



EMPLOYMENT TRIBUNALS

Claimant: Mr Johnson
Respondent: Trenitalia C2C Limited
Heard at: East London Hearing Centre (via CVP)
On: 12, 13, 14 July 2023 and (in chambers) 26 July 2023
Before: Employment Judge Howden-Evans
Members: Mr L Purewal
Mr Plush

Representation:

Claimant: Mr Bullock, Counsel
Respondent: Ms Swords-Keily, Counsel

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

1. The Claimant's complaint of unfair dismissal is not well founded. The Respondent has not unfairly dismissed the Claimant.
2. The Claimant's complaint of direct race discrimination is not well founded and is dismissed.

REASONS

Background

1. In this judgment where numbers appear in square brackets like this [1] they are referring to the page number in the updated bundle (file) of documents.
2. The Respondent is UK train operating company that operates the Essex Thameside railway franchise at 26 stations in East London and South Essex.

3. The Claimant commenced employment with the Respondent 6th December 2018 as a customer service assistant, working in the ticket office at the Tilbury Town station
4. Incidents occurred on Tuesday 10th May 2022 and on Thursday 12th May 2022, which we will discuss in more detail in the Findings of Fact part of this judgment.
5. On 22nd August 2022, the Claimant was dismissed without notice. In their ET3 response the Respondent asserts the reason for dismissal was misconduct namely 1) assault, use of violent and threatening behaviour towards a customer 2) conduct endangering persons and 3) behaviour which seriously distracts from safe and/or efficient working [p38 para 8].
6. Having complied with ACAS early conciliation procedures, on 2nd September 2022 the Claimant presented his ET1 claim [p5], alleging unfair dismissal and race discrimination.
7. At the preliminary hearing on 13th March 23 Employment Judge Massarella noted the Claimant, (who describes himself as being Black African of Nigerian national origin) was alleging
 - 7.1 he had been unfairly dismissed; and
 - 7.2 he had been subjected to race discrimination, both on 10 May 2022 by two security guards Mr Smith and Mr Langley , and by Mr Sullivan (their supervisor), who he says verbally abused him on 12 May 2022.

The Issues

8. At the start of the final hearing, we discussed the List of Issues – this resulted in Claimant’s Counsel suggesting the issues should be expanded to include an allegation that the disciplinary process was tainted by race discrimination. The tribunal noted that only 3 allegations of race discrimination appeared in the List of Issues agreed at the preliminary hearing and there had not ever been any suggestion that this was a discriminatory dismissal. The Judge explained the Claimant would need to apply to amend their claim to include allegations of discriminatory dismissal. Respondent’s Counsel indicated any application to amend the claim would be contested and was likely to result in the hearing being adjourned as the Respondent would need to take instructions and possibly call additional witnesses. It was agreed Claimant’s Counsel would take instruction whilst the Tribunal were completing their reading, so any application to amend the claim could be heard at midday on Day 1. Having taken instructions, Claimant’s Counsel confirmed there was not going to be an application to amend the claim; the List of Issues was agreed to remain the same as those listed by Judge Massarella at the preliminary hearing.
9. By closing submissions, the List of Issues to be determined were:

Claims under Equality Act 2010

Jurisdiction/ Time: *The Respondent accepts that the Claimant’s claims have been presented within the requisite time limits.*

Direct Race Discrimination contrary to s.13 EqA 2010

1. Did:
 - a. Mr Smith and Mr Langley refuse to take instructions from the Claimant on 10 May 2022?
 - b. Mr Sullivan confront the Claimant on 12 May 2022 and say that “he would make sure that [the Claimant] had been dealt with for reporting his staff to the managements (sic)”?
2. If so, in doing any or all of 1(a) – (b) above, did Mr Smith and/or Mr Langley and/or Mr Sullivan treat the Claimant less favourably than they treated or would treat any actual and/or hypothetical comparator,
 - a. who was not a black African person; and
 - b. whose material circumstances were the same as the Claimant per s.23(1) EqA 2010?
3. If so, was that less favourable treatment because the Claimant is a black African person?
4. If so, do any and/or all of the matters at 1 above amount to a detriment?
5. Is the Respondent responsible for the actions of Mr Smith and/or Mr Langley and/or Mr Sullivan pursuant to s.109(1) or s.109(2) EqA 2010?

