EMPLOYMENT TRIBUNALS

Claimant: Mr M M Ahad

Respondent: Group Employment Services Limited

Heard at: **London Central by CVP** **On:17 and 21 June and 8 September 2021**

Before: **Employment Judge N Walker**
Members: **Mr F Benson**
Mr D Kendall

Representation
Claimant: In Person
Respondent: Ms K Patullo, Solicitor

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant was discriminated against when the Respondent dismissed him.

All the Claimant's remaining claims fail and are dismissed

REASONS

The Claim

1 The Claimant brought a claim for direct discrimination against the Respondent arising out of three events which were identified in the case

management order made on 30 November 2020 as inappropriately giving him a written warning on 8 April 2019, failing to rescind that warning and dismissing him.

The Evidence

2 The Claimant gave evidence on his own behalf. Mr. David Dayle gave evidence for the Respondent. Mr Dayle was a contract manager at the relevant time and carried out the disciplinary hearing which led to the Claimant's dismissal. Mr F Baker also gave evidence for the Respondent. He was a Regional Manager at the relevant time and carried out the appeal.

3 The Tribunal was given a set of five-part bundles which together formed one bundle. The Tribunal required the Respondent to search for some further disclosure following the first day of the hearing, as a result of which, the Tribunal was supplied with a further small bundle of two documents relating to the first warning.

The Proceedings

4 The hearing was a remote public hearing conducted using the cloud video platform (CVP) under rule 46. The Tribunal considered it just and equitable to conduct the hearing in this way. In accordance with rule 46, the Tribunal ensured that members of the public could attend and observe their hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5 The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. From a technical perspective there were minor difficulties with connectivity and freezing, but these were all resolved by pausing and waiting for the party concerned to reconnect. The Claimant needed to lean forward and speak close to his microphone in order to be heard clearly. On occasions, he forgot to do this and, on each occasion when his sound became muffled, we explained that was the case and he repeated what he had said. The Tribunal ensured that each of the witnesses who were all in different locations had access to the relevant materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

6 The participants were told that it was an offence to record the proceedings.

The Issues

The issues were identified in the case management order as follows.

Time limits / limitation issues

i. Were all of the Claimant's complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA)?
ii. Was there conduct extending over a period so that it should be treated as being done at the end of that period?
iii. Whether time should be extended on a "*just and equitable*" basis.

Direct discrimination because of race (s 13 Equality Act 2010)

i. The Claimant's race is Bangladeshi.

ii. Has the Respondent subjected the Claimant to the following treatment:

a. Inappropriately giving him a written warning on 8 April 2019;
b. Failing to rescind that warning;
c. Dismissing him.

iii. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

iv. The Claimant relies on Mr Peter Vlad as comparator in relation to his dismissal.

v. If so, was this because of the Claimant's race and/or because of the protected characteristic of race more generally?

Facts

7 The Claimant entered into a contract of employment with the Respondent which anticipated a start date of 26 July 2018, but in fact the first shift he did was on 10 September 2018. The Claimant worked at Selfridges at the relevant time where the Respondent provided security. The Claimant was employed as a security officer. The Claimant describes his race as Bangladeshi. In the course of the hearing the Claimant sometimes described himself as a brown skinned bearded Muslim. The Claimant had not indicated his claim was based on his religion either in his ET1 or at the Preliminary Hearing for case management purposes, but rather solely on his race, and so we have disregarded his references to his religion and treated his claim as a claim for discrimination based on his race.

First Warning

8 During his employment the Claimant received three warnings. The first warning was contained in a letter dated 14 March 2019 and related to failure to attend certain shifts and follow absence reporting procedures. The warning letter expressly stated this warning will be held on his file for a period of 12 months expiring on 14 March 2020.

9 The Claimant informed the Tribunal that he understood this warning had been erased at the relevant time when the warning which led to his dismissal arose. He described having been notified in writing by the Respondent that the attendance procedure was being altered and all previous warnings under that procedure were erased. He said he and other members of staff at Selfridges were asked to sign some paper to confirm they understood but they were not given copies to retain. The Tribunal asked the Respondent to search for any applicable disclosure and the Respondent produced the warning and a blank undated round Robin notification which indicated that staff were asked to sign but which did not have signatures on it. That notification referred to a new procedure but did not state that warnings under the old procedure would no longer be effective. The Respondent denied the suggestion that older warnings were erased when the new procedure was introduced.

10 We conclude that the first warning remained valid. We do not think any employer would completely erase all prior warnings when introducing a new

process to address attendance and there are no documents to confirm the Claimant's assertions.

Second Warning

11 The Claimant was given a second warning a short time later. The bundle contained minutes of an investigation meeting dated 26 March 2019 in which there was an investigation into an allegation of unprofessional behaviour by the Claimant. According to the case management order, the Claimant was given a warning on 8 April 2019. That warning was not initially in the bundle, despite it being one of three matters which were apparently the subject matter of the claim and the Tribunal had to request it.

12 The Claimant informed the Tribunal that he felt dizzy and unwell on the day in question and should not have gone to work but he was concerned about not leaving his colleagues in the lurch and in consequence he had a moment of feeling unwell and sat down when the duties he was required to carry out required him to stay standing. The Claimant appeared to believe that his supervisor was going to talk to the Respondent's management and arrange for the warning given on 8 April 2019 to be removed from his record. There is no indication that he did so. It remained on his record. The Tribunal was told that it was a second written warning, so it was stated to be a final written warning. There was a live warning on the Claimant's file at the relevant time and the Respondent's disciplinary procedure provided as follows:

> *"A Final Written Warning is usually applied after a Written Warning has been given and performance or conduct has not improved but may be applied after a more serious first or second offence.*
> *You will be advised in writing that a failure to improve the standard of conduct or performance may result in dismissal. A time limit will be placed on the warning."*

13 The Tribunal note that the letter which states that it is a final warning states:

> *"You acknowledged your feelings and understood the ramifications that your actions could have had on the Company and our client. You have assured me that this was a lapse in judgement and not reflective of your work ethic or standards as a whole. Due to your clear regret for your actions, I am issuing you with a lower sanction of a written warning.*
>
> *This warning will be held on your file for a period of 12 months, expiring on 14th March 2020."*

This warning does not contain a written explanation that a failure to improve the standard of conduct or performance may result in dismissal, as required by the disciplinary procedure.

<u>Incident</u>

14 On 4 February 2020 the Claimant met with John Cole, deputy manager for the Respondent. The minutes of that meeting show that it was an investigation

into an allegation of the Claimant failing to open the main door on Tuesday 28 January 2020 at store opening.

15 The Tribunal understands that Selfridges had learned that the main doors had not been correctly opened and had asked the supervisor who was Mr Peter Vlad to provide a written explanation.

16 The Tribunal were told that the main doors at the front of Selfridges store on Oxford St in London had an entrance which consisted of three revolving doors. On either side of the revolving doors there is another door, leading to a small vestibule, the length of the revolving doors, and then a second door into the building. We understand that the side doors opened inwards against the concessions on either side to make the least possible interference with the shopping area.

Door opening protocol

17 We were told there was a protocol for opening the doors. This required the security officers (as there was usually a team of two for this entrance) to unlock and remove chains which were around the doors to the side and unlock the revolving doors, leaving one latch on each revolving door closed. One security guard would stand in the area beside each of the side doors and would remain guarding the front door until it was time to open. Once it was time to open, they would allow customers in and stand to greet them inside the building beside these doors. The Claimant said they would have their backs to concessions which were either side of the doors, which meant they would be facing each other although there was a distance of 40 to 50 foot between them. The Claimant's explanation was that they would stand where they were not interfering with customers coming into the building and allowing the customers maximum room to move within the building to their choice of location. The Claimant explained that this also enabled them to see if there was any attempt by shoplifters to rush the building. A group of shop lifters who rushed in altogether were referred to as steamers.

18 Once the waiting customers had been greeted and allowed into the building, the security officers were expected to move on and release the final latch on each of the revolving doors. These security guards then had to return the keys and chains to a central location where they were kept. There was no written protocol about this procedure that we were shown.

19 On this occasion the Claimant was allocated this duty together with another security guard called Georgi Vlad. Mr Vlad was called to the control room. A supervisor called Peter Vlad, (no relation to Georgi Vlad), said he would assist the Claimant and the two of them went to the main door.

