EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Skeete	**- V -**	Mitie Security (First) Ltd

Heard at: London Central **On**: 5-9 December 2022

Before: Employment Judge Baty
Ms S Campbell
Mr I McLaughlin

Representation:

For the Claimant: In person
For the Respondent: Mr B Uduje (counsel)

JUDGMENT

The claimant's complaints of "automatically" unfair dismissal pursuant to section 100(1)(c) Employment Rights Act 1996 ("ERA") (health and safety cases), direct race discrimination, direct age discrimination and for unlawful deduction from wages all fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 11 December 2020, the claimant brought complaints of "automatically" unfair dismissal pursuant to section 100(1)(c) Employment Rights Act 1996 ("ERA") (health and safety cases), direct race discrimination, direct age discrimination and for unlawful deduction from wages. The respondent defended the complaints.

2. The claimant had also brought a complaint of "ordinary" unfair dismissal but, as he did not have the two years' continuous employment necessary for the tribunal to have jurisdiction to hear this complaint, he withdrew this complaint, and it was dismissed on 3 December 2021. The claimant had also confirmed

previously that there was no protected disclosure ("whistleblowing") complaint in his claim, most recently at the postponed final hearing which had commenced on 4 May 2022.

The Issues

3. A list of issues had been agreed at a preliminary hearing on 3 December 2021 before Employment Judge Tinnion. That list of issues was at pages 68-70 of the bundle provided to this hearing. At the start of the hearing the judge asked the parties whether that remained the list of issues for the claim and they both confirmed that it was. That is, therefore, the list of issues which the tribunal was tasked to determine. A copy of that list of issues is annexed to these reasons.

4. This hearing was listed to consider liability and, if necessary, remedy and the parties confirmed that that was the case at the start of the hearing.

The Evidence

5. Witness evidence was heard from the following:

For the claimant:

The claimant himself; and

Mr Wilfred Christopher, a BECTU trade union representative who accompanied the claimant at his grievance appeal meeting on 4 August 2020; his disciplinary meeting on 12 August 2020; and his appeal against dismissal on 27 October 2020.

For the respondent:

Mr Matthew O'Hara-Lythgoe, who was at the relevant time a Contracts & Compliance Manager at the respondent and who heard the claimant's grievance;

Mr Mervin Thomas, an Area Security Manager at the respondent;

Mr Derek Morgan, who was at the relevant time a Regional Operations Manager at the respondent, who carried out an investigation in relation to the claimant which led to his dismissal; and

Mr Terry Havard, People Business Partner at the respondent.

6. Both Mr Dan O'Riordan, who held the disciplinary meeting into the claimant and took the decision to dismiss the claimant, and Mr Lee Hill, who heard (and dismissed) the claimant's appeal against dismissal, no longer work for the respondent. They did not attend the tribunal to give evidence.

7. An agreed bundle numbered pages 1-259 was produced to the tribunal. In addition, the claimant asked if he could submit a further document, which was a

copy of the respondent's policy dated 2 June 2020 regarding face masks. Mr Uduje did not object and the tribunal therefore permitted the admission of that document.

8. Mr Uduje also produced a cast list, a chronology and a skeleton argument.

9. The tribunal read in advance the witness statements and any documents in the bundle to which they referred as well as Mr Uduje's skeleton argument.

10. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing. This was largely adhered to.

11. The claimant produced written submissions, which the tribunal read in advance of hearing oral submissions (Mr Uduje relied on his skeleton argument as his written submissions). Both parties then made oral submissions.

12. The tribunal gave its decision on liability with reasons orally at the hearing. The claimant then asked for written reasons.

Findings of Fact

13. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

14. We first set out an overview of the facts, before going on to make our more detailed findings of fact.

15. The claimant was throughout his employment employed by the respondent as a Security Officer, providing services to the respondent's client, the BBC, at BBC Broadcasting House in London.

16. Whilst it is not an important point for the purposes of this claim, there is some dispute as to whether or not the claimant's employment commenced on 3 or 13 January 2020. However, as his contract of employment states that his employment commenced on 13 January 2020, we, therefore, find on the balance of probabilities that it did indeed commence on 13 January 2020.

17. The claimant had a three-month probationary period, which, in the light of our finding as to the date of commencement of his employment, completed on 13 April 2020.

18. From March 2020 onwards, there were a series of interchanges between the claimant and Mr Mervin Thomas, an Area Manager, regarding the issue of the wearing of face masks. We will return to these in more detail below.

19. On 30 June 2020, the claimant raised a formal grievance against Mr Thomas. That grievance was heard by Mr O'Hara-Lythgoe, who held a hearing with the claimant on 21 July 2020. Mr O'Hara-Lythgoe did not uphold the claimant's grievance and confirmed this in a letter of 27 July 2020 to the claimant.

20. The claimant appealed this decision. His grievance appeal was heard by Mr Dan Crook, an Area Manager. Mr Crook held a grievance appeal meeting with the claimant on 4 August 2020. He did not uphold the claimant's appeal and confirmed this to the claimant in a letter of 6 August 2020.

21. In the meantime, further to an incident on 15 July 2020, which we will return to in more detail later, the claimant was suspended from his duties pending a disciplinary hearing. He remained suspended from 15 July 2020 until the termination of his employment with effect from 14 August 2020.

22. The disciplinary hearing was heard on 12 August 2020 by Mr Dan O'Riordan, the London Regional Operations Manager, who was the manager in charge of the respondent's BBC contract. Mr O'Riordan took the decision to dismiss the claimant, which was communicated to the claimant by letter of 14 August 2020. The claimant's employment terminated on 14 August 2020.

23. The claimant was 26 years old at the time of his dismissal.

24. On 21 August 2020, the claimant appealed the decision to dismiss him. He supplied further grounds of appeal on 7 October 2020. The appeal was held by Mr Lee Hill, the respondent's Deputy Account Director, who conducted an appeal hearing with the claimant on 27 October 2020. Mr Hill did not uphold the appeal and confirmed this to the claimant by letter of 26 November 2020.

25. On 3 December 2020, the respondent's name was changed from Interserve Security (First) Limited to Mitie Security (First) Limited. Accordingly, any references in the reasons below to "Interserve" are references to the respondent.

26. We turn now to our more detailed findings of fact.

<u>Representative or safety committee</u>

27. Although the respondent has a strategic health and safety committee at group level, it did not at any time during the claimant's employment have a representative or safety committee at the BBC site. Mr Havard accepted this in cross-examination.

28. The claimant was not aware of any such committee or representative on site to which he could raise health and safety matters should he wish to do so.

The claimant's exchanges with Mr Thomas

29. As noted, the claimant commenced employment with the respondent and at the BBC site on 13 January 2020. His responsibilities included manning the front of house reception area for the BBC building.

30. Mr Thomas also worked from that site. As an Area Security Manager, he was two levels of seniority above the claimant, so the claimant did not report to him directly. At the start of the claimant's employment, Mr Thomas got on well with the claimant. He liked the claimant. He tried to help the claimant.

31. The claimant is black. Mr Thomas describes himself as Caribbean by background and ethnicity.

32. The Covid 19 pandemic started in early 2020. At that time, the respondent's policy, following the government guidance of the time, was that its employees should not wear face masks.