Claims under the Employment Rights Act 1996 - Unfair Dismissal contrary to s.94(1) (when read with s.98) of the Employment Rights Act 1996

It is agreed the Claimant was summarily dismissed on 22 August 2022.

6. Was the Claimant’s dismissal unfair within the meaning of s.98 ERA 1996? In particular:
 - a. Was the reason (or principal reason) for the dismissal a permitted reason within s.98(1) and (2) ERA 1996?

The Respondent relies on misconduct pursuant to s.98(2)(b) ERA 1996.
 - b. Did the Respondent act reasonably in all the circumstances in treating the Claimant’s misconduct as a sufficient reason to dismiss him?

The Hearing

10. The case was heard by an employment tribunal sitting remotely via video link.
11. The Claimant has been represented in these proceedings; at the final hearing, the Claimant was represented by Mr Bullock, Counsel. Ms Swords-Keily Counsel represented the Respondent.

12. At the outset of the hearing we discussed the timetable and order of evidence. Respondent's Counsel had lost her voice so it was agreed the Respondent's witnesses would give evidence first (as much of Day 1 would be the Claimant's Counsel's cross examination) . The Tribunal read the bundle of documents (of 340 pages) and the 8 witnesses' statements before starting hearing evidence at lunchtime on Day 1. We had the benefit of having 3 extracts of cctv footage of the incident on 10th May 2022 – on occasions we watched this during the hearing, but the footage appeared rather jumpy when being played during the video hearing and so the Respondent emailed this footage to the clerk so each member of tribunal was able to re-watch the cctv footage on their own device. We also had a written opening submission from the Respondent's Counsel. The Claimant's Counsel confirmed he had both the CCTV footage and Respondent's opening submission.
13. We heard evidence on oath as follows:

Day 1

- 13.1 Mr Walker-Aylward (who considered the Claimant's grievance);
- 13.2 Mr Langley (one of the security guards alleged to have directly discriminated against the Claimant).

Day 2

- 13.3 Mr Smith (the other security guard alleged to have directly discriminated against the Claimant)
- 13.4 Mr Qayyum (the Claimant's line manager and investigating officer)
- 13.5 Mr Hendry (who consider the claimant's appeal against his dismissal)
- 13.6 Ms Hayter (who took the decision to dismiss the claimant)
- 13.7 Mr Sullivan (the supervisor who was alleged to have directly discriminated against the Claimant)

Day 3

- 13.8 The Claimant

14. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions, before questions from the other side, questions from the tribunal and any re-examination.

Findings of Fact

Background

15. The Claimant commenced employment with the Respondent on 6th December 2018 as a customer service assistant (ticket office). There had been some confusion about the date the Claimant's employment started - there appears to have been a typographical error on the Claimant's offer of employment of 19th November 2018 [page 130] which referred to the Claimant's start date of Thursday 6th November 2018 (rather than Thursday 6th December 2018); the Claimant's Statement of Terms [page 132] confirmed the Claimant's continuous employment started on Thursday 6th December 2018.
16. The Claimant was based at the Tilbury Town station which we accept can be a busy and challenging station to work at. It is based outside the M25 on the outskirts of London and gets particularly busy during peak time with workers commuting to a nearby distribution centre and docks.

Mr Langley, Mr Smith and Mr Sullivan

17. The Respondent has subcontracted security provision for Tilbury Town station to a third party, Amulet (Church Security Solutions Limited) ("Amulet"). Mr Langley and Mr Smith work at Tilbury Town station as Serrano Safeguarding Officers employed by Amulet. Mr Sullivan is their supervisor (also employed by Amulet); he oversees Serrano Safeguarding Officers at a number of stations.
18. We are anxious not to inadvertently step into the shoes of employer and slip into substitution mindset, so in this part of the judgment we will discuss what the Respondent's officers had in front of them when considering the situation and making the decisions they did.