20 When Selfridges discovered the doors had remained locked for a period, they asked for a statement from the supervisor, who was Mr Peter Vlad. His statement read as follows:

> *"After a brief and opening plans, SO officer Mohamed Ahad was allocated main doors for opening, with me follow checking to go and support him with opening.*
> *After opening times, due to the situation I get together keys and chains from main doors 4 and 5 door and leaving Mr Ahad back on main door. I started making my way back to 2 ED Mews with keys and chains thinking that Mr Ahad will complete his task for opening main doors.*

> *Later on Duty Manager Henrik was let me know that revolving doors was not fully unlocked. Straight after I was have a discussion with Mr Ahad on North Hall doors letting him know that he failed to complete his tasks and try to find why that happened, moment when he denied to take responsibility for what was happened"*

21 Selfridges also showed the CCTV footage to Mr Henrik Harewood, their Duty Manager and to Mr Dayle who later carried out the disciplinary hearing. Mr Dayle and Mr Harewood discussed the footage.

Investigation

22 The investigation meeting was carried out by Mr Cole on 4 February 2020. who had viewed the CCTV footage but did not show it to the Claimant. He made handwritten notes and subsequently a typed report was prepared for HR. The Claimant says he asked to see the footage that day but was not shown it.

23 The handwritten notes record Mr Cole asking if a the briefing the task was given to the Claimant. He replied "*he said that Georgi and me would open the main doors*". Mr Cole's typed report to HR noted that the Claimant was a core officer who had been here for a good amount of time. It continued *"Previous issues with lateness and minor concerns. Had a few welfare checks. Officer not suspended - Securigroup instigated the investigation, not the client."*

24 In the investigation meeting, the Claimant explained to Mr Cole that after the chains were removed, they made a start on the revolving doors and he explained that from his knowledge you unlock the revolving doors but leave the latches so they are still secured until after opening time and then open them fully. He said he had trouble with a lock on one of the revolving doors and Peter Vlad assisted him with unlocking it. He explained that Peter Vlad unlocked the side doors and asked him to wait inside the foyer for the last five minutes until opening. He explained that Mr Vlad went to unlock the other side and he asked him if he wanted him to stay there as the door and was unlocked as they were five minutes early. He manned it until it was opening time. The notes say:

> "*After letting customers in I walked over to him and asked if he wanted me to take the chains or anything. He said don't worry about it what's next position. I said door 8. He said to go to next position.*

25 The notes show that Mr Cole asked where Peter Vlad was when Mr Ahad approached him. Mr Ahad replied *"He was at the other side.*

26 The notes then show that Mr Cole said *"so you walked past the revolving doors to go to him.* Mr Ahad said*: "yes."* Mr Cole questioned: *"why didn't you unlock them?* Mr Ahad said: *"I was unsure if he had already done them as he may have already done while I was letting customers in which was why I asked him if he wanted me to take chains or anything else."*

27 Mr Cole asked why the Claimant had not checked the revolving doors to make sure and asked if he'd opened the main doors before. Mr Ahad said he'd opened the main doors before but not that many times and he'd never done it by himself. He said he didn't check as he went straight to him. Mr Cole said if the task was given to you to do you think it was your responsibility to check everything that on that task is done and Mr Ahad replied:

"the task was given to Georgi and me.

28 Mr Ahad then explained that Peter Vlad took Georgi's place *and continued saying:*

> *"but if it was Georgi I would have checked more thoroughly as he is not as experienced but Peter is a supervisor and I asked him if he'd like me to take chains or do anything else. He told me not to worry about it which is why I thought he had done it or would deal with it. If he told me to unlock revolving doors I would have. It was why I asked him.*

29 Mr Cole asked the Claimant if there was anything else he wanted to add and he replied:

> *"Next time I open any doors either on my own or with someone else I will make sure I check it thoroughly. This is not happened before. First time it happened."*

30 These notes are signed or initialled twice on each page and so far as the Tribunal can say, they appeared to be the initials of Mr Cole and the signature of the Claimant.

31 Mr Cole then wrote a report explaining but there was a meeting on the 4th of February 2020 at 4:20 p.m. with Mr Ahad and himself. He explained the remit of the hearing being due to the failure to open the main revolving doors at store opening. He summarised Mr Ahad's reasoning being that the supervisor was opening the door with him and didn't open the doors or instruct him to do it. He noted that Mr Vlad opened one side of the main doors and the Claimant opened the other. He confirmed that the Claimant had opened the main doors before and knew the process and that his defence was geared towards the supervisor not doing or not telling him to do it.

32 Mr Cole reported that the evidence he had was a statement from the supervisor, Mr Vlad and CCTV footage and he then summarised the CCTV footage. His summary noted:

> "*Upon Viewing the CCTV - Peter opens his side of his side doors with his back to the revolving doors, Mohammed opens his facing the revolving doors. Once the customers are in, Mohammed walks directly to Peter and doesn't open the revolving doors. Peter still has his back to the revolving doors, and he is aware that Mohammed knows the processes, Peter just picks up the chains and walks away with Mohammed.*
> *Mohammad said he assumed Peter had opened but had full view of Peter the whole time and could clearly see Peter had not moved anywhere towards the doors and was not facing the same way."*

33 The report concludes with a section called recommendations which states that the task was allocated to the Claimant directly and therefore he should have ensured the task was completed and he has tried to pass the blame and not considered that CCTV would capture the process. Mr Cole's recommendation was that it needed to go to written warning at least, with a final warning at worst.

Disciplinary hearing

34 There followed an effort to set up a disciplinary hearing. There were three meetings which took place and other attempts to set up meetings which did not take place because the Claimant was given too little notice. The HR department asked Mr David Dayle to be the disciplinary manager as he was a site manager. In preparation for that event, the HR department sent Mr Dayle a pack of information which included John Cole's report and notes of the investigation. In his witness statement Mr Dayle says:

> *"From reading John Cole's HR investigation report, I understood that the physical position of the officers would not have allowed the Claimant, who owned the task of opening the doors, to see Peter Vlad's actions.... the Claimant was facing the revolving doors as he opened his set of doors. Peter Vlad's back was turned to the Claimant and the revolving door, so he didn't have sight of what the Claimant was doing and what he had already done."*

By letter dated 7 February 2020 from Mr Dayle, the Claimant was asked to attend a meeting on 12 February at 4:00 p.m. at North Row London. The letter was not sent out on 7 February. In fact, it was only sent out by Mr Dayle with an email dated 10 February. In consequence the Claimant had very little warning about it. The letter stated it enclosed all of the investigatory evidence that would be considered as part of the disciplinary hearing and identified that evidence as investigation minutes dated 7 February 2002 and a statement from Peter Vlad. We understand that the reference to the investigation minutes dated 7 February must have been an error since that was the date of the letter and the investigation minutes were actually dated 4 February.

35 The Claimant replied with an email dated 11 February 2020 asking Mr. David Dayle to bring a copy of the CCTV footage with him to the meeting on 12 February. His email made it clear that he asked for the CCTV when it was mentioned to him on the day of the incident, and he was told that he would be able to view it. He wanted to see it at the meeting as he had not seen it yet.

Meeting on 12 February 2020

36 The Claimant did go to the meeting on 12 February and says that when he asked about the CCTV footage again, they went to the control room to view it where he was kept waiting outside for a considerable period of time. He complains on several subsequent occasions that he was kept waiting on that occasion for 2 hours. He says in his witness statement that he was eventually told by Mr Dayle that they would have to request it in writing from Selfridges.

37 Mr Dayle did not mention that meeting in his witness statement, but we have no doubt it took place as it is referred to by the Claimant in the subsequent meeting notes made on 2 March 2020 and Mr Dayle subsequently emailed the Claimant on 24 February referring to a discussion they had had on 12 February when the Claimant requested to view the CCTV "*which wasn't available to you*". The email said: "*CCTV is now available*".

38 By his email dated 24 February, Mr Dayle asked if the Claimant was available to attend the rescheduled disciplinary on Wednesday 26th February at 1:00 o'clock. Again, this was very short notice. The Claimant replied saying he was

unfortunately unavailable as he already had plans for that today and so there was a further effort of at rescheduling which resulted in the hearing being arranged for 2 March 2020.

Meeting on 2 March 2020

39 When the hearing did start on 2 March 2020, Mr Dayle chaired it and was accompanied by Mr Mohammed Imtiaz from admin and the Claimant. Once again, despite Mr Dayle's recent assurance that the CCTV was now available, it was not available. In consequence, the Claimant again asked to adjourn the meeting and complained that he had been treated unfairly and appear to give two reasons. He said on the day of the incident Peter Vlad was given the opportunity to speak to the duty manager and was able to explain his side of the story and also Peter Vlad was given the opportunity to write a statement and he believed Mr Vlad was able to see the footage (i.e. the CCTV footage) as well. He complained he wasn't given the opportunity to do either of these things but was asked to come in for an investigation meeting. He had not been able to see the CCTV footage. It is clear the Claimant expressed concern as he was not able to see the CCTV footage he had been assured was available and also mentioned the two hour wait on the last occasion.

