**Case Number: 2204802/2021**

# THE EMPLOYMENT TRIBUNAL

**SITTING AT:** **LONDON CENTRAL**
**BEFORE:** **EMPLOYMENT JUDGE ELLIOTT**
**MEMBERS:** **MR M SIMON**
**MR A ADOLPHUS**

**BETWEEN:**

**Mr M Fraser**

**Claimant**

**AND**

**Equinox Kensington Ltd**

**Respondent**

**ON:** **4, 5, 6 and 7 October 2022**
**Appearances:**
**For the Claimant:** **In person**
**For the Respondent:** **Mr R Hogarth, counsel**

## JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

## REASONS

1. This decision was given orally on 7 October 2022. The claimant requested written reasons.

2. By a claim form presented on 1 September 2021 the claimant Mr Marlon Fraser brings claims of unfair dismissal and direct race discrimination. The claimant was known at work as Ashley.

**This remote hearing**

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended on day 2.

5. The parties and member of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

6. No request was made by any member of the public to inspect any witness statements or for any other written materials before the tribunal.

7. The participants were told that is was an offence to record the proceedings.

8. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses were being coached or assisted by any unseen third party while giving their evidence.

**The issues**

9. There were three preliminary hearings in this case with a view to seeking to clarify the issues and assisting the claimant to clarify his claims.

10. At the first preliminary hearing before Employment Judge Adkin on 6 January 2022 the claimant appeared to wish to bring claims that were not set out in his claim form. Judge Adkin told the claimant that if he wished to bring such claims he needed to make an application to amend (bundle page 38).

11. The second preliminary hearing, again before Employment Judge Adkin, took place on 21 February 2022. There was a discussion about whether the claim included a claim for victimisation and the Judge considered an application to amend to include the wording that the claimant had set out in the Agenda for that Case Management hearing.

12. At the second hearing the Judge decided that the claimant had not provided sufficient factual details for the respondent to answer the additional claims he wished to put.

13. Employment Judge Adkin heard the third preliminary hearing on 8 June 2022. He refused permission for the claimant to amend to include a claim of victimisation. He said that the claimant had been given three opportunities to set out the detriment he relied upon but had failed to do so, despite the guidance given by the Judge. The issues were confirmed as those set out in the List of Issues attached to the third Case Management Order (bundle page 60).

14. The claims are for direct race discrimination and unfair dismissal. There was an agreed list of issues in the bundle at page 60, appended to the

Case Management Order of 8 June 2022. The parties confirmed at the outset of the hearing that these were the issues for the tribunal's determination. The issues were as follows:

15. It was common ground that the claimant engaged in the following conduct:

    a. He made a covert recording of a conversation between himself and a member of the respondent's Kensington gym on or prior to 1 May 2021; and
    b. He shared this recording on 1 May 2021 on a WhatsApp group of respondent managers.

16. Although it appeared from the agreed list of issues that the claimant accepted that he had made the recording without consent, he backtracked from this in evidence. He said he did not know what the word "*covert*" meant. His evidence was that he told the member on a different occasion that he was going to record him and the member had replied "*do whatever you like"* which the claimant treated as consent to be recorded.

17. We were aware that the test for us in terms of unfair dismissal was the reasonable belief of the respondent and we were not required to make our own finding of fact on whether the member gave consent.

18. The parties agreed that it was not necessary to name the member of the gym who is referred to below as "the member".

Unfair dismissal

19. It was common ground that the claimant was dismissed on 27 May 2021.

20. What was the reason for dismissal? The respondent says that the reason was the claimant's conduct described in paragraphs (a) and (b) above.

21. Did the dismissing manager believe in the guilt of the claimant?

22. If so was this belief based on reasonable grounds?

23. Was there a reasonable investigation?

24. The claimant contends that the decision to dismiss him was prejudged and unfair. In particular:

    a. He believes that Mr Julien Delande's attitude toward him after the incident on 1 May 2021 when he tried to talk to him about it, suggested that a decision had been made.
    b. The claimant believes that there was a pre-existing management plan to replace him with someone who would run three gyms instead of just one.