Complaints received from Amulet employees

19. On 13th May 2022, Mr Bridgland (C2C manager) forwarded the complaints he had received from Ms Thomas (Amulet manager) [178]. There were two emails both dated 11th May 2022:
 - 19.1 one from Mr Smith reporting on 10th May 2022, the Claimant *"went to slap a child who couldn't afford a ticket" "it would be on cctv at the ticket office" "I see this happen" "it was a unprovoked attack which could have caused the boy whose age was about 14 serious harm" "please ask C2C to look into this as it's a very serious matter"*.
 - 19.2 one from Mr Langley and Mr Smith complaining they are being told where to stand and how to do their job (by the Claimant) and reporting the Claimant *"has also gone to slap a child"*.
20. Mr Langley provided more detail about his complaint (captured in an email of 17th May 2022) [185] reporting,

"Myself and [Mr] Smith noticed a young kid coming down the stairs to the ticket office Platform 1, approximately around 0950 to 1030 we was inside barrier side. As the kid walked in we recognised him. The kid started talking to the [Claimant] asking to be let through saying he's got no money etc and saying "come on mate let me through please". Me and [Mr Smith] are standing by the WAG gate waiting

to see the outcome of this will be, we noticed [the Claimant] left the window where he was working and was making his way out, he appeared behind us and walked to the WAG and the kid was standing near the gate and [the Claimant] attempted to slap this kid "saying I'm not you're mate" the kid had to move/ducked/lean out the way, myself and [Mr Smith] was shocked by this and [the Claimant] went back to office and the kid walked out and 5 minutes later appeared with a friend and both had tickets"

Investigation

21. The Claimant's line manager, Mr Qayyum investigated the complaint and compiled an Investigation Pack [156 onwards]. He obtained and viewed cctv video footage that captured the incident between the Claimant and a teenager on 10th May 2022. Three cameras captured the incident:
 - 21.1 File 0053
 - 21.2 File 0054
 - 21.3 File 8943
22. The Tribunal have viewed this footage a number of times. The first camera is situated inside the ticket office and captures the Claimant serving a customer and then serving the teenager. The teenager plays with the turntable on the counter and then plays with the card machine (which is raised up on a pole). He flips the card machine up and down (but doesn't appear to be trying to snap the machine off it's fittings). The Claimant speaks to the teenager and at one point waves him away from the counter, gesturing for the teenager to leave.
23. The next part of the incident is captured on the second and third cameras. The second camera is located on the track side of the ticket barriers (where tickets are swiped to gain entry to the platform); the third camera is located in the entrance of the station and faces the ticket barriers. Both cameras capture the teenager waiting at the barrier and the incident itself (with good views of the teenager and Claimant from front and back). The Claimant had left the ticket office and walked along the platform side of the ticket barrier. He approached the ticket barrier and almost immediately, swiped with his open hand as if to slap the teenager, but did not make contact as the teenager quickly stepped back out of the way. In this single action the Claimant had lent across the barrier and appeared to have forcefully lashed out at the teenager.
24. There is a dispute as to the age of the young person involved in the incident – Mr Langley and Mr Smith believed he could be as young as 14 and so did the Respondent. The Claimant believed he was in his early 20s. Having viewed the cctv footage, the Tribunal accept the young person was an teenager (albeit he was similar height to an adult).
25. Having obtained and viewed the cctv footage, Mr Qayyum interviewed the Claimant on 27th May 2022. Mr Qayyam explained he was investigating an allegation that had been made against the Claimant. He explained it could lead to disciplinary action. He asked if the Claimant could recall an incident on 10th May 2022 involving a teenager. Mr Quyyam explained the allegation was that the Claimant had left his seat in the ticket office and went to the gate line area to

confront the individual. Mr Quyyam asked the Claimant *“at any point did you intend to strike him?”* The Claimant didn't recall the incident. Mr Quyyam explained *“the customer walked in at 10:30 when you were working on the 1092 window and the customer must have approached you at your window. Do you recall him asking for travel information?”* The Claimant didn't recall the incident. Mr Quyyam said *“He had a chat with you about travel, then the allegation is you left the ticket office window and you walked in the gate line area. At any point did you try to strike him?”* The Claimant replied, *“No why would I try and strike a customer?”*

26. Mr Quyyam adjourned the meeting for 32 minutes and then told the Claimant he was being suspended on full pay whilst the investigation was being completed. The Tribunal notes that the Claimant was not shown the CCTV footage during the investigatory meeting.
27. On 1st June 2022 Mr Quyyam interviewed Ms Jackson (C2C employee). Ms Jackson was working in the ticket office alongside the Claimant on 10th May 2022. The minutes of her investigation meeting with Mr Quyyam [164-165] record her account as being:

“A teenager came up to [the Claimant]'s window asking to be let through the barrier and the Claimant said he needed to buy a ticket then the teenager just asked to be let through the barriers. [The Claimant] let him know he couldn't travel without a ticket, the teenager sat up on [the Claimant]'s window playing on the card reader and [the Claimant] told him he needed to leave the station if he was not purchasing a ticket. The teenager ignored him and called [the Claimant] a peanut head. The teenager was asking [the Claimant] why he would not let him through. They were arguing about him not buying the ticket and security was standing outside watching. One of the security was on the platform side and the other was on the customer side right near the gates. I was cashing up at the time, the teenager was telling [the Claimant] to come outside and [the Claimant] went out into the station. My window was down so I couldn't see but they were arguing, the teenager carried on touching the card reader and [the Claimant] told him he was going to break it. [The Claimant] said they couldn't be in the station and he needed a ticket or he would not get on the platform.”

28. On 9th June 2022 Mr Quyyam separately interviewed Mr Smith, Mr Langley and Mr Farmsworth (another Amulet employee that was on duty on 10th May 2022). Mr Farmsworth confirmed he didn't witness the incident as he was taking a rest break.
29. The investigation minutes report Mr Smith's account was:

“[The Claimant] went out the ticket around to the wide aisle gate as the boy was there he went to smack the boy the boy moved if he didn't move he would have got hurt. It was pretty unprovoked it was so random me and [Mr Langley] looked at each in absolute shock.”

30. Mr Smith also told Mr Quyyam that the teenager had called the Claimant *“mate”* and that [the Claimant] had said the teenager was pushing the red button and had been messing around with the card machine. Mr Smith told Mr Quyyam if there had been a heated discussion he would have stepped in as it was his role to

protect the C2C staff *“but [the Claimant] come out and attacked the boy it was pretty shocking to be honest”*.

31. The investigation minutes report Mr Langley’s account was
“[The Claimant] come off his chair, walked out the ticket office and appeared near the gates the kid was near the wag gate [the Claimant] lent over and took a swing at the kid. The kid swerved and ducked out the way [the Claimant went back to the ticket office and the kid left.”
32. Mr Langley was asked whether he would have stepped in to help the Claimant if the argument had got heated and replied *“if the kid was being rude or racist I would have, I would have stepped in and removed the kid from the station. All I could hear “come on mate” there was nothing seen to be a bad situation at all”*.
33. Mr Quyyam’s investigation report concluded *“the allegations made against [the Claimant] of attempting to strike the 14 year old male customer with the open palm of his hand are supported by CCTV footage evidence and the Amulet witnesses”* and recommended the Claimant was invited to disciplinary hearing to consider allegations of exceptional grave misconduct.
34. On 1st July 2022 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 11 August 2022.

Disciplinary Hearing

35. On 15th July 2022 the Claimant was provided with a copy of the investigation report (which included minutes of the various investigation meetings and still images from the CCTV footage) and was invited to a disciplinary hearing, to consider allegations of gross misconduct, *“that on 10th May 2022 at around 10:30 AM [he] attempted to strike a teenage customer with the palm of his hand”*, which was identified as being a breach of 3.3.1 of the Discipline Procedure:

- 35.1 *“assault use of violent and threatening behaviour towards a customer”*;
- 35.2 *“conduct endangering persons”* and
- 35.3 *“behaviour which seriously detracts from safe and / or efficient working”*.

The Tribunal notes these are 3 extracts from the Respondent’s Discipline Procedure, where they are identified as being examples of exceptionally grave misconduct.

36. On 22nd August 2022, Ms Hayter chaired the disciplinary hearing which was attended by the Claimant and his representative. Ms Crudgington took minutes for the hearing [199 to 207]. At the start of the hearing the Claimant watched the CCTV footage of the incident on 10th May 2022.
37. During the disciplinary hearing, the Claimant explained the teenager had been pulling the bank card reader and the Claimant was worried he might break the reader. The Claimant also asserted he had asked the Serrano officers to help him but they didn’t come to his aid and said he would not have left the ticket office if the Serrano officers had intervened.