40 Mr Dayle wrote an HR report. There are a number of surprising comments in that report. The report identifies the subject of the investigation as involving officer Mohammed Ahad leaving the main door at Selfridges open, which resulted in members of the public entering the store. That was not what happened. It was the opposite. The complaint was that he failed to open the doors fully. Additionally, there are references to the employee which state that the Claimant had been working here for approximately 2 plus years, which was incorrect. It continues explaining that he is a security officer and only conducts this type of role, no other specialisms included. It then states:

> "*Previous concerns however may not have been disciplined".*

41 The report then continues referring to the remit of the meeting and addressing the CCTV footage. It explained the CCTV footage was still not available from the client. He explained that he still wished to proceed with the disciplinary without recalling any of the CCTV footage. He explained that Mr Ahad refused to proceed as he was not going to continue without reviewing the CCTV footage even when Mr Dayle explained the footage would not be used as a reference towards the disciplinary. He noted that Mr Ahad mentioned the supervisor should be investigated and that he was treated unfairly. As regards the evidence he said the CCTV footage was not available anymore. In the findings section, he said "*I feel like he had a fair point regarding the CCTV footage, however he is using this as an excuse and over using it*."

42 Mr Dayle then continued noting:

> "*John [who we understand to be John Cole] (Site Deputy Manager SG) and Henrik Harewood, (Selfridge's Duty Manager) have both reviewed the footage and they mentioned to me that they saw Ahad as the main culprit in this incident even though the CCTV is now not available.*
>
> *Mohammed Ahad was given the duty to open the main doors and would have been responsible on opening the revolving doors that were left closed."*

He asked HR for some advice. Specifically, he asked two questions. First, he asked whether it was possible to decide the issue without carrying out another disciplinary. Secondly, he asked whether Mr Ahad had a claim regarding the supervisor Peter Vlad being investigated too.

43 Mr Dayle sent the HR summary and disciplinary notes for the hearing to HR on 3 March 2020. The next day he received a response asking why the CCTV was not available. On 4 March Mr Dayle replied to HR and to BP saying:

> *"Hi All, The CCTV wasn't available for some reason when I requested it from the client. I believe they just didn't save it and it was also mentioned that they don't keep all footage over a certain period of time. Which is weird since they requested an incident to be investigated I would have assumed that they would have saved the footage.*
>
> *This was after the CCTV was viewed by the client and I believe they thought this was the necessary steps to take after viewing the footage."*

44 Mr Dayle was also asked in Tribunal why he emailed the Claimant to say the CCTV footage was available, only then to say it was not. He told the Tribunal that Selfridge's were asked to secure it but when he came to use it, for some reason they had not got it. He insisted the CCTV belonged to Selfridges and not to the Respondent.

45 The Tribunal were not satisfied with Mr Dayle's explanation about the CCTV. The failure to produce it is very strange since Mr Dayle had expressly written to the Claimant to say the CCTV was available after it had not been available when they had gone to view it on 12 February.

46 HR wrote to Mr Dayle on 5 March 2020 twice. The first response said:

> "*If the CCTV footage isn't available then it can't be used as evidence*".

It continued:

> *"We can however proceed without it. We have a statement from Peter and within the investigation meeting, Mo openly admits that he failed to open the door, he does however attempt to pass the blame to Peter. HR said they would write a response to be sent to Mo and would get this over shortly.*"

There followed a further email with a draft response to Mr Ahad and that email asked Mr Dayle when he was available to chair the hearing. The draft response referred to the meeting on 2 March which was adjourned as Mr Ahad felt had been unfairly treated and responded to his points.

47 HR's draft email responded to the Claimant's question about CCTV saying this was out of their control and that he had asked the client for the footage to be made available before the hearing but had been advised the footage was no longer available due to the delay between the initial incident and the date of the disciplinary hearing. The email recorded:

"As you have been unable to view the CCTV this will not be considered as part of the evidence against you."

48 It then continued referring to Peter Vlad said he could not discuss specifics regarding Peters employment but his concerns were noted. The draft said any further action is a matter between the company and the named individual.

49 Mr Dayle responded to HR on 7 March 2020 confirming he was happy to do the disciplinary on 12th March at 2:00 p.m. with a response which had been drafted. But he specifically asked:

"Can you also advise me if Ahad has clear points of investigating Peter Vlad, even though the footage isn't available anymore? When viewed by the client and John Cole, they both stated that Peter Vlad didn't need to be investigated and he was only requested to write a statement."

50 HR replied on 9 March 2020 telling Mr Dayle that it was the decision of the chair and himself. In practice Mr Dayle was the chair of the meeting. The HR email said:

"I think you need to consider who's responsibility it was to open the doors. If this was partially Peters responsibility, then yes he should be investigated".

51 The email continued: *"If Mo starts creating I would cite exactly what is said within the attached, that you are unable to discuss Peters employment".*

52 By letter dated 9 March 2020, Mr Dayle sent the Claimant the letter that he had been given by HR addressing both the CCTV point and saying it was no longer available due to the delay between the initial incident and the date of the disciplinary hearing and saying they could not discuss Mr Vlad's employment. As advised by HR the letter continued explaining that if the Claimant failed to participate in the process it may result in further disciplinary action against him and accordingly the meeting was arranged again for 12 March 2020 pm at 25 North Row.

Meeting on 12 March 2020

53 There were a number of problems with this disciplinary meeting when it took place. First, we understand that the meeting was relocated away from North Row to the SF Briefing Room in Edwards Mews, with no warning to the Claimant whatsoever so the Claimant went to that address initially. Both he and the receptionist called Mr Dayle a number of times to try to find out where he was. According to the Claimant, Mr Dayle then called him and expressed some surprise that he had gone to North Row. When the Claimant explained he was at North Row since that was where the invite letter instructed him the meeting was taking place, Mr Dayle said he sometimes just forwarded on the HR letters without reading them. Secondly, when it did take place, Mr Dayle arranged for it to be held in a communal room used by other officers who came in and out during the course of the meeting, one even changing while a disciplinary hearing was ongoing. One of the people who came into the room in the course of the disciplinary meeting was Mr Peter Vlad who the Claimant regarded as equally responsible for the incident but who had not been investigated or disciplined.

54 The meeting notes indicate there were three people present, being the Claimant, Mr Dayle and Mr Imtiaz. Mr. Dayle asked the Claimant to go through what happened on the 28th of January at the main doors and the Claimant apparently explained his version of events. He said:

> *"Me and Peter removed the chains. Me and Peter then proceeded to unlock the latches on the revolving doors leaving one side up and one down on each door. After I was working in between the main doors and shop floor waiting for store opening. I then remind Peter that there are 5 mins left after which he responded OK. After I opened the door for the customers I walked over to him and I asked him is there anything else you want me to do or take the chains, to what he replied no and asked me to go to my next position, so I went to my next position.*

55 The meeting continued with Mr Dayle asking the Claimant if he had been fully briefed and the Claimant said that he had been. Mr Dayle then asked him why he didn't walk straight over to Peter Vlad after the last customer on his side walked in? The Claimant replied I walked over to ask him if there is anything else to do before I was unsure whether he had unlocked the remaining doors. Mr Dayle asked him whether there were any more customers from Peter's side going in and the Claimant replied that he didn't recall seeing any customers go to the door at that point. Mr Dayle asked what was Peter's reply when you asked him what to do. The Claimant relied "No his response was don't worry about and he asked me what my next position is to which I replied door 8 and he asked me to go there. Mr Dayle asked whether the Claimant had a visual of Peter when he was opening the door and the Claimant said not the entire time as he was greeting the customers. He said:

> *"I was holding the first set of doors for the customers and the second set of doors too as I was greeting the customers"*.

