mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr W Liu**

Respondent: **City & Essex Ltd**

Heard at: **East London Hearing Centre**

On: **31 October and 1 November 2018**

Before: **Employment Judge Russell**
Members: **Mr P Quinn**
Mrs B K Saund

Representation
Claimant: **In person**
Respondent: **Mrs W Dove (HR)**

JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1 **The claims of direct discrimination because of race and of victimisation fail and are dismissed.**

2 **The claim of unauthorised deduction from wages succeeds only in respect of 1.5 days' holiday pay for which the Claimant is awarded £114.75 (gross).**

3 **The claim for salary from 28 January 2018 fails and is dismissed.**

REASONS

4 By a claim form presented on 18 March 2018, the Claimant brings complaints of race discrimination, victimisation and a failure to pay him wages due. The Respondent defends all claims.

5 At a Preliminary Hearing on 25 June 2018, I identified the issues between the parties as follows:-

Section 13: Direct discrimination because of race

5.1 Has the Respondent subjected the Claimant to the following detriments?

(i) Mr Carlos Cabral not did not chat with the Claimant or say hello;

(ii) Mr Cabral left the Claimant until last when allocating jobs;

(iii) Mr Cabral refused the Claimant's request to be registered in the finger print log system;

(iv) On 6 December 2017, when asked why he had not allocated work to the Claimant, Mr Cabral said "*because African people know how to do the jobs, I'm the boss here, what you can do"*;

(v) 10 December 2017, the Respondent failed to pay the Claimant

(vi) 10 December 2017, Mr Cabral refused to talk to the Claimant about his non-payment and told him to leave the office and shut the door.

(vii) 13 December 2017, Mr Charles Taylor told the Claimant not to pursue a grievance or he would be sacked.

(viii) On a date between 13 and 27 December 2017, Mr Cabral told the Claimant that he did not want him and that "*I never saw Chinese working as a cleaner, why are you here?*"

(ix) From January 2018, the Claimant was allocated cleaning work which had to be performed to a higher standard than normal;

(x) 10 January 2018, the Claimant was issued with a performance report

(xi) 28 January 2018, Mr Cabral refused the Claimant holiday and refused to allocate him further work.

(xii) 8 February 2018, Ms Dove became annoyed with the Claimant and wrongly claimed that he had resigned;

(xiii) 15 February 2018, the Claimant was prevented from discussing his complaints of discrimination and victimisation.

5.2 If so, was it because of the Claimant's race? The Claimant is Chinese. He compares himself with colleagues at the same site in Canary Wharf, one of whom he can name, Mr Anamul Haque (Bangladeshi).

Victimisation

5.3 Did the Claimant do a protected act? He relies on: (a) a telephone conversation with Mr Charles Taylor on 13 December 2017 when the Claimant

said that Mr Cabral did not want him because he was Chinese; and/or (b) an email sent on 5 February 2018 to Ms Dove.

5.4 If so, was the Claimant treated unfavourably because of it? The Claimant relies on the detriments identified above insofar as they occurred on or after 13 December 2017.

Unauthorised Deduction from Wages

5.5 Was the Claimant entitled to be paid from 28/1/18 when he says he was suspended? The Respondent's case is that he was dismissed on that date and paid a weeks' notice in lieu.

5.6 Was the Claimant entitled upon termination of employment to be paid for 2.5 days accrued but untaken holiday?

6 The Case Management Summary records the Claimant's need for an interpreter in Beijing Mandarin. The Tribunal made the necessary arrangements but regrettably and with no explanation, the interpreter failed to attend on the first day. Attempts were made to find an alternative interpreter whilst the Tribunal read the bundle and the witness statements. No alternative interpreter could be found to attend the hearing that day. The parties were informed that the hearing would start the next day. The Claimant, however, repeated his earlier indication to our clerk that he would prefer to proceed even without an interpreter. The Tribunal made it clear that there was no difficulty with waiting until the following day and that it was important for the Claimant to be able to give his evidence to the best of his ability. The Claimant again elected to proceed. As the Claimant's English was sufficient for him to give evidence and have a fair hearing (albeit challenging for him), we agreed to his request that the hearing proceed.

7 We heard evidence from the Claimant on his own behalf. For the Respondent we heard evidence from Mrs Lisa Pursglove (Divisional Manager) and Mrs Wendy Dove (HR and Payroll Administrator). We were provided with signed statements from Ms Julliette Boyden, Mr Stephen Edwards and Mr Carlos Cabral. Mr Cabral left the Respondent's employment on 10 August 2018. We took into account their evidence but with less weight as they did not attend to be cross-examined.