33. On or around 22 March 2020, Mr Thomas noticed that the claimant, who was working in the front of house reception area, was wearing a bandana to cover his face. He asked the claimant to remove it. He asked why he was wearing it. The claimant explained that he was wearing it to ensure that he was kept safe from the Covid 19 virus. Mr Thomas explained that (as was the case at that time) there were no government or company guidelines on wearing a face covering to avoid the virus. He also told the claimant that wearing a face covering in those circumstances would cause alarm to other users of and visitors to the BBC building.

34. None of the other 93 employees of the respondent at the site chose to wear a bandana or face mask at that time. As the claimant accepted in cross-examination, Mr Thomas was enforcing the respondent's policy as it was at that time.

35. On 12 April 2020, the claimant emailed Mr Thomas asking for a letter to say that, as he put it in his email, *"I wasn't allowed to protect myself"* and emphasising the importance of health and safety; in other words, he was seeking written information regarding the policy of not wearing a face covering inside the BBC building.

36. Mr Thomas replied by email of the same date. His email included the following:

"The use of mask is not deemed appropriate at the reception as firstly, the one you had on to protect yourself is deemed useless against the COVID 19 virus as it is not an adequate protective mask. Secondly, wearing of mask at the front of house can potential create fear for BBC staff members coming into the building via the reception. For the measure of not creating a panic culture, it was deemed that the mask should not be part of the PPE for now."

37. On 23 April 2020, the claimant sent Mr Thomas a further email stating that he did not feel that his query regarding PPE was being addressed and

asking if he would forward the matter to HR or senior management. Mr Thomas duly raised the matter with Mr Havard (in HR).

38. On 28 April 2020, Mr Havard replied to Mr Thomas as follows:

"As you are aware, we have received H&S advice on this issue previously. We were informed that we need to follow all of the government and Interserve guidelines including the use of PPE. All other staff are following the instructions Jermail is expected to respectfully comply also."

39. Mr Thomas forwarded Mr Havard's email to the claimant on 12 May 2020. In his covering email, he stated:

"Please see below advise received from HR in respect to you wearing a face mask whilst on duty.

As you are aware, we are continually reviewing the H&S updates received from the Government and Interserve. If there are any changes we will implement it and your line manager will make you aware it."

40. In fact, Mr Thomas had had to speak to the claimant on three different occasions regarding PPE issues and the deputy security managers (managers senior to the claimant but not as senior as Mr Thomas) also had to speak to him about PPE issues on at least three occasions. The claimant was the only employee to whom Mr Thomas had had to speak about such issues.

41. On 2 June 2020, again in accordance with government guidelines, the respondent changed its policy on mask wearing. Whilst the wearing of masks inside the BBC building was not compulsory, the respondent's employees were permitted to wear a mask should they choose to do so (provided that the mask was of a plain design and neutral colour). The policy was issued in writing on 2 June 2020. The claimant was aware of it.

42. In addition to the emails, the claimant had conversations with Mr Thomas regarding masks.

43. On 10 June 2020, the claimant emailed Mr Thomas again, copying in Mr Havard. He headed his email *"Discrimination"*. In it, he complained to Mr Thomas about a discussion that they had the previous day about the wearing of face marks and queried the rules surrounding the wearing of masks and Mr Thomas's manner of dealing with it. His email concluded:

"Since I started wearing a mask in March I feel my health and safety is discriminated against and was put at risk every time I had to come to work, I'd like you forward this to Human Resources as you keep tampering with my rights a human being trying to preserve and prolong my life."

44. Mr Thomas replied, answering the claimant's queries, and he copied his reply to Mr Havard and also to Mr O'Riordan.

45. On 11 June 2020, the claimant wrote a further email to Mr Thomas, copying in Mr Havard, Mr O'Riordan and several other individuals as well. In his email, he stated that he had been *"persecuted"* by Mr Thomas in relation to the mask wearing issue.

46. A Deputy Security Manager, Mr Fred Job-Bake, was asked to have an informal discussion with the claimant about these complaints. That discussion took place on 20 June 2020. Notes were taken of it, which were in the bundle. In that meeting, the claimant vented what he said were concerns about not being clear about the mask wearing policy and most specifically concerns about Mr Thomas (with more references to being *"persecuted or discriminated against"*).

47. Mr Job-Bake explained the mask wearing policy to the claimant. At the end of the meeting, Mr Job-Bake asked the claimant:

"With all discussed on this meeting, would you say you are satisfied with all the explanation to your concerns and guidelines on the usage of the mask with policy."

48. The claimant replied:

"It has helped in a way but I would like to take it further by a raising grievance against the Area Manager Mervin as I still feel I was targeted and persecuted as he never found time to explain the reasoning in depth as you did and always have. I feel Mervin manner of approach is wrong and I feel he tries to intimidate me. Mervin as an Area Manager could have tried explaining things when he requested for me to take off my mask which he failed to do."

49. In other words, the claimant was not stating that there was an ongoing health and safety concern about the policy on mask wearing (as he was, after all, permitted to wear a mask); rather, his alleged concern was with Mr Thomas' alleged handling of the matter.

50. We have seen other examples in the bundle of the claimant resisting or not complying with company policies. However, it is not necessary to go into details of this for the purposes of these reasons.

<u>The claimant's grievance</u>

51. The claimant raised a formal grievance in writing on 30 June 2020, by email to Mr Havard. The grievance commenced:

"I am writing a formal grievance today against the area manager Mervin Thomas as my human right of protecting myself has been violated and I have been made to be a scapegoat and constantly discriminated about protecting and preserving my life."

52. The grievance is lengthy and at points it references health and safety. However, it is for the most part a complaint about Mr Thomas's alleged behaviour. Indeed, the claimant admitted in cross-examination that (as was evident from what he said in the meeting with Mr Job-Bake), he no longer had any concern about health and safety as the respondent's policy had been changed on 2 June 2020 so that employees could wear masks if they wished to; and that, rather, his grievance was about the way he had allegedly been treated by Mr Thomas.

53. Mr O'Hara-Lythgoe was appointed to hear the grievance. He carried out a thorough investigation. This included meeting the claimant on 6 July 2020 (the claimant was accompanied by his trade union representative, Mr Tony Norton).

He also obtained a statement from Mr Thomas and a statement from Mr Job-Bake.

54. As is apparent from various documents which we will come to, it had become common knowledge at the BBC site that the claimant had raised a grievance against Mr Thomas and several individuals felt that the claimant was being unfair to Mr Thomas in this respect. Three of these individuals therefore wrote emails to management about this. They were Mr Frank Mensah and Mr Timothy James, each of whom emailed Mr Job-Bake on 10 July 2020; and Mr Clarence Nelson, who emailed Mr Havard on 11 July 2020.

55. Mr Mensah's email states:

"Myself Frank Mensah, have been aware for some time that the employee named above [the claimant] has had a few work related issues with melvin.

It seems like no matter the company policies and rules that are implemented, Jermail finds it difficult to adhere to them. And just from what I keep hearing he is on the notion that their Mr Melvins own rules. Which I know their not.

And during these past few months with the corona crisis, more rules regulations have had to be adhered to and I never seem to.be able to just walk pass for once, without Jermail having to bring Melvin into our discussion. Putting me in an uncomfortable situation.

I feel their issues that may need to be addressed to him in order to let him know what the company policy and regulations are."

56. Mr James' email states:

"I would like to raise my concerns about a certain member of staff that believes he is untouchable. Mr J.S actions falls under Defamation of character of members of the management team and slander of the company structure of management.