38. At the end of the disciplinary hearing, Ms Hayter adjourned the hearing for an hour to consider her decision. She concluded:
- 38.1 the Claimant had intended to strike the teenager;
 - 38.2 this was threatening behaviour;
 - 38.3 this was conduct endangering the teenager; and
 - 38.4 demonstrated behaviour which detracts from safe working, as she noted the Claimant had left the safety of the booking office to confront the teenager.
39. Ms Hayter told the Claimant he was being dismissed without notice and gave him a letter confirming his dismissal. [209]

Appeal Hearing

40. On 23 August 2022 the Claimant appealed the decision to dismiss him [210 - 211] asserting *“the punishment was too severe”* and putting forward mitigation including his *“good record, good timekeeping, his diligence, teamwork and professionalism”* and *“apologising formally...for not acting professional in this one instance”*.
41. On 8th September 2022, the Claimant attended his appeal meeting which was chaired by Mr Hendry. The Claimant was accompanied by his representative and Ms Crudgington took minutes of the meeting. During the appeal meeting, the Claimant said that on the day of the incident, the Serrano staff were not doing what they were supposed to be doing and he had already reported this to their manager. He explained at the time of the incident he was stressed about the situation with the Serrano staff and not being supported by the Serrano staff to protect company property and felt he had to deal with the teenager himself. His representative explained it was a moment of poor judgment on the part of the Claimant and he had apologised for his behaviour.
42. Having listened to the claimant’s submissions, Mr Hendry adjourned the appeal meeting for an hour to consider his decision. Mr Hendry decided to uphold the decision to dismiss the Claimant. In oral evidence he explained that he expected colleagues to sometimes overreact to a situation especially if they were provoked, but in this case the Claimant had chosen to leave the safety of the ticket office to attempt to strike the teenager and this went beyond what could be tolerated by the Respondent, for an employee that was working in a customer facing role.

Grievance

43. On 12th May 2022 the Claimant sent an email to his line manager and Ms Hayter (among others) that complained of *“Bullying and Harassment by Amulet Supervisor”* asserting that on 12th May 2022 Mr Sullivan had raised his voice at the Claimant and said *“Don’t ever start screaming at my Serrano staff on the platform again as I won’t take that from you...I am giving you your last warning”* whilst pointing his finger at the Claimant.

44. On 13th May 2022 Ms Hayter responded to the Claimant explaining that Mr Quyyam was looking into the incident, and it would be addressed. She also explained that the Claimant would not be informed of any sanctions imposed as a result of that investigation. The complaint was passed on to Amulet and, unbeknown to the Claimant, Amulet conducted their own disciplinary investigation. During Amulet's disciplinary investigation, two C2C employees gave evidence and supported Mr Sullivan's account of the incident of 12th May 2022, confirming "*there was no threatening behaviour on the supervisors part*" [332].
45. On 14th August 2022 the Claimant submitted a grievance about the Respondent's handling of his complaint of 12th May 2022. This grievance was considered by Mr Walker-Aylward, who held a grievance meeting with the Claimant on 22nd August 2022 and completed a thorough investigation into the Claimant's grievance. In his letter of 28th September 2022, Mr Walker-Aylward partially upheld the Claimant's grievance [321 to 323] noting the Claimant should have been offered more support after his complaint on 12th May 2022.

Further Findings of Fact only relevant to the race discrimination allegations

46. The Claimant had previously been employed by Amulet and had his own understanding as to how Amulet staff should perform their duties. We note Mr Langley and Mr Sullivan reported to Ms Thomas (Amulet manager) [326] and Mr Sullivan (Amulet employee) was their supervisor. Mr Langley and Mr Sullivan's key responsibilities included "*Assist our client's staff in times of disruption ensuring customer needs are addressed*" [326].
47. We accept that prior to the incident on 10th May 2022, the Claimant's relationship with Mr Langley and Mr Sullivan was deteriorating. The Claimant was trying to support his C2C colleagues and trying to be proactive by attempting to instruct Mr Langley and Mr Sullivan as to where they should be standing within the station. Mr Langley and Mr Sullivan were not answerable to the Claimant; it was not part of the Claimant's role to be their supervisor. Instead, they were free to use their own judgment as to how to best support C2C and it's staff and how best to perform their duties.
48. On the morning of 10th May 2022 at about 8.30 am the Claimant phoned Ms Thomas (Amulet manager) to complain Mr Langley and Mr Sullivan were not in the gate area of Platform 1. The Claimant made a second complaint (by phone) to Ms Thomas shortly after 9am, saying Mr Langley and Mr Sullivan were not close enough to the gate area. The incident between the Claimant and the teenager took place a little later that same day (10th May 2022).
49. As Mr Langley and Mr Smith had raised concerns about the Claimant's behaviour with the teenager, their supervisor, Mr Sullivan attended the station on 12th May 2022. There are conflicting accounts of the discussion that took place between the Claimant and Mr Sullivan on 12th May 2022. We accept there was a heated discussion (as witnessed by Mr Quyyam who heard raised voices on the telephone). However, we find Mr Sullivan was completely motivated by trying to support and protect his staff (Mr Langley and Mr Smith) given that the Claimant was repeatedly making complaints about them. This is further supported by the