56 Mr Dayle asked him whether he could confirm that he finished greeting the customers and opening the doors internally whilst having a visual of Peter. The Claimant said he did not have a visual of Peter the entire time. There was a discussion about precisely where the Claimant was and whether he had visual sight of Mr Vlad. The Claimant confirmed he was positioned inside the store when the last customer entered, but he couldn't confirm he had a visual of Peter Vlad the whole time. Effectively the Claimant maintained that when he had asked Mr Vlad if there was anything else he could do it was because he didn't know if the revolving doors had been fully unlocked and he expected Mr Vlad to tell him to do that if they had not been unlocked. He also insisted that he did not have a clear sight line of sight to Mr Vlad the whole time and did not know if Mr Vlad had unlocked them himself. The Claimant was asked what would have been his next step to find out if the main revolving doors were opened. He replied:

> "*I would have checked the revolving doors however at that particular incident I was unsure whether or not Peter had already checked them. Just to confirm, I asked him if there is anything else for me to do or if I should take the chains.*

57 There was a further question about the doors with Mr Dayle asking how the Claimant could have been unsure if he was internal at the finishing stages of opening his doors, to which he replied:

> *"I was under the impression that he has either already checked the door or would check them which is why I left after he told me to go to my next position".*

He also maintained that Mr Vlad would have seen him walk towards him without unlocking the doors *saying:*

> *"so when I asked if there was anything else he would like me to do, he could easily have told me to double check the revolving doors and I would have been more than happy to do so, but instead he told me don't worry about it and asked me what my next position was to which I replied door 8 so then he said go to your next position".*

58 Those notes were followed by an HR report dated 12 March 2020, the reason for the meeting being a disciplinary hearing and the notes being condensed into sections the first which described the employee and the second describing the remit of the meeting. Under evidence section there is reference to a statement from Duty Manager Henrik Harewood. There was no statement from Mr Harewood in the bundle and we have no information as to what it might have said. It was not referred to in the initial invitation letter to the Claimant about the disciplinary hearing.

59 Under the remit, there is a short summary of the sequence of events as follows:

> "*Mohammed Ahad was supposed to open the main doors alongside another officer. But this officer was to down to do another job for control and supervisor Peter Vlad stood in his position.*
>
> *Mohammed Ahad and Peter Vlad proceeded with opening the main doors.*
>
> *Then Mohammed and Peter unlocked one side of the latches on the revolving doors. There are three revolving doors for the main doors and two side doors.*
>
> *After this they then both went to both side doors to open the doors on call of opening until the last customer from their site enters. After the last customer has entered your side you are to proceed to unlocking the middle revolving doors (whoever is first).*
>
> *Soon after the last customer has entered through Mohammed's door, he then asked Peter Vlad is there anything else to do in which Peter replied for Mohammed to go to his next position.*
>
> *Peter finished opening the main doors by picking up the padlocks and chains and handing them back in control".*

60 Under the section on findings it states:

"The procedures of unlocking the main doors are after the last customer has entered through your door the officers closing it are to straight away go the revolving doors and open them too.

Mohammed Ahad claims he knows this but he didn't do it and assumed that Peter had done it already.

Mohammed also claims that he couldn't see unlocking it when he was internally and the last customer came through his door.

Mohammed Ahad just walked over to Peter Vlad without checking the doors, even if they were opened already then should have been double checked."

61 The notes recommend next level of disciplinary to be given. By a letter dated 24 March 2020 Mr Ahmed was told the outcome of this hearing. The allegation was:

"1 It is alleged that on Tuesday 28 January 2020 you failed to follow site protocol when unlocking the main doors which resulted in customers being unable to enter through this door.

2 It is alleged that your action could have potentially damaged our relationship with a valued client."

62 The letter then referenced the comments made by the Claimant about having approached Peter Vlad and asked if there was anything else that he required assistance with, and then going to the next position. It also explained:

"You said you were unsure if Peter had opened the revolving doors, therefore I cannot understand why you would not check, or simply ask. As a direct result of your actions patrons were unable to enter our client's premises. Your clear disregard for your duties makes me question your suitability to work as a security officer."

63 The letter continued that Mr Dayle had decided the Claimant's conduct merited a written warning. There was then a reference to the two prior warnings on 14 March and 8 April and as the final written warning remains active, the fact that the Claimant had been warned that if there was any further misconduct prior to its expiry he may be dismissed. In fact, this was not correct. As noted before, the final warning letter had been described itself as a final warning but did not include any statement that if there was any further misconduct, the Claimant might be dismissed.

64 The dismissal letter then said:

" the addition of this written warning makes me believe that you have taken on no learning from previous meetings. In light of this, I have taken the decision to dismiss you from the organisation.

The Claimant was told of his right of appeal.

65 The Tribunal note that it was clear both from the disciplinary procedure and from the dismissal letter that dismissal was not an automatic outcome

following a final warning. In his witness statement Mr Dayle expressed the reason for his decision saying:

> *"During the disciplinary procedure the Claimant did not show any remorse for his actions. He failed to admit that he acted wrongly or that he failed to follow the Respondent's procedures after confirming to me that he knew what was expected of him. The Claimant didn't show any reflection at the end of the proceedings and he didn't demonstrate anything that he had learned following the incident to stop a repeat in the future....*
>
> *The Claimant was already on a final written warning dated 8 April 2019. Both the conduct that resulted in the final written warning and the conduct in this disciplinary was of a similar type of conduct. He showed no improvement or remorse and instead the behaviour was continuing.*

66 Mr Dayle explained that it was his conclusion that it was the Claimant's duty to open the doors as he signed out the keys before opening that day. He said there was only one set of keys, that the Claimant had them and he referred to him being the owner of the task and it being his responsibility to ensure that all of the doors were open. We do not know where this information came from as we cannot find a reference to it in any questions put to the Claimant or in Mr Vlad's witness statement. Indeed, we were told that Mr Vlad took the keys and chains back and we do not know what point he took over the keys from the Claimant.

67 In particular Mr Dayle said in his witness statement:

> *"I was satisfied that by Peter helping the Claimant, the liability for the store being open does not transfer from the Claimant to Peter because Peter was not stationed to one place at any given time.*
>
> *I made my decision based on the admissions the Claimant made. I didn't need to see the CCTV footage to reach the outcome that I did and I had already told the Claimant that the CCTV evidence would not be taken into account. He was aware that it was site procedure to go and double check the doors were unlocked once he finished letting customers into the store first. I was satisfied that the supervisor was not assigned the task availing the main doors. There was a lack of accountability by the Claimant which was apparent from the disciplinary hearing.*
>
> *I did not accept the Claimant's account as he claimed that he could not see that the door was locked. The Claimant had a clear view as he was letting customers in. The Claimant admitted he walked across the doors as he was finished opening first and did not check the revolving doors. This is recorded in the investigation minutes and the disciplinary minutes....*
>
> *As the Claimant's previous warning was for related conduct where he again demonstrated a poor attitude and did not follow company procedures, my warning was totted up and amounted to a dismissal. Therefore the Claimant was dismissed for misconduct with notice pay.*

68 Mr Dayle appears not to have taken any account of the fact that at the investigation hearing, the Claimant volunteered, when asked if he had anything

else to say, that when opening doors in future whether on his own or with someone else, he would check thoroughly, indicating he had learned from this incident. It is not clear why Mr Dayle concluded the Claimant had a clear view of Peter Vlad as he was letting customers in, but we do know that Mr Dayle had seen the CCTV himself more than once, and had the investigation report which described it.

Appeal

69 The Claimant did appeal. Essentially, he argued that he appeared to be held completely responsible for the incident even though he was accompanied by another individual who he thought had been "favouritised" from the very beginning of the investigation. In relation to that, he complained that Peter Vlad was the supervisor of the team. He argued that Mr Vlad was given the opportunity to speak to the Duty Manager and was able to explain his side of the story and write a statement with his version of the incident. Peter Vlad had been able to see the footage as well. He said that in the CCTV footage it is clear that the Claimant had left the facility, but Mr Vlad claimed he left before the Claimant which was untrue.

70 The Claimant complained that he was asked to come in for an investigation meeting, but Peter Vlad had not been asked to do so. He complained he was invited to a disciplinary meeting which was adjourned for him to see the CCTV footage, but he was unable to see it after waiting for two hours.

71 He complained when he attended the meeting, he was told the footage wasn't available anymore and Peter had not been invited in for an investigation meeting either. He complained that the CCTV footage had a significant bearing on and was crucial to deciding the outcome of this disciplinary matter and it was management's responsibility to ensure that that footage was available for this investigation.

72 The Claimant complained that disciplinary meeting had been interrupted five times by people walking into the room it was being held in, including Peter Vlad also walking in it at one point and removing a plug out of one of the wall sockets which was connected to a charging dock used to charge radios even though it clearly said do not touch on it. The meeting he said was also interrupted by Paul who was supervising his team that day who came in to ask three times how long it would take and someone else called John who came and changed his clothes whilst the meeting was taking place.

73 He complained that he was rushed when looking through the notes to see if there were any discrepancies and told to hurry up because the time was going to come out of his break which he said was completely out of order and very unprofessional.

74 The Claimant talked about the day of the incident and gave his side of the story again. Again, he described walking up to Peter Vlad stating:

> *"I walked over to him and asked him if there was anything he would like me to do or if you would like me to take the chains, he replied saying don't worry mate, what is your next position"*.