Mr J.S on many occasions have been speaking about members of the management team claiming he has been treated unfairly and has been putting his life at danger. Which I believe the request from management was a reasonable ones. I overheard Mr J.S speaking to a member of staff stating he going to take grievance against certain members of management due to he being told whilst on duty he can not wear him mask on and his shift pattern as far as I understand. Mr J.S was ask to take it off and an explanation was given about the reasons to why his mask was not allowed to be worn. Mr J.S was also advised that when the government give the go ahead for everyone to wear mask then we will be able to wear a mask on duty. He seem rather upset with the reply and decided to take the issue further by still being defiant and wearing the mask. I have also seen Mr J.S wearing sheel mask and gloves. I believed this was an act of plain defiance and to prove a point to other staff that he was untouchable.

It is also to my belief Mr J.S will not stop making issue until he gets a settlement or certain members of management get fired. As far as I am concerned; members of the management team are putting their best foot forward to make sure of the smooth running of the business and its clients. I believe it is unfair that Mr J.S is taking a reasonable management request personally. This are policies that are simple to follow and put in place by the company which are also the government's guidelines to help all working during this pandemic period."

57. Mr Nelson's email states:

"Approximately 12 weeks ago I was approached by a Security Guard called Jahmal, a 6ft IC3 male probably weighing in excess of 18 stones outside Old Broadcasting House. He was talking to me about not being allowed to wear face masks at the BBC.

He said to me in a bullying way that he hopes I will support him with his petition. He immediately got my back up due to his mannerism and aggressive tone. I told him straight away that I did not like his attitude and I felt that he was trying to strong arm me into a situation."

58. The claimant has submitted at this tribunal that the reference to a *"6 foot IC3 male probably weighing in excess of 18 stones"* is an example of racial profiling and that such a description amounts to a stereotype, that stereotype being of large black young men as being aggressive. However, it was agreed by all those who were asked that the references to "IC" and then a number were a form of code used in the security industry and indeed by the police, most commonly over the radio, as a quick means of describing an individual (IC3 being the code for a black individual with, for example, IC1 being the code for a white individual). Whilst he continued to insist that it was racial profiling throughout his evidence, the claimant himself liberally used these codings (IC1 and IC3) in his own submissions to the tribunal. So did Mr Christopher in his evidence. Furthermore, as Mr Thomas said in his evidence, this is common everyday vocabulary in the security industry. We accept that it self-evidently is common to security officers and that Mr Nelson, who is himself black, in describing the claimant as IC3, was not racially profiling him but was merely describing and identifying him in the normal way that security officers would.

59. Furthermore, the suggestion that Mr Nelson's description was a stereotype is no more than a bare assertion with no evidential basis on the part of the claimant. It was not stereotyping; rather, it was simply Mr Nelson describing and identifying the claimant.

60. Mr O'Hara-Lythgoe also interviewed Mr Job-Bake on 21 July 2020. During the course of that interview, Mr Job-Bake told Mr O'Hara-Lythgoe that he thought that the claimant had ulterior motives against Mr Thomas for raising the grievance, and referenced the statements from Mr Mensah, Mr James and Mr Nelson.

61. Mr O'Hara-Lythgoe also interviewed Mr Thomas on 21 July 2020. At the end of the interview, having been through all the other matters, Mr O'Hara-Lythgoe asked Mr Thomas if there was anything he would like to ask him. Mr Thomas replied:

"no. JS is a young guy, we've all been young too, so I have been trying to understand why he has acted in these ways. The young guys can have a lot of adrenaline running in their body but it is not an excuse and JS can't act like this in the workplace. We all need to work as a team to get by."

62. The claimant seized on this statement as what amounted to the only piece of evidence from which we might draw an inference that his treatment was because of his age. He was asked in cross-examination whether or not he considered that in fact Mr Thomas was genuinely looking for reasons to excuse his behaviour (in other words considering whether his age should be taken as a reason for treating him more favourably) or whether this was an example of

negative treatment; he replied that it was negative treatment. Mr Thomas, by contrast, confirmed that he was indeed looking to see if there was anything which might excuse what was unacceptable behaviour; in other words, he was looking to favour him rather than penalise him. On a fair reading of the passage, it is self-evidently the case that the claimant's interpretation of it is incorrect, and Mr Thomas's is correct. Quite clearly, Mr Thomas is not seeking harsher treatment of the claimant by reason of his age. He is looking for a way to explain what was unacceptable behaviour by the claimant and seeing whether it might, because of his youth, be appropriate to give him the benefit of the doubt (albeit he concludes that that cannot in fact be an excuse for the way he has acted).

63. Mr O'Hara-Lythgoe did not uphold the claimant's grievance. There was no evidence to support the allegation that Mr Thomas had been persecuting the claimant or that he had somehow discriminated against the claimant; Mr Thomas had applied the earlier mask "ban" to all staff members, not just the claimant. Mr O'Hara-Lythgoe also found that it was in fact Mr Thomas who had been the target and subject of malicious and vexatious allegations from the claimant. In reaching this conclusion, he took into account the three emails from Mr Mensah, Mr James and Mr Nelson. He therefore also concluded that he believed that the claimant's approach to raising complaints was an abuse of the respondent's grievance policy and was done as an attempt to undermine the site management team's ability to manage him under reasonable instructions. He therefore recommended the matter be referred to a disciplinary hearing. In light of the evidence before him, we find that that conclusion was a reasonable one.

64. Mr O'Hara-Lythgoe communicated the outcome of the grievance to the claimant in a letter of 27 July 2020.

<u>Grievance appeal</u>

65. The claimant appealed against the grievance outcome. The grievance appeal was conducted by Mr Dan Crook, Area Manager. Again, Mr Crook conducted a thorough enquiry. This included a grievance appeal meeting on 4 August 2020 between Mr Crook and the claimant, at which Mr Havard was present and Mr Christopher accompanied the claimant.

66. One of the grounds for appeal was that the claimant stated that the three emails from Mr Mensah, Mr James and Mr Nelson were *"bogus and hearsay"*. Mr Crook therefore enquired of them as to why they sent their emails of concern through at the time that they did; what prompted them to inform management of the claimant's behaviour; and whether they had a timescale of when the incidents they referred to occurred. All three replied and their replies were as follows:

"Mr Nelson - He repeatedly came to me on several occasions when I'm on post on the Piazza bothering me about my support for his face mask Issue initially. Then he came to me on several occasions talking to me about a grievance he has put through against the Area Manager Mervin Thomas. He kept going on about his rights towards wearing a face mask and stated he will be going to the union about this. Two weeks later, I saw him with a plastic home made visor which he also mentioned that it is his right to wear a form of PPE. I do not remember the dates as I didn't see it relevant to remember dates of the conversation. Due to his comments, it became public knowledge as everyone seems to know that he has put in a grievance against management which prompted me to raise my concern on this issue. The timescale of this

conversation was roughly late March and Mid April he was bothering me with his issue and requesting support.

Mr James - I sent an email to Area Manager Fred Job-Bake due to my concerns of the issue becoming public knowledge and everyone was talking about it and it was portrayed as very negative towards the Area Manager Mervin Thomas. It was apparent that he has something against the management team as from the time I was seconded to the CPO TOS duty in W1 Campus, Jermail kept complaining to different staff about he being sent to different site within London to cover duties. That was a strange complaint to me as I thought he is a guaranteed hours staff contracted to cover both W1 and W12 Area. The timescale of me hearing all this was between the middle March and towards the end of June.