8 We were provided with a 160-page bundle of documents and we read those pages to which we were taken in evidence. On the first morning, the Claimant said that he did not have a copy of the bundle. We were satisfied that it had been sent to him electronically in advance of the hearing but nevertheless arranged for a photocopy to be given to him whilst the Tribunal read. When Mrs Dove came to give her evidence, the Claimant said that he did not have a copy of her 7-page statement and had not read it. Again, a copy was provided but we are satisfied that it had too had been sent to him in advance of the hearing. The Claimant had sufficient time to read and consider both the documents and the contents of Mrs Dove's witness statement.

9 The Claimant struggled to focus upon the issues identified at the Preliminary Hearing despite being encouraged by the Tribunal to do so. For example, the Claimant wished to spend a long time analysing a complaint from a security guard employed by

the Respondent's client even though it formed no part of the issues or pleaded case. As a result, the Claimant significantly exceeded the time allocated to him for cross-examination which was based upon his own initial assessment with more time added by the Tribunal to reflect the fact that he is not an experienced advocate used to estimating time. Despite considerable leniency being shown and attempts to guide the Claimant to the relevant disputes to address, ultimately the Tribunal reluctantly decided that it must guillotine his cross-examination in order that the hearing not go part-heard. We considered that there was no great prejudice to the Claimant in doing so as by this stage the Claimant was not so much asking questions as making long statements of his case, why he believed that he had been treated unfairly and how both Mrs Pursglove and Mrs Dove were lying to the Tribunal.

Findings of Fact

10 The Respondent is a large family business providing cleaning services to a range of commercial clients. It has a high value contract to clean One Canada Square, Canary Wharf where it employees 56 full-time staff to clean the 50 floors. In November 2017, the Respondent advertised for night cleaners to work at One Canada Square. The Claimant sent in a CV to be considered. We accept Mrs Dove's evidence that she reviewed his CV and shortlisted him for an interview. The local site management interviewed the Claimant and decided to offer him a job. Mrs Dove carried out the necessary reference checking and a contract of employment was issued.

11 The Claimant signed the contract on 28 November 2017. The first page is entitled "Part One - Written Statement of Terms". It sets out the main terms of employment as required under section 1 of the Employment Rights Act and says that it should be read in conjunction with the full terms and conditions of employment detailed on the reverse of the document. Mr Charles Taylor signed on behalf of the Respondent as manager responsible for the One Canada Square contract. Just above the Claimant's signature is a declaration that the employee has read or had read to them the terms on the reverse and accept that they form part of the contractual terms. The Claimant denies receiving a copy of the terms on the reverse page and his original contract is not available. A blank pro forma document was available and the front page was identical to the version signed by the Claimant. On balance, we find that the terms on the reverse page were also provided to the Claimant and that his signature was acceptance of the same.

12 It was an express term of the contract that the holiday year is from 1 January to 31 December, holiday must be taken in the current year and cannot be carried forward, must be authorised in advance and booked on a holiday request form completed by the employee. It was an express term of the contract that appointments are subject to the employee achieving a satisfactory standard of work, performance and conduct during the first three months of employment. If not, the company may give notice either during or at the end of the probationary period or it may extend the probationary period if it chooses to do so. If the Claimant was not aware that he was subject to a probationary period as he says, it is because he did not read the terms of the contract which he signed.

13 The Claimant is an experienced cleaner. He had previously worked for OCS Facilities Services Ltd in which employment he had met Mr Charles Taylor. That

employment ended and, in 2008, the Claimant brought a complaint of unfair dismissal and race discrimination in the Central London Employment Tribunal in which Mr Taylor was called as a witness.

14 Cleaners at One Canada Square are generally allocated to an area of work. To guarantee a reliable and satisfactory cleaning service, the Respondent rosters four additional cleaners to provide cover in the event that an allocated cleaner does not attend work. Such additional cleaners are shown as "floaters" on the duty rota. The night shift starts at 9.00pm. We accept Mrs Pursglove's evidence that the practice was and still is that managers and supervisors would wait until approximately 9:15pm and then allocate floaters to cover areas where the allocated cleaner was absent. If all staff attended, then additional 'deep cleaning' tasks would be allocated to the floaters. As well as employed cleaners, the Respondent also uses agency workers. The cost of an agency worker is substantially higher than that of a permanent employee, such as the Claimant, and so they are allocated tasks before the directly employed floaters.