He then referenced the CCTV footage saying that when he asked me to go to my next position that is also evident in the CCTV footage as he put his hand in my back to usher me in my direction of travel. He explained he was following instructions given by his supervisor and walked over at his next position. He assumed the supervisor would unlock the revolving doors which are in between the doors which we had already opened for customers to enter the store because he had said "*don't worry about it mate*" and asked me asked him to go to the next position.

75 The Claimant referenced the allegation in a letter of dismissal where it states that he was unsure if Peter opened the revolving doors and explained that Mr Dayle could not understand why he would not check or simply ask, stating he did ask Peter if there's anything you would like me to do before I left and he replied "*don't worry about it mate*" which gave him the impression that he would open the remaining doors before he left.

76 The Claimant commented on the position regarding prior warning stating that he understood he was already on a final warning, but the written warning given before that regarding attendance should not be valid due to the fact they were all given a clean sheet on 11 November 2019 when a new procedures put in place and everyone was told that it would be a fresh start and they were asked to sign a document to confirm they understood it. He also referenced the fact there had been many occasions when other people in his team had had similar incidents but were not disciplined for them. He explained he believed there had been procedural irregularities and that management had been inconsistent throughout the course of this investigation.

77 The appeal took place on Friday 17 April 2020. It had been delayed by the pandemic and the isolation rules. It took place by a video call. The appeal was conducted by Frank Baker, regional manager and was attended by Carol Marshall as note taker and by the Claimant and Alton Boatswain, his union representative.

78 There was a discussion about the protocol for opening the doors and about what happened in which the Claimant repeated his position about having unlocked all the doors apart from returning to the revolving doors and then asking Peter Vlad if he wanted him to do anything else to which he replied "*no don't worry mate, go to your next position*". He was asked expressly whether he was aware that the revolving doors were still locked at that point and replied that he thought that Peter Vlad was going to unlock them. He was then asked if he walked past the three revolving doors when he walked over to Peter to which he replied yes. He was asked if he specifically asked Peter if he had opened those doors to which he said no. He was asked if there was any reason why he didn't check the doors when he walked past them and said he wasn't sure if they were unlocked or not.

79 There was a discussion initiated by the union representative about what he perceived as the unfairness of the situation with the Claimant being disciplined and Peter Vlad not being disciplined. They referred to the CCTV and the trade union representative pointed out that the minutes might state that CCTV would not be used, but it already had been. He explained:

"that's how they knew Mohammed walked past the doors. It's unfair. Mohammed wasn't given the opportunity to view it. He is recording from memory whilst everyone else has used CCTV."

80 They also discussed why the Claimant was sent to a meeting at the office rather than North Row, where the invitation had stipulated the meeting would be held and why there have been so many interruptions.

81 After the meeting, a typed note was prepared, again called an HR report. The findings record that the investigating officer viewed CCTV and concluded that the Claimant had full view of Peter Vlad at all times and knew that Peter Vlad had not unlocked the revolving doors and as such did not proceed to an investigation with Peter Vlad as the Claimant should have unlocked the revolving doors as he knew Peter Vlad had not. It continued that while CCTV was not available for the Claimant to review as the client had not saved the footage, this was not used in the disciplinary hearing. The suggestion that the CCTV footage was not used in the disciplinary hearing was clearly incorrect. Both during the disciplinary hearing and the appeal, the officers concerned relied on their understanding of the facts which had been obtained from the initial viewing of the CCTV. Specifically, the reliance on the on the account of the events in the report of the investigating officer who had viewed the CCTV, was itself use of the CCTV footage.

82 The report then said the written warning referred to was prior to the Final Written Warning that had been issued for another incident whilst on duty and it was this FWW that was taken into account. It also said that the Claimant did not unlock the doors that he had been tasked with doing. The recommendation was that the award for the written warning was upheld as this warning was issued when a final written warning was active and this had escalated to dismissal.

83 By a letter dated 24 April 2020 the Claimant was told of the appeal outcome which was that the appeal had failed. The appeal officer noted that when asked why he did not check the doors himself when he walked past them, the Claimant said he wasn't sure if they were unlocked or not. If he wasn't sure if the doors were unlocked, he should have checked. On the balance of probabilities, it was the appeal officer's belief that he had failed to complete his assigned duties by ensuring that the client's premises were fully unlocked before moving to his next position.

84 Mr Baker said he was unable to go into specifics with regard to his colleague's employment. As a result, he did not address the inconsistency between the Claimant's position and that of Peter Vlad. He addressed the meeting taking place at a site office instead of the North Row location and the interruptions during the meeting and said that these interruptions may have been off putting and interrupted the flow of the meeting, but he did not believe this had any impact on the decision taken after the meeting. However, he agreed he said he would raise concerns with the dismissing officer's line manager.

85 As regards to CCTV, he said it was outside the Respondent's control as they did not own the CCTV footage. After reviewing the notes of the case, he believed that the actions warranted a written warning.

86 With regard to the point that there was a clean sheet given in relation to the first warning, he said that there was still a second warning live and it was that final written warning which had been taken into account. For those reasons he dismissed the appeal.

87 We should note that in the course of this hearing, the Claimant argued that the description that he had walked past the revolving doors to Peter Vlad was not correct and that in practice it was more a question of walking towards the middle of the floor where they had both met. Having reflected on the number of times the Claimant described the situation as walking across to Peter Vlad in meetings with the Respondent, and indicating that he had walked past the revolving doors, we do not find this new description convincing.

Procedural errors

88 It is noteworthy that there were a number of occasions when the Respondent made errors in the procedure. Individually such errors were potentially accidental, but the number of errors in this case is unusually large.

89 Prior to the disciplinary hearing, Mr Dayle told the Claimant that the CCTV was now available and yet when the Claimant was told he would be able to view it, he was kept waiting for 2 hours, and then told the CCTV was not available. No satisfactory reason has ever been given for that change of position.

90 In the HR report on the disciplinary hearing on 2 March 2020, Mr Dayle notes “Previous concerns however may not have been disciplined”, suggesting there were other matters about the Claimant which concerned him, which were not the subject of the disciplinary hearing, but which influenced his decision making.

91 The disciplinary hearing on 12 March 2020, took place in a shared room and various people, including Peter Vlad who the Claimant had explained he considered equally at fault with him, came in and out of the room. There was no confidentiality.

92 Mr Dayle referred to John, site deputy manager and Mr Harewood having reviewed the CCTV footage and mentioning to Mr Dayle that they saw the Claimant as the main culprit in this incident even though the CCTV was now not available, indicating that he had been discussing the matter with other managers and had been influenced by their viewpoint about the CCTV.

93 Mr Dayle asked HR about the need to investigate Mr Vlad. His question to them asked if he should investigate Peter Vlad, even though the footage wasn't available anymore? He again specifically referenced the client and John Cole telling him that Peter Vlad didn't need to be investigated and he was only requested to write a statement. When HR told him that if Peter Vlad was partially responsible, he should be investigated, he did nothing.

94 In the HR report on the disciplinary hearing on 12 March 2020, Mr Dayle referred to the subject of the investigation as involving the doors being left open and members of the public entering the store, when it was the opposite. He also referred to the evidence being a statement from duty manager Henrik Harewood. While it is clear from the documents that I have just referred to that

Mr Dayle talked to Mr Harewood about the matter and was clearly influenced by his opinion, there is no evidence that such a statement was ever given to the Claimant and no such statement has been produced to the Tribunal.

95 Mr Dayle insisted that Mr Vlad bore no responsibility for checking the main doors were fully open and that the revolving doors had had the final bolt lifted on the basis that he could not become responsible by virtue of the fact he did he had agreed to step in for Mr Georgi Vlad. That explanation is incomprehensible. Most employers would accept that if a supervisor took on a task which was to be done by another employee, they would be at least as responsible as that employee would have been for it being done correctly. Indeed, most employers would take the view that a supervisor had more responsibility than any other employee because their greater seniority meant that they there was a greater onus on them to ensure the task was completed correctly.

Submissions

Respondent's Submissions

96 The Respondent reminded the Tribunal of the purpose of this hearing which was to consider a claim for discrimination and not to consider a claim for unfair dismissal.

97 In relation to the question of whether the claims were within time, the Respondent explained that they recognised that the date of 7th April in the dismissal letter was incorrect but that it was likely the Tribunal would allow the ET1 to be received late as the error would be construed against the Respondent and therefore they did not pursue the argument on time limits.