Mr Mensah - We started the guaranteed hours duties together and he always tends to tell me a lot of things. It was a bit of concerns that other staff were talking about it as well which prompted me to send the email of concern. The statement that I heard other staff talking about the Area Manager was something I deemed very negative which I didn't feel it was ideal to speak about a senior manager in that light. Jermail started talking negatively about the Senior Management team from the second week we started our shift which approximately was around late February. I can say he is not a big fan of company policies. Any request that is made as a policy of the company, he tends to then start being negative and acting against the policies. For example, he keeps stating that he would like to wear a shirt sleeve shirts even though he knows that the policy on uniform is long sleeve shirts."

67. Mr Crook did not uphold the claimant's grievance appeal and he set out his decision and the reasons for it in a letter of 6 August 2020. In it, he goes through the various grounds of appeal. Included within the letter, he addressed the "racial profiling" issue in relation to Mr Nelson's original email which we have made findings about above. He concluded that it was not unreasonable for Mr Nelson to have submitted a statement in that manner and that security officers often used codes such as IC1, 2, 3, etc within their incident reports to the business and that that was widespread common practice. This was, in the light of our own findings on the issue, an entirely reasonable conclusion.

68. As to the statements of Mr Mensah, Mr James and Mr Nelson, he noted that they all stated similar concerns about the claimant's behaviour on site and were corroborative. He also noted that the claimant had admitted that he had no issues with any of these individuals. He therefore concluded that they were credible corroborative evidence in relation to the claimant's behaviour.

<u>Incident of 15 July 2020</u>

69. In the meantime, however, an incident had occurred on 15 July 2020.

70. The respondent's client, the BBC, had asked the respondent's Area Managers to ensure that the areas' security use was presentable and tidy. It was company policy that all personal items should be stored away.

71. Accordingly, Mr Thomas and another Area Manager, Mr Daniel Baquero, carried out these checks on 15 July 2020.

72. At around 9:30 AM, Mr Baquero found a Tesco carrier bag at the claimant's front of house desk. The claimant was not present at the desk at the time (although he was not far away). Mr Baquero asked another security guard who was present to whom the bag belonged. That security guard said that he

did not know. Mr Baquero therefore open the bag to see what was inside. There was a lunch inside the bag in a sealed container. At this point, the claimant approached Mr Baquero and confirmed that the bag was his. Mr Baquero asked the claimant to place the bag elsewhere, which he did.

73. Later that day, at approximately 2:50 PM, the claimant went into room LO47 on site to speak with Mr Baquero. Mr Thomas was also present at the time. The claimant asked Mr Baquero for compensation for his lunch on the basis that he had felt unable to eat his lunch because he believed that it had been contaminated by Mr Baquero when he examined the bag. The claimant asked for compensation on more than one occasion. The conversation lasted no more than five minutes.

74. That much is agreed between the parties. However, there is a dispute in evidence in that the claimant maintains that he remained calm during that conversation. The respondent, however, maintains that the claimant was overbearing and aggressive.

75. It is also the respondent's case that Ms Melanie Cray, an employee of the BBC whose desk was in room L047, was also present in the room at the time of this interchange. It is accepted by everyone that Ms Cray's desk is round a corner in the room and that it would be possible for her to have been at her desk and to have overheard the conversation without the claimant being able to see that she was there from the position at which he was standing. However, as we shall come to, the claimant at this tribunal has disputed that Ms Cray was actually in the room.

76. Later on that same afternoon of 15 July 2020, Ms Cray sent an email to Mr O'Riordan who, as we have noted, was the manager at the respondent in charge of the contract with the BBC. The email was as follows:

"Please can I make you aware of an incident on site today.

I did a quick governance check and following that asked the AMs to ensure the areas security use were presentable and tidy. As you know reception and the media cafe should be clear of personal belongings.

During the checks I believe Danny [Mr Baquero] found a carrier bag, he asked reception who it belonged to, they said they did not know, he opened it and subsequently it turned out to be Jamals food.

Later Jamal attended the security office and demanded that Danny pay for new food as he had touched his lunch. I could not see Jamal due to where I was sitting but could hear the conversation. I would describe Jamal's tone as overbearing.

Danny tried to explain the circumstances and that there was nothing on the bag to identify it as Jamal's but Jamal made comments in relation to he should have known it was his, it was not an unattended item and continued to demand payment.

Danny remained calm and polite throughout.

I found the way Jamal behaved towards Danny uncomfortable enough to ask Danny if he was ok afterwards and to flag it to you.

This is not the type of demeanour I expect from the officers on site.

Let me know if you want to discuss further."

77. The claimant accepted in cross-examination that the email from Ms Cray was a genuine email in the sense that it had indeed been sent by her that day.

78. Mr Baquero also submitted a statement by email on 15 July 2020. He gives a detailed account of what happened. His statement concludes:

"Throughout the conversation with him, Jermail was overbearing in the way he was speaking. He would not let me finish what I was saying, constantly interrupted me and was not interested in anything I had to say other than if I was going to give him money or not. Though I was standing around 2 / 2 and a half meters in front of him, he spoke with a raised voice throughout and the way he spoke felt as though he was trying to intimidate me. The conversation was witnessed by Mervin Thomas and Mel Cray. Peter Paul may have been present."

79. Mr Paul is in fact Mr Poole. In fact, although Mr Poole had been present at the point when the claimant arrived, he had left before the conversation started.

80. Mr Thomas also submitted a statement later on 15 July 2020. It too is detailed and is in all material respects consistent with the other statements. It contains the following:

"At 14:50, Security Officer Jermail Skeete then came into the office and asked Area Manager Danny Baquero if he was going to pay for his meal at which point Area Manager Danny Baquero replied no stating that he only had a look inside the Tesco bag and barely touched the content in the bag and also advised the officer that he can use the sanitiser wipes to clean the content in the bag if he is worried about any form of contamination.

Jermail Skeete became aggressively loud arguing his point and then demanded for his meal to be paid. He was very rude and abrupt in his approach to this issue and also displayed this attitude in the presence of the client who was sat on her desk at the corner of the office. Jermail Skeete had no regards to the senior management team as his mannerism was clearly unprofessional.

I would presume Jermail Skeete was unaware of the presence of the Corporate Security Manager but this is no way to act regardless of who was present in the room."

81. In the light of this incident, the claimant was suspended on full pay with effect from 15 July 2020, pending a disciplinary investigation.

82. Mr Morgan carried out that investigation.

83. As well as the statements referred to above, further witness statements were obtained. Mr Poole's evidence included that at 4 PM on 15 July 2020, in other words after the incident, the claimant had told him that he intended to call the police regarding what he referred to as Mr Baquero's "tampering" with his bag that morning (although the claimant did not in the end do so).

84. Mr Morgan also held an investigation meeting with the claimant on 23 July 2020. At that meeting, the claimant disputed that he was rude or overbearing on 15 July 2020.

85. Mr Morgan put together an investigation summary and recommended that the claimant be put forward for a disciplinary hearing.

Disciplinary hearing

86. By letter of 29 July 2020, the claimant was invited to a disciplinary hearing. The charges were not only those of *"aggressive and overbearing behaviour towards managers and security colleagues"* and *"bringing the company into serious disrepute"*, both of which related to the incident of 15 July 2020, the latter because the claimant's behaviour allegedly took place before the respondent's client; in addition, there was a charge of *"misusing the grievance policy by knowingly making false and malicious allegations in an effort to undermine site management team's ability to manage [the claimant] under reasonable instructions"* (which was recommended by Mr O'Hara-Lythgoe in his grievance outcome letter of 27 July 2020).