25. If the reason was the conduct describe above: in all the circumstances,

did the respondent act reasonably in treating that conduct as a sufficient reason for dismissal? Did the sanction of dismissal fall within the range of reasonable responses?

Direct race discrimination

26. The claimant contends that he would not have been dismissed had he been white, since Mr Julien Delande would not have called him *"half-caste*". Did this comment set in motion a chain of events leading to his dismissal?

27. Can the claimant show facts from which the Tribunal could decide, in the absence of any other explanation: that the Respondent dismissed him because of his race and that this amounted to less favourable treatment than would have been received by a hypothetical white comparator otherwise in the same circumstances?

28. If so, can the respondent show that it did not contravene section 13 Equality Act i.e. that it did not dismiss the claimant because of his race and/or that it would have treated a hypothetical white employee in the same circumstances in the same way?

Remedy

29. Should the claimant be reinstated / re-engaged?

30. Is the claimant entitled to damages for injury to feelings? If so, in what value?

31. What, if any, pecuniary loss has the claimant suffered by reason of any unlawful treatment?

32. Should any compensatory award be reduced on *Polkey* grounds?

33. Should any award be reduced to reflect the claimant's contributory fault?

34. Should any compensatory award be extinguished or reduced on the basis that the claimant has failed to take reasonable steps to mitigate his loss?

**Witnesses and documents**

35. We had a liability bundle of 210 pages, a statements bundle, an interparties correspondence bundle of 35 pages, an opening note from counsel for the respondent and a remedy bundle of 107 pages. There was an agreed chronology within the bundle at page 205 and a cast list at page 206.

36. We had written submissions from both parties to which they spoke. All submissions and authorities referred to were fully considered, whether or

not expressly referred to below.

37. On the claimant's side we heard from the claimant.

38. The claimant wished to call a witness who was in Dubai. The relevant permissions had not been obtained. The claimant was asked by the tribunal if he wished to seek a postponement or to continue with the hearing. He informed the tribunal on 30 September 2022 that he wished to go ahead.

39. For the respondent the tribunal heard from 2 witnesses, (i) Mr Julien Delande, General Manager at Kensington and the investigating officer and (ii) Mr Martin Spies, General Manager at Bishopsgate and the dismissing officer. Mr Spies left the respondent's employment in July 2022.

The claimant's application to call an additional witness

40. On the afternoon before the start of the hearing the claimant emailed the tribunal with a request to call a witness to give evidence from Hungary. This was a very late request. From the information given to this tribunal by the Foreign Commonwealth and Development Office, we understood that Hungary gives permission provided the witness has not been coerced if they refuse to cooperate.

41. There was no statement from the witness in question. The claimant said that the witness had his own proceedings against the respondent and these proceedings were no longer ongoing. The claimant drew the conclusion that the proceedings had been settled, but we did not know this for certain. The claimant said he had not wished to ask the witness whilst he had his own proceedings, but wanted to ask him now.

42. The respondent's position was that they did not consent to the witness being called. The proceedings had been on foot for over a year, the claimant had notice of hearing for many months and there was prejudice to the respondent for the witness to be called when they had no prior notice of what the witness would say. The respondent said that the claimant had the opportunity to call the witness and the fact that he had his own proceedings was not a good reason why he could not prepare a statement for the claimant in good time.

43. Our unanimous decision was to refuse leave to call the witness. The date for exchange of witness statements in this case was 6 September 2022. There was no witness statement for the person the claimant wished to call. The respondent was at a disadvantage because they did not know what the witness would say and they had not had a chance to prepare. In addition there was the exceptionally late request to call this evidence from overseas. For these reasons we refused permission.

**Findings of fact**

44. The claimant worked for the respondent as a maintenance manager from 15 October 2012 to 27 May 2021 when he was dismissed for gross misconduct. He claims that his dismissal was unfair and that it was an act of direct race discrimination.

45. The claimant described his racial group as "*mixed race heritage*". (Case Management Order 6 January 2022 paragraph 23, bundle page 40).

46. The respondent is part of a global luxury fitness company with its headquarters in the United States. The respondent company operates a gym in High Street Kensington which is where the claimant worked. The respondent business was described as "*high-end"* where members would pay a 3-figure sum per month for membership.