98 However, in relation to whether there was conduct extending over a period, the Respondent argued there is no evidence of a continuing act. In relation to whether the time should be extended on a just and equitable basis the Respondent said that the claim was out of time in relation to the final written warning and there is no evidence of a continuing act and that matter as well as the allegation about failure to rescind should both be dismissed by the Tribunal.

99 In relation to the evidence about the alleged direct race claim, the Respondent argued that both their witnesses had been straight forward and credible whereas the Claimant sought to deflect questions.

100 The Respondent complained that the Claimant did not cross examine Mr Dayle on the direct discrimination claim before the Tribunal but focused on the unfair treatment and he did not put to Mr Dayle or Mr Baker, the appeal manager, that the alleged treatment was due to his race.

101 The Respondent referred to the cross examination in relation to the doors and said that in evidence before the Tribunal the Claimant sought to change his position and say that both he and Mr Vlad walked towards each other and met somewhere in the middle. Where there was a difference the evidence of the Respondent's witnesses should be preferred.

102 The Respondent argued that it was being suggested that in a moment in time Mr Vlad stepped into the shoes of Georgie Vlad and notwithstanding the

fact he was a supervisor, he downgraded into the role of security officer at that moment. The reality was that the supervisor had gone to lend a hand to the Claimant and did not, by osmosis, step into the shoes of being a security officer. The Claimant "owned" the task of opening the doors and it was the Claimant's evidence he had not done so.

103 It was regrettable that the CCTV could not have been obtained but it was irrelevant during the stages of the process.

104 On the legal aspects, the Respondent argued that on the question of whether the Claimant was directly discriminated against contrary to section 13 of the Equality Act, there was no case to answer. The Claimant had not put his case to the Respondent's witnesses and the evidence of Mr Dayle and Mr. Baker should be preferred.

105 In the alternative, if the Tribunal was not with the Respondent's representative on that matter, in relation to the question whether the Claimant established a prima facie case which switched the burden of proof to the Respondent under section 136 of the Equality Act, this does not apply if the Respondent shows he did not contravene the Act. The Claimant has to establish a prima facie case that he was being treated less favourably in order for the burden to shift the Respondent. The treatment has to be because of his race. The case of Madarassy demonstrates that Claimant must show more than a difference in sex and treatment to establish this position. This was further repeated by Igen and Wong. There has to be more than the mere possibility of discrimination.

106 The Madarassy approach was considered in the case of Hewage v Grampian Health Board in 2013. It is clear that it is not enough for the Claimant to show a difference in treatment; there has to be something more. Peter was white. The Claimant was Bangladeshi. The Claimant says it amounted to direct discrimination, but the Respondent argued that the "something more" was missing, so the burden of proof does not shift. If, however, the Tribunal finds the burden of proof has been switched it has to consider whether there has been less favourable treatment; that is whether there's been a comparator who is the same or not materially different and less favourable treatment because race.

107 When considering whether it's been less favourable treatment because of race, the Tribunal should look at "the reasons why". The Respondent submits that there were non-discriminatory reasons why the Claimant was disciplined. There was a misconduct reason for failing to unlock the doors. He simply did not do so. The Claimant argues that Peter Vlad should have walked the floor to check all the doors but that was not the case. The Claimant owned that responsibility; it was not passed to Peter Vlad.

108 The contemporaneous account demonstrates the Claimant's fault. He admits walking past the doors and not touching them, not checking them to see if they were unlocked. He claimed he was aware of the procedure for unlocking the doors

109 One of the points the Claimant felt that showed he had been treated unfairly was that Peter Vlad provided a statement at the beginning and the Claimant was not afforded this. This was requested from Selfridge's and in a

management capacity, Peter Vlad did provide that. The Claimant was provided with the opportunity in the investigation meeting with John Cole to explain his side of the story.

110 In the alternative, even if there was a finding of differential treatment, the Claimant has not established it was because of race. Effectively the Claimant said he was disciplined, and Peter Vlad was not. The Claimant said that must be direct race discrimination. In relation to the CCTV there is a lot of evidence that it was not available. David Dayle said Peter Vlad also did not get to see the footage and there was no difference between them.

111 A comparator must be the same in all material respects, or if not the same, not materially different. On the comparator point, section 23 the Equality Act subsection 1 provides there must be no material differences between the circumstances relating to each case. The Respondent says Peter Vlad is not an appropriate comparator. Looking at the case management summary there's no evidence that Peter Vlad was a comparator to the first two allegations. Effectively he applies to the third matter only. The Claimant says he and Peter Vlad shared responsibility for unlocking the doors. The Respondent's position is that Peter Vlad had materially different circumstances as the task was given to the Claimant and Georgi Vlad. Georgi was called called away. The Respondent referred to the case of Shamoon v Royal Ulster Constabulary and said the Tribunal cannot draw inferences from this alone there is no evidence of discrimination.

112 In relation to the Judge's question about whether Peter Vlad was an indicative comparator, (that is to say not an actual comparator but someone whose treatment might inform the tribunal when considering how the hypothetical comparator would have been treated) the Respondent said they couldn't see how that could be considered without talking about supervisor role. Mr Vlad was not just another security officer lending a hand, but a supervisor.

113 Finally, the Claimant was out of time in relation to 8th of April incident and admitted he didn't appeal and there was no grievance. The Claimant said the policy to do with sickness absence had changed and that warning would be extinguished. There was no evidence about this and the Claimant had not appealed or challenged this warning. Davies v Sandwell Metropolitan Borough Council UKEAT/0416/10/DA is authority for the approach that it is not the function of an employer or tribunal to re-open the case of a previous warning if issued in good faith unless it was manifestly inappropriate to issue such a warning.

The Claimant's Submissions

114 The Claimant made submissions about the evidence and the factual circumstances. In some circumstances he raised new matters which we had not been told previously. We did not take account of any new facts which had not been raised in evidence when the process of cross examination was available to the Respondent. The Claimant said he could not understand why they couldn't produce the CCTV, particularly when Mr Dayle had said it was available.

115 The Claimant referred to the supervisor's role and their responsibility for making sure everyone was in position.

116 Mr Dayle had viewed the CCTV on the day of the incident took place and he viewed it again after the investigation. The Claimant didn't understand how the Respondent allowed Mr Dayle to carry out the disciplinary. Overall he didn't understand why they couldn't get a copy of the CCTV for him, and he felt they were racially motivated to get rid of him and used this incident as an opportunity to do so.

117 The Claimant referred to the occasion when he asked specifically to see the CCTV and being kept waiting for two hours and then being told it was not available. He also referred to the other disciplinary minutes from the 2nd March which he only received on 29th April after raising a SARS request. He said he had initially requested CCTV as early as the day of the incident and had been invited to investigation meeting by John Cole. He had received an email from Mr Dayle asking him to confirm attendance on the 12th of February. The invitation letter was dated 7th February, but the meeting was on the 12th and the letter was supposed to be sent to him the previous week, but was actually sent on 10th February.

118 The Claimant argued that he was not shown the evidence, namely the CCTV, which he could have used in his defence let alone been given a copy of the footage in order to prepare his defence. He referred again to the Respondent assuring hm that he would be able to view the CCTV and then attempting to persuade him to go on without the footage when it was not available after he had waited for two hours. He was told the management would have to request the CCTV from Selfridges in writing. He was told the CCTV was available, but then it was not available. After that, the meeting had to be rescheduled. He referred to it being management's responsibility to ensure the CCTV was available and pointed out that the CCTV footage was referred to in the investigation minutes.

119 He referred to the problems at Edwards Mews when he waited for the meeting and then the meeting was interrupted five times including Peter Vlad walking in and taking a plug from a charging dock. He referred to being interrupted by his supervisor who came in attempting to rush him and John Cole who also came in to change his clothes after the shift ended. He also referred to being asked to look through the notes and told to hurry up and how the Respondent tried to rush him into signing the notes. He was only sent the minutes after requesting them from HR. He was concerned that the CCTV had not been shown to him because it would not support the assertion against him.

120 The matter was a minor offence, and the Claimant argued that he was not solely responsible for it. There was no documentation to indicate the request for the CCTV from Selfridges. There was no correspondence between the Respondent and Selfridges and nothing to indicate what efforts they made to get the CCTV. The Claimant also argued that when other occasions when the doors had been properly opened another people had not been disciplined. There is no other documentation produced about other disciplinary scenarios. He considered the Respondent had not follow the ACAS code of procedure.