87. The disciplinary hearing took place on 12 August 2020. It was conducted by Mr O'Riordan. The claimant was present, as was Mr Christopher, and Mr Havard was also present.

88. The claimant continued to maintain that he was *"a quiet person"* and was *"very professional"* and that he was *"calm and polite"* at the incident in room LO47. He stated that he was *"only aware of there being 3 people in the room"* (in other words, himself, Mr Baquero and Mr Thomas). Neither he nor Mr Christopher suggested that the client, Ms Cray, was not in the room at the time; rather, the claimant maintained that it was unfair that she was there; he stated:

"For the client to still be in the room and hidden from sight I feel is entrapment. I don't feel she should have been in the room. Everyone else should have left the room."

89. The comments made by the claimant and Mr Christopher in the meeting notes clearly indicate that at that point they believed that Ms Cray was there but that the claimant did not realise she was there.

90. Although Mr O'Riordan was not present at this tribunal hearing, Mr Havard was. Mr Havard was present at the disciplinary hearing and advised Mr O'Riordan on the process. Whilst the decision was Mr O'Riordan's, he discussed it with Mr Havard. Mr Havard is therefore in a good position to be able to give evidence about the rationale for Mr O'Riordan's decision.

91. Mr O'Riordan took into consideration the investigations conducted by Mr O'Hara-Lythgoe and Mr Crook in relation to the claimant's grievance and appeal (which related to one of the charges at the disciplinary hearing), as well as the investigation conducted by Mr Morgan in relation to the incident of 15 July 2020. Mr O'Riordan preferred the consistent evidence in the three witness statements of Ms Cray, Mr Baquero and Mr Thomas over the claimant's evidence and found that he did act in an aggressive and overbearing manner during the incident on 15 July 2020. He also accepted Mr O'Hara-Lythgoe's findings in relation to the charge of raising malicious complaints and concluded:

"Multiple witness reports have been received against you, each confirming your unreasonable behaviour towards the managers, specifically MT, during a difficult period. It is also evident that you were the only person to have not been following company rules and policy as they were being implemented. It is clear that you have an issue with management authority and I believe you have knowingly and intentionally been difficult and obstructive. I share Matt O'Hara's concerns and belief that you have raised complaints maliciously and not in good faith."

92. In the light of the evidence, his conclusions on these allegations were entirely reasonable.

93. Mr O'Riordan decided to dismiss the claimant and did so, with effect from 14 August 2020, communicating his decision and the reasons for it to the claimant in a letter of that date. Again, in the light of the evidence before him at the time and the seriousness of the allegations, this was a reasonable decision.

94. Although the claimant did not put this to Mr Havard, the tribunal panel did question Mr Havard about whether or not race or age played any part in the discussions that they had or the decision which Mr O'Riordan reached. Mr Havard stated that such issues were not even discussed. We have no reason to doubt his evidence and therefore accept it.

Appeal against dismissal

95. The claimant appealed against his dismissal by an email to Mr Havard on 21 August 2020.

96. The claimant then got in touch with another employee, Ms Donna Carr, by text. Ms Carr is a white female. Ms Carr was another employee whose bag had been searched by Mr Baquero on 15 July 2020. The claimant sought information from her about this. Ms Carr replied by text of 23 August 2020. In her reply, she confirmed that Mr Baquero did check her bag and that she went to see him about it afterwards. Her text goes on:

"About 2:30 PM I went downstairs to speak with DB and I asked him to tell me the truth as I believe he is a decent guy and I just want the truth, I asked him if he physically put his hand in my bag he replied yes, and he done the full "bomb safety check" I said thank you for being honest with me. And I let the situation go. His reason for putting his hand in my bag was to check whose bag it was to make sure nothing was there that wasn't meant to be, i.e. bomb."

97. As the claimant accepted in cross-examination, if it was the case that the claimant had acted aggressively and overbearingly to Mr Baquero (which he of course denies), those circumstances would have been materially different to the circumstances involving Ms Carr, who just *"let the situation go"*.

98. Subsequently, on 7 October 2020, the claimant sent a modified appeal to Mr Havard. In it, and without naming Ms Carr, he made an allegation of disparate treatment between himself and Ms Carr.

99. Mr Hill had been appointed to conduct the appeal.

100. On 15 October 2020, Mr Christopher contacted Mr Morgan. Amongst other things he made allegations to Mr Morgan that the client, Ms Cray, had been

lying in relation to being in room LO47 and witnessing the incident and stated that he had a witness to confirm this.

101. An appeal hearing took place on 27 October 2020. Mr Hill was present, as was the claimant, accompanied by Mr Christopher. Mr Havard was not present at this meeting. At the meeting, the claimant alleged that Ms Cray was not in the room on 15 July 2020; which, if correct, would have meant that the email which she had sent that day giving her version of events was completely fraudulent. He and Mr Christopher also alleged that another employee, Alesha Massiah, was in the room at the time. He also sought to cast further doubt on the statements of Mr Mensah, Mr James and Mr Nelson. Issues of CCTV and access security cards were also raised.

102. Mr Hill conducted further investigations.

103. The claimant was provided with the CCTV but the CCTV in question covered only the corridor outside room LO47 and did not have audio or video of the room. It could only be used to determine who went in and went out of the room and, as Mr Christopher admitted in evidence, there was another exit/entrance to the room, albeit he did not think the other exit/entrance was used as frequently. The CCTV would not, therefore have been determinative of who went in or out of room LO47.

104. Mr Hill also sought the access reader information requested. This was information in the possession of the BBC and not the respondent. He wrote to the BBC about this, but they refused access.

105. As regards Ms Massiah, the claimant had produced a text message trail between himself and Ms Massiah. That message stated that Ms Massiah did not hear raised voices after she left the room. It therefore confirmed that she was not present to witness the actual incident involving the claimant and Mr Baquero so she could not provide an account of that.

106. However, Mr Hill also interviewed Ms Massiah on 10 November 2020. Even though she had left the room prior to the incident itself, Mr Hill asked her about whether Ms Cray was in the room at the time. Ms Massiah said that she did not recall seeing her in the room. Mr Hill asked her if she was adamant that this was the case and she said *"yes"*. Later that day, she emailed Mr Hill once she had received the notes of the meeting and stated: *"I would like to make a correction, and state that I can categorically confirm that [Ms Cray] was not in the room at the time of Mr Skeete's entry"*.

107. In considering this, Mr Hill took into account that there were statements from two senior managers (Mr Baquero and Mr Thomas) and one statement from the client at the BBC who all provided witness testimony to the incident and that there was no motive for those individuals to have submitted a false testimony; that, in addition he and the claimant had viewed photos of the room which clearly showed that Ms Cray's desk is mostly hidden behind a wall; that whilst Ms Massiah did not see Ms Cray, it was completely plausible that she was there but was obscured from view; and that, finally, Ms Massiah produced her statement

sometime after the incident occurred and it is easy for recollections to become unclear; he therefore concluded that the evidence that Ms Cray was present in the room was more convincing and reliable than the statement received from Ms Massiah some months after the incident occurred. For the reasons he gave, that was a reasonable belief to come to.

108. Having now been through all of the evidence relating to the incident of 15 July 2020, we agree for the reasons set out above that the evidence of Ms Cray, Mr Baquero and Mr Thomas should be preferred and that, on the balance of probabilities, the claimant was overbearing and aggressive towards Mr Baquero on 15 July 2020 and that, given the presence of Ms Cray, this brought the respondent into serious disrepute in relation to its client, the BBC.