47. The claimant's dismissal arose from a recording that he made of a gym member and that he shared the recording in a WhatsApp Group called EQX Managers. It is not in dispute that he made the recording or that he shared it with managers on WhatsApp.

The relevant policies

48. The respondent has a Telephone Use Policy which was in the bundle at page 66. It says under the heading *Recording meetings"*:

> *"Using electronic devices to record conversations […] is strictly prohibited unless consent is gained or given by all parties involved",*

49. Under the heading "*Breach of policy"* (page 68) it says:

> *"If you are found to have breached this Policy in any way the Company's Disciplinary Procedure may be invoked against you and you may be subject to disciplinary action up to and including dismissal"*

50. The respondent also has a Data Protection Policy (page 69) which says that personal details cannot be processed other than lawfully or with explicit consent.

51. The claimant agreed that he had knowledge of the policies. In his capacity as a manager, he had sent the Employee Handbook to his team asking them to take time to familiarise themselves with it (page 210) and he accepted that it was his responsibility to do this himself.

The incident on 1 May 2021

52. The claimant had some past difficulty with a male member of the club. For example, in the past this member had brought his own hairdryer into the club during more stringent Covid restrictions, when at the time this was against the club rules. The claimant and this member had also clashed over the use of towels.

53. On 1 May 2021 the claimant had a discussion with the member about razor blades and shaving in the showers. The claimant thought the member was abrupt with him and did not like the way the member spoke to him. We saw a transcript of the conversation at page 119-120. In essence, the claimant told the member that he should not leave razor blades lying around and that he should put them in a yellow sharps bin for disposal. The member thought that the cleaners should do this and the claimant explained that it was dangerous. They did not reach agreement on the matter.

54. Towards the end of the day on 1 May 2021 the claimant sent an email to Mr Julien Delande, the club's General Manager, (page 133) complaining about the member and attaching photographs of shaving gel in the shower area. Mr Delande was not at work that day.

55. The claimant admits that he made a voice recording of the conversation with the member in the changing room and he shared that in a WhatsApp Group called EQX Managers, which is a group for all UK managers at the respondent. The claimant only intended to send the recording to the managers at the Kensington club and mistakenly sent it to all UK managers.

56. Mr Delande was a recipient of the recording. He heard the conversation between the claimant and the member with shower noises in the background. On receiving the recording Mr Delande and other managers removed themselves from the WhatsApp group as they did not consider it appropriate.

57. Mr Delande spoke to Mr Jamie Bailey, the UK People Services Manager, and Ms Jen Zweibel, the UK Operations Director. Ms Zweibel had also received the recording through the WhatsApp group. Her comment on receiving it was "*Not cool"* (page 118). Mr Bailey and Ms Zweibel advised Mr Delande that there should be a disciplinary investigation into the matter.

<u>The disciplinary investigation</u>

58. On 5 May 2021 Mr Delande held an investigatory meeting with the claimant accompanied by Mr Bailey from HR. The claimant did not deny that he made the recording or that he shared it on the WhatsApp group. The claimant told Mr Delande that he made the recording on his phone which was in his pocket, so the member would not have seen it. During the meeting he said he would not record any members again (page 124). The claimant signed a note of the meeting confirming that it was a true account of the meeting (page 124).

59. On 6 May 2021 Mr Delande conducted an investigation with the Assistant General Manager Mr Dalton who had been on duty that day. Mr Dalton said that he remembered that the claimant complained to him that the member was not wearing his face mask. Mr Dalton went to speak to the

member, but he was getting changed so he decided not to interrupt. Mr Dalton did not have first-hand knowledge of the conversation which the claimant recorded.

60. Mr Delande considered that the claimant had secretly recorded the member in the changing room and this was a serious privacy concern. The claimant had not said anything in the investigatory meeting about having consent from the member to make the recording.

61. Mr Delande did not consider any further investigation to be necessary as the claimant had admitted making the recording which he described as "*the core issue*" (statement paragraph 5.16).