two C2C employees who noted there was no threatening behaviour from Mr Sullivan.

The Law

Unfair dismissal (liability)

50. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the respondent persuades the tribunal that it did have a genuine belief in the claimant's misconduct, and that the claimant was dismissed for that potentially fair reason, we must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.
51. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.
52. In considering the question of reasonableness, we have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office and Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:
 - 52.1 When considering Section 98(4) ERA, we should focus our enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of the investigation.
 - 52.2 However, we should not put ourselves in the position of the respondent and test the reasonableness of their actions by reference to what we would have done in the same or similar circumstances. This is of particular importance in a case such as this where the claimant is seeking, in effect, to "clear his name".
 - 52.3 In particular, it is not for us to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before us at the Hearing) and substitute our own conclusions as if we were conducting the process. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead our function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that band.
 - 52.4 The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

53. The Court of Appeal highlighted the dangers of the “acquittal mindset” in *London Ambulance Service NHS Trust v. Small* [2009] IRLR 563. According to Mummery LJ (at paragraph 43):

“It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal.”

54. The ACAS Code of Practice: Disciplinary and Grievance Procedures applies to misconduct dismissals and the Tribunal is required to have regard to this Code, when considering the range of procedures that a reasonable employer might adopt.

Relevant law - discrimination

55. The provisions of the Equality Act 2010 (“EqA”) apply to these claims. EqA protects employees from discrimination based on a number of “protected characteristics”. These include race (see Section 9 EqA).
56. Chapter 2, EqA lists a number of forms of “prohibited conduct”. In this claim, the Claimant alleges direct discrimination.

The claim of direct discrimination

57. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.
58. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:
- “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.”*
59. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.
60. The Claimant has to demonstrate less favourable treatment: it is not enough to show he has been treated differently.

The burden of proof in discrimination claims

61. S136 Equality Act 2010 establishes a “shifting burden of proof” in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332 and *Igen Ltd & others v Wong & others* [2005] IRLR 258, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:
- 61.1. *It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".*
 - 61.2. *If the claimant does not prove such facts their discrimination claim will fail.*
 - 61.3. *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.*
 - 61.4. *In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*
 - 61.5. *It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*
 - 61.6. *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*
 - 61.7. *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw ...from an evasive or equivocal reply to a questionnaire....*
 - 61.8. *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*
 - 61.9. *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on*

the ground of [eg race], then the burden of proof moves to the respondent.

- 61.10. *It is then for the respondent to prove that he did not commit that act.*
- 61.11. *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.*
- 61.12. *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.*
- 61.13. *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*
62. In *Madarassy v Nomura International plc [2007] IRLR 246*, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.
63. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519*).
64. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR*).
65. S109 Equality Act 2010 provides an employer is liable for actions of its employees and agents. An employer is not liable for discriminatory acts of a contract worker; a contract worker is not an agent (see *Ministry of Defence v Kemeh [2014] ICR 625*).
66. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Conclusions - Direct Race Discrimination Claim

Did Mr Smith and Mr Langley refuse to take instructions from the Claimant on 10 May 2022?

67. Mr Smith and Mr Langley were not employed by the Respondent. The Claimant was not their supervisor; nor did he have any authority to give instructions to Mr Smith and Mr Langley. He could ask for help if he needed their assistance with a difficult customer, but we found he did not ask for help. Having viewed the CCTV footage of the incident, the Claimant did not ask for help over the loudspeaker, nor did he approach Mr Smith or Mr Langley for help when he left the ticket booth.
68. During the time of the incident, Mr Smith and Mr Langley were on the platform close to the barrier, but did not intervene as the Claimant did not ask for help and they did not consider the Claimant to be in any danger, particularly as the teenager was standing quite calmly the other side of the barrier (to the Claimant) and was calling the Claimant "mate".