109. We would add that none of Ms Cray, Mr Thomas or Mr Baquero knew that the claimant would come to room LO47 until he actually arrived. However, within a couple of hours of the incident, they had all sent detailed emails, containing lots of context and which corroborate each other, regarding what happened. It is inherently unlikely that, within the very short timeframe from the point when the claimant left room LO47 until they submitted their statements later that afternoon, they would be able to collude, agree a plan and implement such plausible statements, the details of which are extensive in terms of context but which corroborate and are consistent with each other.

110. As to the claimant's further criticisms of the evidence of Mr Mensah, Mr James and Mr Nelson, Mr Hill interviewed all three of them again, on 10, 10 and 13 November 2020 respectively. They all stood by their original statements. Furthermore, in each case, Mr Hill asked if they had anything else they would like to add.

111. In response, Mr James said:

"No. not really. The situation got to a point where Jermail was portraying the management team as treating him badly, which wasn't the case. I tried to understand where he was coming from as I have also worked 42hrs per week across both W1 and W12 sites. I started here on a zero hour contract, I went all over the place including to Cardiff. Jermail was doing things purposely to antagonise the situation. For example, during COVID, before the masks came out, the business stated that no one was to wear a mask, but Jermail would then come into work with a mask on and keep it on, just to show he could overstep the boundaries to see how far he could go. Also, when he was talking, he would always put a light on management telling people that they don't know what they are doing. Jermails main intention was to get a pay-out and leave for these reasons. Myself, Mervin and Fred are friendly in the way we talk to each other, that has made me the black sheep of everyone. Jermail actually told people once or twice that he was seeking a pay-out."

112. Mr Mensah said:

"If I was to add anything, it would be that every day I came into work, Jermail was complaining about something. There was not one day when he didn't complaint. Every time he complained it always seemed to be about Fred or Mervin. In the 6 months I knew him, he never had any other conversation. We started employment together, we had a conversation later together when I told him that he was draining me. He was taking my duracell energy, everything he had to say was a complaint. I asked him what the problem was, he said that he didn't like wearing a mask. I said to him that it is not his home, if he didn't like it he could get out. I told him that. We can't just

make our own policies, we follow the policies and get paid. If he doesn't like that then he needed to work elsewhere. It came to a point that he wouldn't talk to me anymore. I just felt drained by him."

113. Mr Nelson said:

"I didn't know J Skeete very well but he seemed a troubled individual. He was constantly digging out the managers, he was not a happy soul. He told me that he had been fired from his last job, I believe it was somewhere along Baker Street. I got the impression that he was troubled and confused, in the end I had to distance myself from him because it felt he was trying to latch onto others to tell his sob story, he was a strange person. One of the days, I came across him wearing a full mask on the piazza, I asked why he was wearing it, he said that it was his right. He had the attitude that he was going to wear it and carry on doing so. In the end, I felt that he was trying to bully me through the back door to agree with what he was doing."

114. Having done this, Mr Hill took into consideration that all three of these individuals, who were not under investigation themselves, had had their statements verified as part of the process. He concluded that he did not have any concerns regarding the information they supplied, especially as there was no evidence to suggest that they provided their statements in bad faith. Based on the evidence above, this was not an unreasonable conclusion.

115. Mr Hill set out his conclusions in a detailed outcome letter dated 26 November 2010. He did not uphold the claimant's appeal against dismissal.

Wages during period of suspension

116. The period to which the unlawful deduction from wages complaint relates is the claimant's period of suspension, from 15 July to 14 August 2020.

117. All the documents in the bundle relating to the claimant's suspension reference that he will be paid his full pay during any period of suspension. Furthermore, the claimant admitted in cross-examination that he was paid his full pay for the period of his suspension, albeit he stated that he considered that he had been paid late in relation to some elements of this. However, he was clear that he had in fact been paid.

118. We therefore find that the claimant was paid his full pay for the period of his suspension.

Alleged conspiracy theory

119. At this tribunal, the allegations made by the claimant and Mr Christopher expanded further into an even more extensive conspiracy theory. To an extent, this followed from their assertions made for the first time at the appeal stage that Ms Cray's email of 15 July 2020 was fabricated and that she, therefore, at least, was giving an entirely made up account of what happened on 15 July 2020. However, at this hearing, the claimant maintained that not only Ms Cray, but also Mr Thomas and Mr Baquero had colluded to make up the allegations against the claimant. Mr Christopher went even further. He maintained that the conspiracy extended beyond those three individuals to include Mr Job-Bake, Mr Mensah, Mr

James, Mr Nelson, Mr Havard and Mr O'Riordan himself (although for some reason he specifically excluded Mr Hill from this lengthy list).

120. Although the claimant did not put this conspiracy theory to the respondent's witnesses, the tribunal felt that it ought to in the light of the assertions made by the claimant and Mr Christopher in their evidence; and the respondent's witnesses denied it. There is no evidence for it beyond the assertions of the claimant and Mr Christopher and, in the light of all the evidence to the contrary set out above, we reject this conspiracy theory entirely.

The Law

Section 100(1)(c) ERA (health and safety cases)

121. Section 100(1) of the ERA provides as follows:

100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, …

122. For the purposes of his complaint, the claimant relies on section 100(1)(c).

123. The respondent's case was that the claimant was employed at a place where there was a representative or safety committee and that it was reasonably practicable for the claimant to raise matters by those means, such that the tribunal did not have jurisdiction to hear the claimant's complaint under subsection 100(1)(c); however, in the light of the evidence, Mr Uduje withdrew this assertion in his submissions.

Direct race and age discrimination

124. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination.

125. Both race and age are protected characteristics in relation to direct discrimination.

126. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

127. The burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did discriminate against the claimant because of race or age. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and the employer must prove that the treatment was "in no sense whatsoever" because of race or age. If the employer is unable to do so, we must hold that the provision was contravened and that discrimination did occur.

128. In London Borough of Islington v Ladele [2009] IRLR 154, paragraph 40, the EAT stated that *"The explanation of the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee"*.

129. Where, however, the tribunal is able to make clear findings of fact one way or another, it is not necessary to use or rely on the burden of proof provisions set out above.

Unlawful deduction from wages

130. The law relating to unlawful deduction from wages is set out in Part II ERA. Wages includes salary. It is unlawful for an employer to make any deduction from wages which are "properly payable" to an employee (subject to certain exemptions which it is not necessary for us to go into here).

131. If all wages which are "properly payable" have been paid, there is no valid complaint of unlawful deduction from wages.

Conclusions on the issues

132. We make the following conclusions, applying the law to the facts found in relation to the agreed issues. Except where stated to the contrary, we follow the order in the agreed list of issues.

Section 100(1)(c) ERA (health and safety cases)

133. Is accepted that the respondent dismissed the claimant, by letter of 14 August 2020.

134. In his submissions, Mr Uduje conceded that, during the period it employed the claimant, the respondent did not have a representative and/or a safety committee at the place where the claimant worked (in other words at the BBC site) and that the respondent no longer relied on that. The respondent did have a health and safety committee at group level, but this was not at the place where the claimant worked. As there was no such representative or safety committee, it follows that the claimant could not have raised circumstances connected with his work which he believed were harmful or potentially harmful to health and safety to that representative or safety committee. Issues 2 and 3 do not, therefore, preclude the claimant from bringing this complaint.