62. On 11 May 2021 Mr Delande emailed the claimant to say that he had spoken to the member and would monitor that he followed what was expected from members (page 130).

63. We find that in the light of the claimant's admission this was a reasonable investigation.

The disciplinary hearing

64. The invitation to the disciplinary hearing was at page 128. The disciplinary allegations were put as:

- *Breach of Telephone Use policy*
- *Breach of Data Protection Policy*

65. The claimant accepted in evidence and we find that he had copies of the policies in advance of the hearing and all the relevant documents. He was given the right to be accompanied and he was told that a potential outcome was dismissal with immediate effect.

66. We find that the claimant was aware of the disciplinary charges when he attended the hearing.

67. The disciplinary hearing took place on 26 May 2021 before Mr Martin Spies, the General Manager of the Bishopsgate gym. The notes were at page 148. The claimant initially wished to be accompanied by his trade union representative, who was subsequently unavailable. The claimant was asked if he was happy to proceed without a representative and he said he was.

68. The claimant accepted in that hearing that he made the recording and that the sent it to the WhatsApp Group. His position at all times was that he did it to "*protect himself"* to show that he was being polite and professional to members. The claimant told Mr Spies that even his girlfriend reacted, when he told her about it, by saying "*what on earth are you doing?".*

69. Mr Spies asked the claimant if he realised the implications of the member

finding out he had recorded him. The claimant replied " – *of course, but I don't believe anyone should be taking the recording to the member".* The claimant said he sent the recording to the whole UK management group in error and he only meant to send it to the Kensington management group. Mr Spies view was that now that the recording had been sent to such a large group, it could reach the member. The claimant said he understood this but blamed it on the way that Mr Delande had been treating him.

70. We find that the claimant did not assert in his disciplinary or appeal hearings that he had consent from the member to make the recording. This is something that he asserted in this Tribunal hearing before us, but we find that he did not raise the argument of having consent, when he was in his disciplinary or appeal hearings. As we find he did not raise this, Mr Spies and Ms Zweibel (at the appeal hearing) could not take this into account in making their decisions.

71. Mr Spies concluded the hearing at 14:47 hours and told the claimant that he hoped to make a decision by the end of the day.

The decision to dismiss

72. The dismissal letter was sent to the claimant by email the following day, on 27 May 2021 (page 156). Mr Spies confirmed in evidence that it was his own decision and he did not discuss it with Mr Delande (statement paragraph 3.20). We find that it was Mr Spies' own decision as we had no evidence to call this into question. We also make findings below that there was no pre-existing plan to remove the claimant.

73. Mr Spies noted that the claimant had confirmed that he made the recording in the changing room and shared it with the UK management WhatsApp group. Based on the claimant's own admission, he found the disciplinary charges proven.

74. In the dismissal letter Mr Spies explained that as a manager, the claimant held a position of authority and he was relied upon to model appropriate workplace behaviour. He said that the member had a reasonable expectation of privacy especially whilst in a locker room and the making and sharing of a covert recording was in breach of two company policies. He took the view that the claimant had breached the respondent's trust and confidence in him to make appropriate decisions in line with company policy and had risked bringing the business into disrepute.

75. The claimant was given a right of appeal.

76. The claimant was asked in cross-examination whether he thought Mr Spies had dismissed him because of his race. The following exchange took place between the claimant and counsel for the respondent:

*Q: You have not alleged anywhere that he is a racist?*

*A: No.*
*Q: He was not a racist.*
*A: No. I wouldn't know his personal background, but no, I wouldn't believe so.*
*Q: He didn't make the decision because of your race?*
*A: No. I would not say that.*

77. We find that Mr Spies did not dismiss the claimant because of his race.

78. The claimant conceded in evidence that Mr Spies did everything expected of him but considered that he dismissed him because he did not go into the mitigating circumstances. The claimant said that these mitigating circumstances were the matters between himself and Mr Delande.

79. Mr Spies was asked in evidence why he did not impose a lesser sanction such as a final written warning. Mr Spies said that it was a case in which two policies had been breached and the claimant was a manager, and he felt that the claimant had breached their confidence that he could perform as a manager and that with the recording, there was the potential for the company to have been brought into disrepute, which in his mind justified dismissal.

