us was, was the less favourable treatment that we found above to have occurred due to the Claimant's race. This required the Tribunal to consider the reason why the Claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment? The Tribunal had to consider the conscious or subconscious mental processes which led the Respondent to take a particular course of action in respect of this Claimant, and to consider whether the protected characteristic of race, played a part in the treatment. In relation to direct discrimination based on race, the burden of proof rested initially on the employee to prove on the balance of probabilities facts from which the Tribunal could decide, in the absence of any other explanation, that the employer did contravene that provision. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee could establish this, the burden of proof shifted to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer was unable to do so by offering a reasonable explanation for such unfavourable treatment, the Tribunal must hold that the provision was contravened, and discrimination did occur.

76. In this case, we decided that the protected characteristic of race was the reason for the Claimant's less favourable treatment in respect of the above three examples of less favourable treatment that he cited and that there was something more upon which we could reasonably infer that race discrimination had occurred absent a reasonable explanation from the Respondent. We come to this conclusion firstly because, we found that the Claimant's work pattern in the Dulwich division before he moved to the Loughton division was a contractual term of his contract of employment. He raised the fact that his work pattern was being changed in his first grievance in October/November 2020 shortly after his move

in September. The Respondent made little effort to investigate whether what the Claimant said was true about his work pattern and maintained its position that his work pattern remained the same as prior to his move. The Respondent made no effort at an early stage to ascertain what the Claimant's work pattern was by interviewing his previous line manager, Mr Underwood. It was especially incumbent upon the Respondents to do this as it had no time or worksheets as documentary evidence to discount what the Claimant was saying about his work pattern was true. However, the Respondent chose not to reasonably investigate the matter. Secondly, The Claimant in his first grievance in November 2020 also raised the matter of less favourable treatment of him due to his race which the Respondent made no reasonable effort to investigate, believing that from the outset only conscious discrimination could occur in the workplace and subconscious discrimination could not. Thirdly, within less than a week of the dismissal of the first grievance in November 2020, Mr Jerman, the Managing Director of the company who had given evidence to the Tribunal that he was not directly involved in the grievance or disciplinary process, wrote to the Claimant to inform him that disciplinary proceedings would commence against him in respect of the grievance that had been dismissed by Ms Turner. The Tribunal found this to be wholly irregular and inappropriate and a direct contradiction of the evidence that Mr. Jerman gave to the Tribunal. In addition, it showed to the Tribunal that Mr. Jerman was involved almost from the outset in the grievance and disciplinary process and had already made-up his mind as to the rights and wrongs of the issues that the Claimant had chosen to raise in his grievance. Fifthly, none of the officers that were tasked with dealing with the Claimants grievances and the disciplinary process against the Claimant undertook a proper or reasonable investigation of the issues under consideration. The Respondent did not provide us with a reasonable explanation of why it had decided to proceed in the way that it did in relation to the above five examples.

77. The Claimant at the first grievance considered by Ms Turner in November 2020, gave evidence of comparative less favourable treatment due to race endured by Mr Omojuwa prior to his resignation in March and at the hands of the same managers that managed him. Again, the Respondent chose not to undertake a reasonable investigation into these allegations at the outset and on a continuing basis citing that the Claimant had not produced any evidence of race discrimination not considering the fact that the Claimant had given the example of Mr Omojuwa and the less favourable treatment that he faced. This was evidence of discrimination as the Claimant was raising a factual example of an Area Manager who had been treated less favourably due to race by the same managers that the Claimant was complaining about. The Tribunal found that the Respondent did not properly or reasonably engage with the Claimant's allegations of race discrimination at all. Not only did this Respondent fail to deal with the allegations, it used the allegations made by the Claimant against him to conclude that the allegations were inappropriate, malicious and negligent. Indeed, four out of the five reasons for the termination of the Claimant's employment for gross misconduct relied upon the Claimant's assertion that he was and had been treated less favourably due to his race. We find that we could reasonably infer that race discrimination had occurred by the Respondent failing to consider this evidence and again the Respondent failed to provide us with a reasonable explanation for why it had failed to properly engage with the evidence provided by the Claimant of the less favourable treatment of Mr Omojuwa.

78. The Tribunal found that a hypothetical white Area Manager would not have been treated in the same way at the Claimant had been by this Respondent and would have been treated more favourably. It is likely in the Tribunal's finding that such a comparator would have had a proper investigation of his contention that he was working a different work

pattern prior to his move to Loughton and would not have been subject to the less favourable treatment that the Claimant was subject to as described in paragraph 72 above. Therefore, this Tribunal concluded that the Claimant's treatment by the Respondent in this case amounted to race discrimination contrary to section 13 of the Equality Act 2010 and upon which we could reasonably infer that discrimination had occurred absent a reasonable explanation from the Respondent.

79. As this employer cannot be described as a small employer and has an ethnically diverse workforce, we recommend that all managers employed by the Respondent should undertake further equal opportunities training that focuses on conscious and subconscious discrimination and how complaints made by employees of such discrimination against them should be dealt with in respect of the grievance and disciplinary procedures.

80. As the Tribunal has upheld some of the Claimant's claims, the matter has been listed for a remedy hearing which the parties were notified would take place on 29 and 30 June 2023 at the previous hearing. The Tribunal will send out directions to the parties in order to prepare for this remedy hearing.

Employment Judge Hallen
Dated: 13 February 2023