135. We turn therefore to issue 4. The claimant relies on his grievance email of 30 June 2020 sent to Mr Havard as the act of bringing to the respondent's attention circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. Issue 4 is whether that email brought to the respondent's attention circumstances connected with the claimant's work. Mr Uduje accepts that it did. The grievance email clearly set out various issues connected to the claimant's work, in particular his complaints about Mr Thomas. Mr Uduje notes, however, that similar circumstances had been brought to the respondent's attention on numerous previous occasions, starting in April 2020 and again earlier in June 2020 and that the email was a rehearsal of issues previously raised. We accept that it was.

136. As to issue 5, however, we accept Mr Uduje's submission that the claimant did not genuinely believe that the circumstances he referred to in that email were harmful or potentially harmful to health or safety. This is for several reasons. First, the issues raised were about mask wearing and the claimant had long since complained about not being able to wear a mask, which he stated was a health and safety issue. However, the respondent's policy had, with effect from 2 June 2020, changed in accordance with government guidance so that employees, including the claimant, were allowed to wear a mask at work if they wished to. The claimant was aware of this policy from the time it was introduced; indeed, he had several discussions about the policy, including his meeting with Mr Job-Bake on 20 June 2020 at which Mr Job-Bake explained the policy to him. At that meeting, the claimant stated that Mr Job-Bake had explained to him in

depth the policy relating to masks. Finally, the claimant accepted in cross-examination that, at the point when he submitted his grievance on 30 June 2020, he did not have an ongoing concern about health and safety because the mask policy had changed and he was able to wear a mask, but that his grievance was about the way he had allegedly been treated by Mr Thomas.

137. He did not, therefore, believe at all that the circumstances he referred to in his 30 June 2020 grievance email were harmful or potentially harmful to health or safety. As he had no belief at all, let alone a genuine belief, he has not satisfied the requirements of section 100(1)(c) and his complaint under that section therefore fails at this stage.

138. In the light of that finding, issues 6 and 7 fall away. However, for completeness' sake, it follows that, if the claimant did not have any belief that the circumstances he referred to in his grievance were harmful or potentially harmful to health or safety, he did not have a reasonable belief. However, if we are wrong and he did genuinely believe that, such a belief would not have been reasonable in the light of the evidence summarised above; in particular the 2 June 2020 policy change which permitted the wearing of masks, of which he was already well aware.

139. As to the point at issue 7 about whether the means by which the claimant brought his concerns to the respondent's attention were reasonable, we consider that an email to the respondent's HR representative is in principle a reasonable way of raising such concerns. That is, however, subject to our findings that the respondent was entirely reasonable in its conclusion that the claimant's raising of this grievance was an abuse of the grievance process and that the complaints were raised maliciously and not in good faith. There are of course no reasonable means of acting in that manner.

140. We do, however, need to cover two further points in relation to these issues.

141. In his submissions, the claimant sought to resile from his admission in cross-examination that at the time of his grievance, the health and safety issue (mask wearing) was historical and that his grievance was about Mr Thomas's handling of him. However, in this respect, and as we said to the claimant on several occasions in explaining what "submissions" are and are for, we make our findings based on the evidence before us and not what someone later asserts in their submissions, where that submission is not based on the evidence.

142. Furthermore, the claimant in his submissions also sought to expand the health and safety issue and suggest that his grievance was not just about the historical mask wearing issue but that it was about easing his anxiety levels and mental health and was about him not being referred to mental health first aiders.

143. However, whilst there was reference to mental health first aiders at points during the evidence, the assertion which he made in his submissions is not what the claimant's grievance said; it is not what was in his claim or his witness statement; it was not asserted in his evidence; and it was not put to any

of the respondent's witnesses. The first time that this assertion was made was in his submissions. We cannot, therefore, legitimately take this assertion into account as it was not part of the evidence and we do not do so. However, even if we did feel permitted to do so, we would reject it; that is because, for the reasons in this paragraph, it has not been established (or even asserted) on the evidence.

Reason for dismissal

144. Finally, although this complaint has already failed, we nonetheless address the issue at issue 9 as to whether the respondent's real reason for dismissing the claimant was the fact that he had raised the concerns which he raised in his 30 June 2020 grievance email.

145. We remind ourselves that, for the section 100(1)(c) complaint to succeed, it is not enough for this reason to have been only a part of the reason for dismissal; it must have been the sole or the principal reason for dismissal.

146. The evidence, however, is quite clear that it was not part of the reason for dismissal, let alone the principal part. We do not repeat all of the evidence set out in our findings of fact above. However, as we have found, it was entirely reasonable for Mr O'Riordan on the evidence to find that the claimant had behaved overbearingly and aggressively in the incident of 15 July 2020; that in doing so he had also brought the respondent into serious disrepute in relation to its client; and that the 30 June 2020 email was an abuse of the grievance process and that the grievance was brought maliciously and not in good faith. These are serious matters and were good grounds for dismissing the claimant for gross misconduct. By contrast, there is nothing to suggest that Mr O'Riordan was in any way motivated by the fact that the claimant had raised an issue about mask wearing previously or referenced his previous mask wearing issues in the 30 June 2020 grievance email; it was not the fact that the email referenced these issues which was one of the three reasons for which Mr O'Riordan dismissed the claimant; rather it was the fact that he (quite reasonably) considered that the claimant's purpose in bringing that grievance was malicious.

147. The raising of health and safety issues was, therefore, no part whatsoever of the reason why Mr O'Riordan dismissed the claimant. The section 100(1)(c) complaint therefore fails for these reasons as well.

<u>Direct race discrimination</u>

148. We quickly deal with the first three issues in relation to the direct race discrimination complaint, which are not in dispute. First, the respondent did dismiss the claimant. Secondly, the claimant is of black race/ethnicity and Ms Carr is of white race/ethnicity. Thirdly, the respondent did not dismiss Ms Carr.

149. However, we remind ourselves that, for the purposes of the direct race discrimination complaint, there must be no material difference between the circumstances relating to the claimant and Ms Carr. As set out in our findings of fact, there were material differences between them. Whilst both were subjected to a bag search and both went to see Mr Baquero about it, the similarities end

there. Ms Carr asked for an explanation, received one which was to her satisfaction, and then let the situation go; the claimant, by contrast, demanded compensation for his lunch and, most pertinently, did not let the situation go but was overbearing and aggressive towards Mr Baquero, and to such an extent that the respondent's client felt the need to email the person responsible for the contract with the BBC, Mr O'Riordan, to express her concerns about it. Because of these material differences, Ms Carr is not a valid comparator and the complaint of direct race discrimination based on such a comparison therefore fails.

150. For completeness, therefore, to address issues 4 and 5, even though the respondent treated the claimant less favourably than Ms Carr (in that it dismissed him and did not dismiss her), that was because of the differences in their circumstances and not because of the claimant's race.

151. Although it is not in the list of issues expressly, we do consider that it is appropriate to consider the claimant's allegation about racial profiling and the reference in Mr Nelson's original email of 11 July 2020 where he describes the claimant as IC3. We refer again to our findings of fact in this respect and do not repeat them all here. However, in summary, this was an ordinary description of the claimant using commonplace terminology that was commonly used on a day-to-day basis in the security industry. There is nothing in that use of that expression by Mr Nelson, a security officer, which could lead us to draw an inference that Mr Nelson was treating the claimant less favourably because of his race. Furthermore, although Mr O'Riordan had the statement at the time he took his decision to dismiss the claimant, they were not his words and, in any event, were entirely innocuous for the reasons given in our findings of fact. They cannot therefore cause the burden of proof to shift in terms of Mr O'Riordan's thought processes in relation to the claimant's race discrimination complaint relating to his dismissal.