15 At the start of his employment, the Claimant did not have an allocated area of work but was used as a floater. The Claimant's evidence was that he believed that he would commence as a permanent employee and would not be used as a floater. Irrespective of whether allocated an area or used as a floater, the Claimant was a permanent employee. The contract of employment does not oblige the Respondent to allocate an area, this is an operational matter dependent upon need. As there was no area which required a cleaner to be allocated when the Claimant first started his employment, he was used as a floater.

16 Mrs Pursglove's evidence was that the duty rota is (and was during the Claimant's employment) seen by cleaners when they sign in for work. In other words, the Claimant would have seen and known that he was a floater on any given shift. The Claimant vehemently denies this. No rotas for the Claimant's period of employment were produced but sample rotas list the name of each allocated area, the supervisor, time of cleaning and cleaner allocated for the week. The sample rotas also show four floaters for each day of the relevant week. In a rota for June 2018, the toilets on floors 49, 48, 47 and 43 were allocated to a cleaner called Martha and one of the floaters is Mr Haque, with others named as Margaret, Peter and Nancy. On the Claimant's own evidence, he would wait in the staffroom at the commencement of his shift for work to be allocated. This is consistent with being used as a floater and the Claimant must have been aware very early in his employment that he did not have an allocated area. On balance, we prefer the evidence of Mrs Pursglove which is plausible and consistent with the sample rota and the Claimant's evidence about how he was allocated work.

17 Security is particularly tight at Canary Wharf and employees are required to have a security pass. Canary Wharf management register the employee and issue a pass with a unique number. This number is sent to the client and security manager. Once registered on the client's system, the Respondent is sent an email to say that the employee's fingerprints can now be registered as part of the biometric system. The employee would then be fingerprint scanned for registration. There have been delays in registering employees on the biometric system. The Claimant was not registered during his employment but nor were some other employees. As confirmed by an email date 25 June 2018, seven employees were waiting to be registered by finger print, including Mr Haque. None of the others named were Chinese. We do not accept that

Mr Cabral refused a request by the Claimant to be registered.

18 The Respondent has a limited number of lockers available in the male and female changing rooms. These are issued in priority to day staff who require a change of uniform. Spare lockers are then issued on request on a "first come, first served" basis to night cleaners. There is no evidence that the Claimant requested allocation of a locker at any time during his employment. Nor is there evidence of the Claimant ever submitting a holiday request form although he did make an oral request for holiday in January 2018.

19 The Claimant's pay period is the calendar month. On the 8 December 2017 he did not receive his pay for the days worked between 26 and 30 November 2017. Nor did Mr Haque. Mr Haque sent two emails to Mr Taylor that day chasing payment; the Claimant did not. Mr Haque was given a loan of £292.50 by the Respondent to tide him over to the next pay day; the Claimant was not. As Ms Boyden explained in her written statement, which we accept., the delay was caused because neither had submitted the required documents to be signed onto the payroll system before the cut-off date. When the documents were submitted, the Claimant and Mr Haque were paid in full in the next pay run and the loan advanced to Mr Haque was deducted. Thereafter, the Claimant was paid salary on the pay day on which it fell due.

20 The Claimant's case is that from the start, Mr Cabral behaved towards him in a way which was hostile and discriminatory, not chatting or saying hello to him. Specifically, on 6 December 2017 the Claimant alleges that he asked why he had not been allocated work and that Mr Cabral replied: "**because African people know how to do the jobs. I'm the boss here what you can do**" (sic). In his written statement, Mr Cabral denies treating the Claimant differently and the comment alleged. In resolving this conflict of evidence, the Tribunal considered the contemporaneous emails and the nature of the working relationship.

21 From very early in his employment, the Claimant had complained to the client that he did not know what he was supposed to be doing and was not shown the tasks he had to carry out. On 7 December 2017, the Claimant sent an email headed: "My Transfer Request" asking to be informed if there were any other sites available, stating:

> "**Over the short past few days I got a feeling that I was not welcomed and there was not a position the manager is going to offer me. I would say maybe even manager himself didn't aware how many roles he need to do the job in his whole night team.**
>
> **Personally I think the management need urgently to re-assess and design the business model of long term then decided how many roles he need accordingly, then recruiting staff based on those roles**."