The Law

121 Section 13 of the Equality Act 2010 defines direct discrimination as follows

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

122 Section 4 of the Equality Act defines protected characteristics as including race.

123 Section 23 of the Equality Act defines a comparator, stating;

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

124 It is for the Claimant to choose the comparator, but an employment tribunal can disregard it on the basis that the comparator selected is invalid or formulate its own comparator. Balmoody v UK Central Council for Nursing, Midwifery and Health Visiting [2002] IRLR 288 which quoted observations of Lindsay J in Chief Constable of West Yorkshire v Vento [2001] IRLR 124, when he said (to quote from the headnote):

> *"In deciding that the applicant had been treated less favourably than the employers would have treated a hypothetical male comparator, the tribunal did not err in constructing an inference of the hypothetical case from how the employers treated actual unidentical, but not wholly dissimilar, cases.*
> *Where there is no evidence as to the treatment of an actual male comparator whose position is wholly akin to the applicant's, a tribunal has to construct a picture of how a hypothetical male comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn. One permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found. If that were the case then isolated cases of discrimination would almost invariably go uncompensated."*

125 Identifying the characteristics of the comparator require some thought. In Stockton on Tees BC v Aylott [2011] ICR 1279 Mummery LJ stated:

> *"In deciding upon the characteristics of a hypothetical comparator, it is necessary to determine the reason why the complainant received the treatment of which complaint is made. The relevant circumstances and attributes of an appropriate comparator should reflect the circumstances and attributes relevant to the reason for the action or decision of which complaint is made."*

126 Section 136 of the Equality Act sets out the burden of proof.

(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 provisions.

127 Hewage v Grampian Health Board 212 UKSC 37 upheld the approach of Igen v Wong which is:

(1) It is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of the act .. these are referred to below as "such facts".

(2) If the claimant does not prove such facts he or she will fail.

(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. In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to 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.

(5) It is important to note the word "could" in section.. 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.

(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.

(7) These inferences can include, in appropriate cases any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the 1975 Act.

(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.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of... then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex race since "no discrimination whatsoever" is compatible with the burden of proof directive.

(12) That requires the tribunal to assess not merely whether the employer 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 sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in 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.

128 In Madarassy v Nomura International Plc [2007] ICR 867 Mummery LJ held that the words "could conclude" meant that a "*reasonable tribunal could properly conclude from all the evidence before it. This will involve evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reasons for the differential treatment... It would also include evidence adduced by the Respondent..*

129 In Kamlesh Bahl v Law Society [2003] the point was made as follows:
"The inference may also be rebutted - and indeed this will, we suspect, be far more common - by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason."

130 There is no requirement that the Respondent must have based its decisions solely on racial grounds, providing they are a substantial reason for the actions in question. Nagarajan v London Transport [1999] IRLR 572 and James v Eastleigh Borough Council [1990] AC 751.

131 In summary, evidence of direct discrimination will be rare. A tribunal must consider the possibility of unconscious discrimination. The purpose or motive of the discriminator is irrelevant.

132 An inference cannot be drawn simply because the employer behaved badly. Unfair treatment is not per se discriminatory.

133 The Claimant must adduce evidence from which the tribunal can infer a causal link between the less favourable treatment and the protected characteristic.

Conclusions

General

134 As a general matter, we reminded ourselves that this was not an unfair dismissal case.

Time Limits

135 The first issue was whether the Claimant's claims were presented within the time limits. We understood from the Respondent that technically the Claimant's employment ended a day before the date recorded in the dismissal letter as his last day of service and on that basis the claim had been lodged one day out of time. However, on considering the matter the Respondent acknowledged that it would be just and equitable for the Tribunal to extend time where the Claimant's error was based on reliance on the Respondent's correspondence with him. On that basis the Respondent did not pursue their argument.

136 The Tribunal have concluded that it is not open to us to ignore the situation if a claim is out of time. We considered the question of an extension of time. Our conclusion is that we grant an extension of time. It is just and equitable to do so in the light of the confusion that the date in the Respondent's dismissal letter causes. We extend time so that the ET1 was filed within the time limit assessed by reference to the dismissal. In so far as the other assertions amount to conduct extending over a period, they too will be in time.

Direct Discrimination

137 The next issue we considered was the allegations of direct discrimination. First, the Respondent argued that this claim should fail as the Claimant did not put the question of whether they had discriminated against him to their witnesses. The Claimant was a litigant in person. The over-riding objective requires us to put the parties on an equal footing and avoid unnecessary formality. The Claimant should not be expected to adhere to the finer points off evidence. It was clear to everybody that the Claimant was asserting that his treatment was direct discrimination. Mr Dayle, the dismissing officer, had already clearly stated in his witness statement that he did not consider he had discriminated against the Claimant. The Respondent said the Claimant complained primarily of unfair treatment. It was clear throughout that the Claimant was arguing that his treatment was different to his white comparator and the unfairness demonstrated that it was discrimination. We reject the Respondent's submission that because of the technicality that the Claimant did not expressly put to Mr Dayle or Mr Baker his assertion that they had discriminated against him, the claim should fail.

138 There were three matters relied on as less favourable treatment. The first matter was the assertion that the Respondent inappropriately gave the Claimant a written warning on 8 April 2019. In his Grounds of Claim, the Claimant had explained that in March 2019 he was investigated for failure to attend a scheduled shift on 15 and 24 February 2019. He said there were mitigating circumstances why he couldn't attend work on those dates. He referred to the fact that he was involved in an accident and the other date he

had got a colleague to cover his shift but his employer didn't take this into consideration and issued him with a written warning. He then continued explaining later that year there was a review of the sickness and absence policy which resulted in some changes being made. Although the list of issues had not been questioned, the description accompanying the ET1 does not appear to relate to the warning given to the Claimant on 8 April 2019 but rather to the first warning given to the Claimant on 14 March 2019. That was the only warning relating to a failure to attend certain shifts or follow absence reporting procedures.

139 However, whether or not the warning the Claimant was asserting was discriminatory was his first warning or the second warning, the Tribunal received no information from the Claimant in the course of his evidence which indicated any discrimination or less favourable treatment. We have no doubt that the Claimant considered the warnings to be unfair. He did explain the course of his evidence that he understood that the attendance policy had changed, and prior warnings had been erased but it was our conclusion that this was not the case. In the circumstances the claim relating to inappropriate warning fails.

140 The next allegation of less favourable treatment is a failure to rescind that warning. Whether or not the Claimant meant to rely on the first or second warning, the Tribunal had no evidence to explain why the Claimant argued the Respondent treated him less favourably than it treats or would treat others, in failing to rescind the warning. If the Claimant was relying on his assertion that the attendance policy was changed so that prior warnings were erased, it was our conclusion on the facts that this did not happen. There was no evidence of any sort that any other member of staff was not disciplined for attendance as a result of a warning being rescinded or anything similar. Accordingly, the second allegation fails.

141 The third allegation is that the Claimants dismissal was discriminatory. The Claimant relies on Peter Vlad as his comparator. Our starting point in approaching this matter was to consider whether there was something which reaches the standard required for a prima facie case. Following the Madarassy case it is clear that there must be something more than a difference of ethnicity and a difference of treatment.

142 It has long been recognised that overt discrimination is unusual in these times. As a result, it is necessary to look at the events in order to decide whether there were a sequence of facts which together should be considered as raising inferences that there had been discrimination. In this case there were a large number of what might be termed procedural irregularities.

143 As we noted in the section on facts, prior to the disciplinary hearing, Mr Dayle told the Claimant that the CCTV was now available and yet when the Claimant was told he would be able to view it, he was kept waiting for 2 hours, and then told the CCTV was not available. We did not get a satisfactory explanation for that and we found Mr Dayle's assertions that Selfridges had not kept it as inadequate in the light of his email saying that it was available. What is more the Claimant was kept waiting for about 2 hours outside the control room which also raises serious questions about what was going on while he was waiting.

144 We consider that Mr Dayle did refer to the CCTV report by John Cole as it was amongst the papers for the disciplinary hearing, even though he had assured the Claimant that he would not do so. Mr Dayle had seen the CCTV personally. Mr Dayle also discussed the matter with other senior managers who expressed their view of it to him. He talked to John, Site Deputy Manager and Mr Harewood, who was the client's representative. They had both reviewed the CCTV footage and told Mr Dayle that they saw the Claimant as the main culprit. Mr Dayle referred to this in an HR report and it clearly impacted on this assessment of the situation. In contrast, the Claimant was not able to see the CCTV.

145 The disciplinary hearing on 12 March 2020, was moved from North Row to Edwards Mews, to a shared room. The ACAS Guide to the Code of Practice on Discipline and Grievance at work provides as follows:

> *"Arrange a time for the meeting, which should be held as privately as possible, in a suitable room, and where there will be no interruptions."*

Various people, including Peter Vlad, who the Claimant had explained he considered equally at fault with him, came in and out of the room. The was no confidentiality. To hold a disciplinary hearing in such a manner displays a complete lack of respect for the serious nature of the event and for employee involved.