152. Finally, we reiterate our finding of fact that we have rejected the claimant's bare assertion that there was stereotyping of him as a large aggressive black man.

153. There was, therefore, nothing to shift the burden of proof in relation to the claimant's complaint that his dismissal was because of his race and it fails. Even if it had shifted, the respondent has provided a complete explanation as to why it terminated the claimant's employment which is in no sense whatsoever because of race.

154. In fact, in the circumstances of this case, it is not even necessary to apply the burden of proof; we can make clear findings that the decision to dismiss the claimant was for the reasons given by the respondent and was in no sense whatsoever because of the claimant's race.

155. The claimant's complaint of direct race discrimination therefore fails.

Direct age discrimination

156. As to issue 1, the respondent did dismiss the claimant and the claimant was 26 years old at the time of his dismissal.

157. The only matter which the claimant relies on to shift the burden of proof in relation to his age discrimination complaint is the passage in Mr Thomas' meeting with Mr O'Hara-Lythgoe. However, as we have already found in our findings of fact and as is self-evident from a reading of that passage, Mr Thomas was not seeking harsher treatment of the claimant by reason of his age. He was looking for a way to explain what was unacceptable behaviour by the claimant and seeing whether it might, because of his youth, be appropriate to give him the benefit of the doubt (albeit he concluded that that cannot in fact be an excuse for the way he has acted). In short, he was being fair and nice to the claimant. There is nothing in that passage which could cause the burden of proof to shift for the purposes of the claimant's age discrimination complaint.

158. Furthermore, there is nothing else in the evidence which could do so. Even if the burden of proof shifted, the respondent has provided a reasonable explanation for its decision to dismiss the claimant which is in no sense whatsoever because of age.

159. In fact, in the circumstances of this case, it is not even necessary to apply the burden of proof; we can make clear findings that the decision to dismiss the claimant was for the reasons given by the respondent and was in no sense whatsoever because of the claimant's age.

160. Again, to follow the order of the list of issues: the respondent's reasons for dismissing the claimant were as we have found above (issue 2); the respondent would have dismissed a hypothetical employee for those reasons if that employee shared the same personal characteristics as the claimant but had been aged 40 or over (issue 3); the respondent did not treat the claimant less favourably than it would have treated that hypothetical older employee (issue 4); and the respondent's treatment of the claimant was in no sense whatsoever because the claimant's age (issue 5).

161. The age discrimination complaint therefore fails.

Unlawful deduction from wages

162. The period to which the unlawful deduction from wages complaint relates is the claimant's period of suspension, from 15 July to 14 August 2020.

163. As he admitted in cross-examination, the claimant was paid his full pay for the period of his suspension, albeit he stated that he considered that he had been paid late in relation to some elements of this. However, whether the wages were paid late is not what we have to decide; the question is whether or not they were paid.

164. As he was paid his full pay for that period, there were no wages "properly payable" for that period which were not paid. All wages "properly payable" in relation to that period have been paid.

165. The claimant's complaint of unlawful deduction from wages therefore fails.

166. The other issues in the agreed list of issues relating to the unlawful deduction from wages complaint therefore fall away.

Conclusion

167. In summary, therefore, all the claimant's complaints fail.

168. We would like to add one final thing. That is that this case is a reminder of how deeply affecting unfounded allegations of discrimination can be. The allegations made by the claimant, in particular of race discrimination, were particularly distressful to Mr Thomas. However, if it is of any comfort to Mr Thomas, not only do we categorically find that he did not in any way treat the claimant unfavourably because of his race or age and was certainly not part of any conspiracy to remove the claimant, but we saw no evidence of anything other than Mr Thomas trying to be helpful to the claimant.

Employment Judge Baty

Dated: 9th December 2022

Judgment and Reasons sent to the parties on:

09/12/2022

For the Tribunal Office

Agreed List of Issues

Claim #1: 'Automatic' unfair dismissal (s.100(1)(c) of Employment Rights Act 1996)

1. First, did the Respondent dismiss the Claimant (the Respondent accepts it did by letter dated 14 August 2020)?

2. Second, during the period it employed him, did the Respondent have a representative committee and/or a health and safety committee at which any circumstances connected with the Claimant's work which he believed were harmful or potentially harmful to health and safety could be raised? If the answer is no, go to the fourth question.

3. Third, on 30 June 2020 was it or was it not reasonably practicable for the Claimant to raise circumstances connected with his work which he believed were harmful or potentially harmful to health and safety via one of those committees?

4. Fourth, did the Claimant's grievance email he sent Terry Havard on 30 June 2020 at 13:36 bring to the Respondent's attention circumstances connected with the Claimant's work?

5. Fifth, if it did, did the Claimant genuinely believe the circumstances he referred to in that email were harmful or potentially harmful to health or safety?

6. Sixth, if the Claimant genuinely held that belief, was that belief reasonable?

7. Seventh, if that belief was reasonable, was the means by which the Claimant brought those concerns to the Respondent's attention – by email to Terry Havard on 30 June 2020 – reasonable?

8. Ninth, if it was, was the Respondent's real reason (or real principal reason if more than one) for dismissing the Claimant the fact he had raised those concerns in his 30 June 2020 email to Terry Havard?

Claim #2: Direct race discrimination (ss.13(1) and 39(2)(c) of Equality Act 2010)

9. First, did the Respondent dismiss the Claimant (the Respondent accepts it did by letter dated 14 August 2020)?

10. Second, is the Claimant of black race/ethnicity and Donna Carr of white British race/ethnicity?

11. Third, did the Respondent dismiss Donna Carr?

12. Fourth, if the Respondent dismissed the Claimant but not Donna Carr, did the Respondent thereby treat the Claimant less favourably than it treated Donna Carr?

13. Fifth, if it did, was that because of the Claimant's black race/ethnicity?

Claim #3: Direct age discrimination (ss.13(1) and 39(2)(c) of Equality Act 2010)

14. First, did the Respondent dismiss the Claimant (the Respondent accepts it did by letter dated 14 August 2020), and was the Claimant 26 years old at the time of his dismissal?

15. Second, what was the Respondent's reason(s) for dismissing the Claimant?

16. Third, would the Respondent have dismissed a hypothetical employee for those reason(s) if that employee shared the same personal characteristics as the Claimant but had been aged 40 or over?

17. Fourth, if it would not have done, did the Respondent thereby treat the Claimant less favourably than it would have treated that hypothetical older employee?

18. Fifth, if it did, was that because of the Claimant's age?

Claim #4: Unlawful deduction from wages (s.13(1) of Employment Rights Act 1996)

19. First, what period of time was the Claimant suspended for?

20. Second, what was the Claimant's contractual wage/pay entitlement during that period of time?

21. Third, did the Respondent pay the Claimant his full contractual wage/pay entitlement for that period of time?

22. Fourth, if it did not, was any shortfall deduction in payment of the Claimant's full contractual wage/pay entitlement required or authorised to be made by virtue of any statutory provision or relevant provision of the Claimant's contract of employment?

23. Fifth, if not, had the Claimant previously signified in writing his agreement or consent to the making of that shortfall deduction?