22 This is consistent with the Claimant being unhappy that he had not been allocated a specific area to clean from the start of his employment and therefore feeling 'unwelcome'. The Claimant's preparedness to criticise the Respondent's business model leads the Tribunal to find that he was not afraid to speak his mind to senior managers and to raise serious issues of concern. The Claimant did not include in this email any reference to the comment by Mr Cabral said to have been made only the day before. It is not plausible that, if made, such a comment would not have been included

in the email as part of the Claimant's complaint about not being welcomed or allocated a position. We reject the Claimant's evidence. Mr Cabral did not make the comment.

23 Upon receipt of the Claimant's email, Mrs Dove contacted Mr Taylor and asked that he speak to the Claimant and put his mind at rest as they believed that the Claimant had misunderstood the way in which work was allocated. Neither regarded the email as a grievance. Mr Taylor contacted the Claimant, also on 7 December 2017, by email and explained that the Respondent needed to place cleaners daily in areas where they were short-staffed and that he would talk to the Claimant and Mr Cabral further. This email is inconsistent with the Claimant's case that he only became aware of Mr Taylor's employment with the Respondent and position as manager on the contract when he saw him in Mr Cabral's office on 10 December 2017 as he tried to discuss his late pay. There is no email from the Claimant on 10 December 2017 complaining about his late pay or the alleged refusal by Mr Cabral to discuss it. We consider that if Mr Cabral had shut the door on the Claimant as alleged, he would have sent an email of complaint and not remained silent.

24 The Claimant and Mr Taylor spoke by telephone on 13 December 2017. The Claimant's evidence is that: there was no discussion about his floater role; Mr Taylor asked why he wanted a transfer; the Claimant said that it was because Mr Cabral did not want him because he was Chinese; Mr Taylor said that this was very serious; the Claimant must stop (making such complaints) if he wanted a job and Mr Taylor required him to confirm in writing that he had no grievance. The Respondent denies that any such discussion took place. Mr Taylor did not give evidence. Mrs Dove's evidence was that when she spoke to Mr Taylor that day, he told her that he had explained the floater system to the Claimant and promised him a permanent area when one became available.

25 In resolving this dispute, the Tribunal had regard to the Claimant's email sent to Mr Taylor on 13 December 2017 immediately after their telephone conversation. In this email, the Claimant confirms that he has no concern to raise, that it was a great pleasure to work for Mr Taylor again and that he is sorry that Mr Taylor regarded his email as a grievance and lost trust in him. The Claimant sent a further email the next day asking whether his email had satisfied Mr Taylor. In fact, Mr Taylor left the Respondent's employ on 14 December 2017 due to a combination of health reasons and pressure from the client. The Claimant was aware at the time that Mr Taylor had been dismissed. He did not contact Mrs Dove to repeat any concern about Mr Cabral or to complain that he had been put under pressure by Mr Taylor. Moreover, in the later appeal hearing the Claimant referred to his 7 December 2017 email as a grievance but did not claim then (as he does now) that Mr Taylor threatened him with dismissal unless it was withdrawn. We find it implausible that the Claimant would not have shared this very serious allegation with Mrs Dove once he knew that Mr Taylor had been dismissed or later with Mrs Pursglove at his own appeal if his evidence were true. On balance, we reject the Claimant's evidence about the content of the telephone call on 13 December 2017.

26 In deciding whether or not the other conduct described at 2.1(i) to 2.1(viii) occurred, the Tribunal had regard to our findings on the alleged comment on 7 December 2017, the conduct of Mr Cabral on 10 December 2017 and the disputed conversation on 13 December 2017. On each, the Tribunal has rejected the

Claimant's evidence. The Tribunal regarded the Claimant as an unreliable witness as to his working relationship with Mr Cabral and we find that the conduct relied upon did not occur.

27 On 22 December 2017, Mr Cabral raised with Ms Ribeiro a client complaint that the Claimant had been rude to one of its security guards. Ms Ribeiro was two levels of management senior to Mr Cabral but was temporarily managing the client account after the dismissal of Mr Taylor. She was the appropriate manager for Mr Cabral to inform and it was not, as the Claimant suggested, evidence of the latter trying to cause problems. A client complaint about rude behaviour was a serious matter and had to be raised with the manager responsible for the contract at the time. Mr Cabral suggested that there be an investigation or disciplinary meeting with the Claimant who was still in his probation period. By this date, the Claimant had also had a clash (as he described it) with a colleague about the use of a cleaning machine. We accept that Mr Cabral had genuine concern about the Claimant's conduct which warranted further investigation.