The disciplinary appeal

80. On 1 June 2021 the claimant appealed against his dismissal in an email to Ms Zweibel (page 159). The claimant's grounds of appeal were that he considered that he was (i) managed out and felt the need to protect himself by making a recording, (ii) that the General Manager Mr Delande was working with a member to remove him from his job, (iii) that the General Manager was displaying racist tendencies, (iv) that there was a disregard for his safety and (v) he acknowledged breaching company policy but considered the sanction of dismissal too harsh. In his email the claimant said that he did not dispute that he was "*incorrect in sending this recording to managers in the group*".

81. The appeal was heard by Ms Jennifer Zweibel, who was the Operations Director at that time. The claimant was accompanied by his union representative, Mr Geoff Saunders.

82. On behalf of the claimant, Mr Saunders opened the hearing as follows:

> *"I would like to open the meeting on behalf of Ashley. Ashley admitted to carrying out the recording, causing breach to the phone policy and a breach to the data/GDPR policy and bringing the company into disrepute but because of mitigating circumstances which he will explain, we believe the penalty of dismissal is too severe and should be a lighter sentence of a final warning."*

83. There was an admission of the misconduct. The reliance was placed on mitigation and harshness of penalty.

84. In the appeal hearing the claimant said he felt he was being pushed out because of the colour of his skin.

85. The appeal outcome was sent to the claimant on 30 June 2021 (page 197).

86. Ms Zweibel set out the grounds of appeal and made her conclusions. On the claimant's contention that he was being "*managed out*" she spoke to his line manger Mr Dalton, who said it was usual to have coaching conversations and whilst he may not have appreciated this level of management, it was not a reason for him to breach company policy.

87. On the allegation of collusion between Mr Delande and the member, she investigated this and was confident that there was no basis to the allegation.

88. On the allegation that Mr Delande was racist, Ms Zweibel took time to revisit an investigation which took place in 2019 where the claimant's race related concerns were explored (page 198). She said in the letter "*you confirmed you did not believe Julien to be racist"* and in evidence the claimant agreed that he said this to Ms Zweibel. We find that Ms Zweibel was entitled to take the claimant's answer at face value.

89. Ms Zweibel could find no basis for the suggestion that there was a disregard for the claimant's safety at work. She reminded the claimant that they have a Joint Health & Safety Committee to which he was voted as a representative.

90. On the claimant's allegation that there was a distrust of him at work, she concluded that this was as a result of his unhappiness at being closely supervised by his manager Mr Dalton and whilst it may not have been his preference, it was reasonable for a manager to pay close attention to the actions of a member of the team to ensure that high standards were met.

91. Ms Zweibel also addressed the claimant's concern that the outcome had been predetermined. She said (page 198):

> *"….this was following a manager's meeting on 1st June 2021. During this meeting, Julien had reason to address a voice note that you had sent to your entire team on 26th May 2021, where you made several comments that were causing anxiety amongst your peers. I have spoken with every manager present at that meeting and am confident that at no point was it inferred that the outcome to your appeal hearing had already been decided."*

92. Ms Zweibel took the time to speak to all the managers present at that meeting on 1 June 2021 and she said that at no point was it inferred that the outcome of the appeal had already been decided.

93. Ms Zweibel upheld the decision to dismiss.

Did the dismissal fall within the band of reasonable responses

94. The claimant says that the dismissal was too harsh a penalty. He had 8.5 years' service and had worked his way up to a managerial role. He considered that a final written warning would have been sufficient.

95. The respondent said that it was a clear breach of 2 company policies, which the claimant had admitted. It could give rise to legal risk and reputational risk to the company. The seriousness of the matter was also that the member had a reasonable expectation of privacy in the gym and particularly so in the changing room and Mr Spies' view was that the claimant had made a poor judgment call such that they could no longer have confidence in him as a manager.

96. We find that the decision to dismiss fell within the band of reasonable responses open to the respondent. We have reminded ourselves that we must not substitute our decision for that of the respondent. Mr Spies was entitled to have regard to the legal and reputational risks to the company and the member's reasonable expectation of privacy in a changing room.