146 In the HR report on the disciplinary hearing on 2 March 2020, Mr Dayle refers to "Previous concerns" for which the Claimant may not have been disciplined, suggesting he had other concerns about the Claimant which were not the subject of the disciplinary hearing, but which influenced his decision making.

147 In the HR report on the disciplinary hearing on 12 March 2020, Mr Dayle referred to the subject of the investigation as involving the doors being left open and members of the public entering the store, when it was the opposite. He also referred to the evidence being a statement from Duty Manager Henrik Harewood. No statement from Mr Harewood was ever given to the Claimant and no such statement has been produced to the Tribunal.

148 Mr Dayle asked HR about the need to investigate Mr Vlad. When HR told him that if Peter Vlad was partially responsible, he should be investigated, he did nothing. Mr Dayle insisted that Mr Vlad bore no responsibility for checking the main doors were fully open and that the revolving doors had had the final bolt lifted on the basis that he could not become responsible by virtue of the fact he did he had agreed to step in for Mr Georgi Vlad. That explanation does not stand up to scrutiny. Most employers would accept that if a supervisor took on a task which was to be done by another employee, they would be at least as responsible as that employee would have been for it being done correctly. Indeed, most employers would take the view that a supervisor had more responsibility than any other employee because their greater seniority meant that they there was a greater onus on them to ensure the task was completed correctly. Mr Vlad had described his role as "follow checking" Mr Ahad and as such he should have checked the doors were fully unlocked, yet he was not subjected to any form of investigation or disciplinary process.

149 Taking all these matters together, the number and type of procedural irregularities were so great that we considered whether an inference should be drawn. We bear in mind the ratio in Hewage in which it said that inferences could be drawn from matters such as an equivocal reply to a questionnaire, or a failure to comply with a relevant code of practice. We consider that it is appropriate to draw an inference from the number of procedural irregularities in this case.

150 Having determined that the burden of proof had passed to the Respondent, we considered the Respondent's explanation and whether that showed that the treatment was not because of race. Essentially the Respondent's argument was that this Claimant had a final written warning on file and when he committed another act of misconduct, it was appropriate to dismiss him.

151 Our view is that it is clear from the letter of dismissal in particular, that it was not automatic that a further offence would lead to dismissal. We considered Mr Dayle's explanation for his decision to dismiss carefully and we have recounted it fully in the factual section of this judgement. Since his explanation omits key matters about the Claimant's learning expressed voluntarily in the investigation, we do not find that satisfactory and do not consider the Respondent has discharged the burden of proof.

152 We reflected on the Respondent's submission that in considering whether the burden of proof has shifted, we should consider whether there was any evidence to indicate that the treatment was on the grounds of race. The Respondent's argument is that Peter Vlad is not an appropriate comparator and there is no evidence of any racial motive. We do not consider that was necessary because the point of drawing an inference is because direct evidence of a racial motive is rare and frequently there is unconscious bias involved.

153 Turning to the Respondent's arguments about the comparator, we do not think that in these circumstances it is essential that there is a consideration of the comparator, but we have done so in any event. We bear in mind the fact that the comparator need not be exactly the same in all respects as the Claimant, provided they are the same in relation to the key factors which have to be considered when determining whether the treatment was less favourable. In other words, we understand that in assessing the comparator, we have to look at what counted at that point in time.

154 The Claimant's dismissal arose because he was investigated and then subjected to a disciplinary hearing as the result of the main doors not being fully opened. There were two security staff manning the process of opening the doors. The Respondent's evidence throughout assumed that Peter Vlad was not responsible for opening the doors. We rejected that argument. Peter Vlad took on the responsibilities which would otherwise have been carried out by Georgi Vlad if he had not been asked to go to the control room at that time. In relation to the door opening, Peter Vlad was acting in the role that had been assigned to the security officer Georgi Vlad. He was therefore a comparator insofar as he was another security staff member, not of the Claimants race, who was jointly responsible with the Claimant for opening the main doors on the day when they were not fully opened.

155 We note that the HR email dated 9 March 2020, specifically recorded the fact that if Peter Vlad was partially responsible for opening the doors he should be investigated. The assertion that Peter Vlad did not bear any responsibility because he was the supervisor is obviously wrong. The Claimant's ET1 complaint was that he was investigated and then subjected to a disciplinary when Peter Vlad was not. In the circumstances Peter Vlad is an actual comparator for the Claimant in terms of a difference of treatment in relation to the Claimant having been investigated and subject to a disciplinary process because of the failure to open the main doors fully. Peter Vlad was treated differently and in our view the Claimant's case in relation to the difference of treatment in being investigated and disciplined must succeed.

156 However, importantly, the list of issues identified the issue as assessing whether the Respondent had subjected to the Claimant to the following treatment - dismissing him - and whether that was less favourable treatment. As noted, in fact, the Claimant's ET1 complaint was that he was investigated and then subjected to a disciplinary when Peter Vlad was not. We have no doubt that the reason the Claimant complained was because the outcome of the disciplinary was his dismissal. While the case proceeded on the basis that the issue was whether that the Claimant had been subjected to less favourable treatment in that he was dismissed, during the hearing we heard evidence about the entirety of the process. The difference of treatment in investigating and then subjecting the Claimant to a disciplinary hearing led to his dismissal. The reference to the dismissal as the less favourable treatment may have been, to some extent, abbreviating his complaints in his ET1. The Respondent addressed the entire process in the evidence and in cross examination.

157 We note that the Respondent argues that the Claimant was only dismissed because he already had a final written warning on his personal file. We have no idea whether Peter Vlad was in a similar situation, and we assume that it is likely he was not. Therefore, insofar as there is an argument that by virtue of the issues identified, the less favourable treatment is the dismissal alone, Peter Vlad is not an appropriate comparator. We are not aware of any person who could be an actual comparator.

158 We consider that the effect of case law is that where there is no actual comparator, we should consider the position of a hypothetical comparator. In determining how that hypothetical comparator would have been treated, it is appropriate to consider how another person who was not in identical circumstances was in fact treated. We raised the question with the Respondent as to whether Peter Vlad could be seen as an indicative comparator, that is to say someone whose treatment helps identify how the hypothetical comparator would have been treated even though they are not an actual comparator. The Respondent simply referred to Mr Vlad's supervisory role. We understand that was a suggestion that his role was different. Nevertheless, we do consider that Peter Vlad's treatment is, to a degree, indicative of how the hypothetical comparator would have been treated.

159 We constructed the hypothetical comparator as another security officer, not being of the same race as the Claimant, who already had a supposedly final written warning on their file and who was involved in an incident in which the door opening protocol was not correctly observed leading to some doors remaining closed for a period. How would that person have been treated in these circumstances? We say "supposedly final written warning" because the

Claimant's final written warning did not contain the correct information, but it seems nobody had noticed that.

160 We reach our conclusion based on the decision made by Mr Dayle as to whether to dismiss the Claimant. It was not an automatic decision. Both security officers on duty were responsible for ensuring the doors were fully opened. In this case Mr Dayle explained his decision, which went beyond deciding that the Claimant's conduct merited a written warning, but further assessed whether dismissal was appropriate. We have cited from his dismissal letter in the factual section of this judgement. His ultimate rationale was that as the Claimant was already on a final written warning and his conduct had not improved, the addition of this written warning made him believe he had not learned "from previous meetings". It was the fact that Mr Cole erroneously considered that the Claimant had not learned that he relied upon in his letter explaining the decision to dismiss. We accept that as the Claimant was on a final warning, he was potentially at risk of dismissal, but we cannot say that the Respondent has discharged the burden of proof and shown that the dismissal was not on the grounds of race. It is far from clear that the hypothetical comparator would have been dismissed in any event or that the decision was not due to race. In reaching this we are also aware that in the case of Nagarajan, it was made clear that it is not necessary for the Respondent to have based its decision solely on the grounds of race provided they are a substantial reason for the actions in question.

161 Bearing in mind the subjective (and in fact erroneous) nature of the decision that the Claimant had not learned, and the efforts made to entirely disregard any responsibility on the part of Peter Vlad, we cannot conclude that the hypothetical comparator would necessarily have been dismissed.

162 We have looked at the less favourable treatment both as the Claimant originally pleaded it, and as the list of issues defined it. As the Respondent has not discharged the burden of proof which falls on it, section 136 demands that our conclusion must be that the Claimant's claim of direct discrimination in relation to his dismissal succeeds.

Employment Judge N Walker

22 September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

22/09/2021.

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FOR EMPLOYMENT TRIBUNALS