Did Mr Sullivan confront the Claimant on 12 May 2022 and say that "he would make sure that [the Claimant] had been dealt with for reporting his staff to the managements (sic)"?

69. Whilst there was a heated discussion between the Claimant and Mr Sullivan, we accepted there was no threatening behaviour from Mr Sullivan.

Did Mr Smith and/or Mr Langley and/or Mr Sullivan treat the Claimant less favourably than they treated or would treat any actual and/or hypothetical comparator, who was not a black African person / Issue 3 Was that less favourable treatment because the Claimant is a black African person?

70. We found the bad feeling between Mr Smith, Mr Langley, Mr Sullivan and the Claimant was completely caused by the fact the Claimant wrongly believed he could tell Mr Smith and Mr Langley where they should stand and how they should do their job and could directly report them to their line manager when they were not performing the role as he thought they should. If the Claimant had any concerns about the service they were providing he should have repeatedly reported this to his own line manager (Mr Qayyum) rather than try to tackle this himself. We found Mr Smith, Mr Langley and Mr Sullivan would have responded to someone who was not a black African person in exactly the same way as they responded to the Claimant.
71. There was no evidence from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination.
72. Having looked at all the evidence in its totality, we accept there was no conscious or sub-conscious bias. We found Mr Smith, Mr Langley and Mr Sullivan's actions / inactions were in absolutely no way whatsoever related to race.

Is the Respondent responsible for the actions of Mr Smith and/or Mr Langley and/or Mr Sullivan pursuant to s.109(1) or s.109(2) EqA 2010?

73. Further and in the alternative, we accept Mr Smith, Mr Langley and Mr Sullivan were not employees or agents of the Respondent company and as such the Respondent would not have been liable for their acts under the Equality Act 2010.

Conclusions – Unfair dismissal claim

Was the reason (or principal reason) for the dismissal a permitted reason within s.98(1) and (2) ERA 1996?;

74. We accept the reason for dismissal was the Respondent held a genuine belief the Claimant had committed an act of gross misconduct, namely he had attempted to strike a teenage customer with the palm of his hand. Three of the examples of exceptionally grave misconduct in the Respondent's Discipline Procedure were "assault use of violent and threatening behaviour towards a customer", "conduct endangering persons" and "behaviour which seriously detracts from safe and / or efficient working" and the Respondent genuinely believed the Claimant's actions fell within each one of these three examples.

Did the Respondent act reasonably in all the circumstances in treating the Claimant's misconduct as a sufficient reason to dismiss him?

75. We accept the Respondent had a reasonable basis for this belief:
- 75.1. They had viewed CCTV footage of the incident from 3 different cameras – this provided such a good view of the incident that this alone would have been sufficient evidence to establish a genuine belief in misconduct; and
- 75.2. They had interviewed the Claimant, Ms Jackson (his C2C colleague), Mr Smith and Mr Langley. Mr Smith and Mr Langley both stated the Claimant had tried to smack the teenager; Ms Jackson did not see the incident at the ticket barrier.
76. The Respondent's investigation was within the range of investigations that a reasonable employer would regard as being reasonable. They interviewed appropriate witnesses, obtained CCTV and the written accounts of the incident as well as making enquiries regarding any body camera footage.
77. The Respondent complied with the ACAS Code of Practice. The disciplinary hearing and appeal hearing gave the Claimant ample opportunity to put forward any matters he wished to rely upon and these were fairly considered by the Respondent. Further the Respondent fairly investigated and considered the Claimant's grievance.
78. In all the circumstances (including the respondent's size and administrative resources) the respondent did act reasonably in treating this misconduct as sufficient reason for dismissing the claimant. It is sad that the Claimant, who appears to be a diligent and conscientious employee, lost a job he loved because he lost control of himself during a stressful moment. However, it is difficult to see what alternative outcome was realistically available to the Respondent, given the Claimant was performing a customer facing role and had attempted to strike a teenager. The question we have to answer is, was dismissal within the range of

responses of a reasonable employer, given all the circumstances; we concluded it was.

**Employment Judge Howden-Evans
Dated: 5th November 2023**