97. There was no dispute that the claimant had breached the policies in question, both as to the prohibition on making recordings and data protection rights and that he had shared the recording, albeit mistakenly, with all UK managers. Mr Spies was entitled to regard this as a very serious breach and the disciplinary policy included categories such as this as conduct which could lead to dismissal. He had regard to the policy at page 77 which showed as categories of gross misconduct: serious disregard for rules or instructions and disclosure of confidential information.

The surrounding circumstances

98. The claimant said that in September 2019 when a job applicant was carrying out a trial shift in the gym, Mr Delande told the Assistant Manager to send the candidate home because "*he looked like a thug"* which the claimant says was interpreted by the Assistant Manager as a racial reference.

99. The claimant spoke to Mr Delande about this a few days later. The claimant's evidence was that Mr Delande said that he "*could not believe this [was] happening"* and that we *"can't have thugs working here*". The claimant said that in same conversation, Mr Delande said: "*I'm not a racist... Look at us, we really get on and you are a half caste."* The claimant said he found this comment "*highly offensive".*

100. When Mr Delande saw that the claimant was offended by the comment and the claimant told him he should have used the term "*mixed race*". Mr Delande apologised to the claimant immediately. English is not Mr Delande's first language, which is French. He said did not want to use the

term "*mixed race*" because in French the word race means "*breed*" and is used of animals and he thought this would be offensive in English. He did not know that the expression "*half caste*" was offensive and outdated but he knew this once the claimant had explained it to him.

101. Mr Delande was asked in evidence why he called the job applicant a "*thug".* Mr Delande said that whilst he understood the meaning of the English word "*thug"* it was not within his vocabulary and he denied using the word.

102. The claimant had recorded the conversation with Mr Delande and set it out in an email to Mr Sean Campbell of HR, dated 30 September 2019. It showed Mr Delande giving his explanation and the claimant immediately accepting his explanation (page 94):

> *Julien: Ashley I am so sorry man I really did not know this. In France we use this word all the time if I w[h]ere to use the term mixed race in French this would be seen as racist in France.*
> *Ashley: Julien I have not taken that personally so please do not worry but also please do not use that term in London.*
> *Julien: of course I completely understand.*

103. The claimant accepted that he had cut and pasted some information from Wikipedia into that note, so it was not a fully accurate account of what was said between them. The claimant made the following comment to Mr Campbell: "*Julien was extremely apologetic and I understood that this was a cultural difference.*" (page 93).

104. The claimant said that after he was dismissed he looked it up in the Collins dictionary and did not believe Mr Delande's explanation.

105. We accepted Mr Delande's explanation for his use of the term "*half caste"* and we noted that he apologised immediately once he understood the offence caused and that on the face of it at the time, the claimant accepted his apology.

106. Mr Campbell looked at the way in which Mr Delande had dealt with the job applicant's trial shift. Mr Delande's evidence was that he had twice had occasion to ask the job applicant to remove his headphones while working in the club, because staff have to interact with members and this is not possible if they are using headphones. Mr Delande's evidence was that the reason he terminated the job applicant's trial shift was because he had been told and he was not following simple instructions not to use headphones. He said it was this "*simple reason".* The claimant put to Mr Delande that it was because the applicant was black and Mr Delande denied this.

107. The outcome of the investigation was that the applicant's trial shift was terminated because he did not meet the required standards (pages 99-100 email dated 3 October 2019). We find that the matter was properly

investigated and we find that the applicant's trial shift was terminated because he did not meet the standards required and not because of his race.

108. The claimant also had a conversation with Mr Delande in June 2020 when the gym reopened after the first lockdown, when he told Mr Delande that two other members of staff had made allegations of race discrimination after being made redundant. The claimant accepted in evidence that he told Mr Delande that he did not believe there was any race discrimination in the club. In oral evidence the claimant said he said this to "*get back in his good books"*. We find that Mr Delande was entitled to take the claimant's answer at face value.

109. The claimant's case was that his dismissal was prejudged because of Mr Delande's attitude towards him when the discussed the incident of 1 May 2021 and also because the respondent wanted a maintenance manager who could run 3 gyms instead of one. Mr Delande's evidence was that even as at the date of this hearing in October 2022, they still have 3 maintenance managers across the three gyms and it has not been converted into one role (statement paragraph 6.3). The claimant provided no evidence in support of his contention and we accepted Mr Delande's evidence that there are still three managers across the three sites.

A prior disciplinary issue dealt with by Mr Delande

110. On the issue of wanting to manage the claimant out or dismiss him because of his race, we were also taken to a disciplinary outcome letter dated 20 March 2020 from Mr Delande to the claimant (page 208). This concerned the claimant taking a bag from lost property and when Mr Delande asked him if he had it, he denied it. This was because the claimant had travelled home for an hour and he knew that if he told Mr Delande he had the bag, he would have been told to go back into work to return it. He did not want to do this.

111. Mr Delande was the disciplining officer. The claimant admitted in that hearing that he had given false information and Mr Delande found this was deliberate. He imposed a final written warning. We find that if, as the claimant asserted, Mr Delande had a plan to manage the claimant out of the business, he had an ideal opportunity to do so at this disciplinary hearing. He did not do so. We did not accept the claimant's argument and we find that there was no such plan to manage the claimant out of the business.

**The relevant law**

Unfair dismissal

112. Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends

upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

113. The tests in ***British Home Stores Ltd v Burchell 1980 ICR 303*** as restated in ***Graham v Secretary of State for Work and Pensions (JobCentre Plus) 2012 IRLR 759 (CA)*** are first, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; second, did the employer believe that the employee was guilty of the misconduct complained of; and third, did the employer have reasonable grounds for that belief.

Direct race discrimination – section 13 Equality Act

114. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

115. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

116. Bad treatment per se is not discrimination; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

The burden of proof

117. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if A goes on to show that it did not it did not contravene the provision, namely where it gives a non-discriminatory explanation for the treatment.

118. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

119. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the

claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

120. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

121. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc****.* The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

122. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

123. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

**Conclusions**

124. Based on the findings we have made above our conclusions are as follow:

125. The reason for dismissal was the gross misconduct of making and sharing the recording of the member in the changing rooms.

126. We have found that Mr Spies as the dismissing manager reasonably believed that the claimant had committed this misconduct. The claimant admitted it. Thus the belief was on reasonable grounds and we have found that there was a reasonable investigation.

127. We have found that the decision to dismiss the claimant was not prejudged. It was Mr Spies' sole and uninfluenced decision which he made having conducted the disciplinary hearing. We have found no pre-existing management plan to replace him with someone who would run three gyms instead of just one. We accepted the respondent's evidence

that even at the date of this hearing in October 2022, there were still three maintenance managers across the three gyms.

128. We have found that the respondent acted reasonably in treating the misconduct as a sufficient reason for dismissal and for the reasons set out above, that the dismissal fell within the range of reasonable responses open to the respondent.

129. We have found that the claimant was not dismissed because of his race. The claimant did not contend that Mr Spies made the decision because of his race.

130. The claimant contended that he would not have been dismissed had he been white, because Mr Delande would not have called him *"half-caste*". We have found above that Mr Delande's use of this term was a misunderstanding of language due to English not being his first language and that the claimant accepted his apology at the time. In any event, Mr Delande was not the dismissing officer. This was Mr Spies. Mr Delande's comment in September 2019 did not set in motion a chain of events leading to the claimant's dismissal. Mr Delande chaired a disciplinary hearing with the claimant in March 2020 at which he decided on the penalty of a final written warning and not dismissal. Mr Delande had the opportunity to dismiss the claimant in March 2020 and he did not do so.

131. On the burden of proof, we find that when the claimant had admitted the misconduct in question, he did not show facts from which we could conclude, in the absence of any other explanation that his dismissal was because of his race. The claimant did not satisfy the first part of the burden of proof.

132. In the circumstances the claims for unfair dismissal and race discrimination fail and are dismissed.

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**Employment Judge Elliott**
**Date: 7 October 2022**

Judgment sent to the parties and entered in the Register on: 07/10/2022

For the Tribunal