28 At the beginning of January 2018, the Claimant was assigned a permanent area cleaning the washrooms on floors 43, 47, 48 and 49 of One Canada Square. These floors were occupied by the Bank of New York. Whilst an important client for the Respondent, they were no more important than clients on the other floors for which the Respondent was responsible under this high value contract and the same standard of cleaning was required for all. The Claimant was replacing an employee who had left just as, in turn, he was replaced on these floors when he was dismissed by another cleaner called Martha.

29 The client and the Respondent operate a system of joint audits of the cleanliness of the washroom areas on floors 43, 47, 48 and 49. Three audits dated 28 December 2017 gave scores of 94.12% for the female washroom on floor 49 (a score of 20/22) and 90.91% for the male and disabled washrooms on floor 49. The audit reports give the time of the inspection and a list of each area inspected. Where areas failed the inspection, photographs and further details are provided. The report includes the time of the audit and two electronic signatures, "Jo" and "Alma", these were the client manager and Respondent's supervisor respectively. The Claimant was not assigned to floor 49 at the date of these audits.

30 An audit report was produced on 9 January 2018 for the female washroom on floor 49. By this date the Claimant was assigned to floor 49. As before, it was undertaken in the morning at the end of the night shift and included details of the areas inspected, photographs and details of unsatisfactory areas and two electronic signatures. This audit gives a score of 71.43% (a score of 15/21).

31 The Claimant's case is that the audit has been fabricated on two grounds. First, as the number of areas inspected is different to the audit in December and furthermore only 20 areas are in fact marked. This is correct; the waste bins have no result entered and the last washroom check area is marked "not applicable" on the second audit. Otherwise, however, the later audit follows the same form as the previous ones. Whereas the first audit had failed two areas (skirtings and hand driers), the audit of the Claimant's cleaning failed five areas (hard floor, walls, skirtings, toilet seats and cubicle doors) with supporting evidence provided. It can be seen that even if the two 'missing'

areas were marked in the Claimant's favour, his score would only have been 77.27%. The second ground for the allegation of fabrication is the Claimant's assertion that the signatures are different from the earlier audits. They are electronic signatures on the handheld device on which the inspection data is compiled during the audit. On each form they are said to be by Jo and Alma. We are satisfied that the electronic signatures are sufficiently similar and each audit report is genuine and undertaken by the same two women.

32 On 10 January 2018, the Claimant's supervisor Evelina attempted to give the Claimant a written document informally recording the concern about his poor cleaning on floor 49. The conduct/performance report is not a formal step in a disciplinary procedure but is kept on the personnel file and taken into consideration should there be further incidents and formal action later required. The examples of poor standards in the report are those areas which failed the audit inspection. The Claimant was given one month in which to improve his performance by paying more attention to detail. The Claimant refused to sign that document. His evidence is that Evelina told him that floor 49 was a VIP area requiring a higher standard of work. We find this implausible and find instead that the Claimant has misunderstood his supervisor's instruction. Whilst a higher standard of cleaning was required of the Claimant, it was because his current standard fell short of that required of any client in One Canada Square. The assigned floors did not require cleaning at a higher standard than any other client in that building.

33 In an email sent to the new site manager Ms Murray on 12 January 2018, Evelina escalated her concerns about the standard of the Claimant's work as discovered in the audit inspection, failure to rectify the shortcomings in his cleaning and his refusal to sign the conduct/performance report. Evelina also raised concern about the Claimant's behaviour towards her on 10 January 2018, describing him as argumentative and raising his voice, and of previous problems with rude behaviour which needed to be addressed upon Mr Cabral's return from holiday.

34 On 24 January 2018, Ms Murray met with a representative of the Bank of New York to discuss inadequate cleaning and areas requiring extra care and attention. These were the four floors assigned to the Claimant and four other floors for which he was not responsible. Ms Murray asked Mr Cabral and Evelina to review the photographic evidence provided by the client and asked which cleaners were responsible for those floors. The client intended to carry out extra inspections in two days' time and Ms Murray made clear that it was imperative that extra care be taken and all aspects of the cleaning regime covered before then. Mr Cabral identified the underperforming cleaners on the floors in question, the Claimant and three others. Mr Cabral stated that the Claimant and one other cleaner were not improving at all.

35 Ms Murray spoke to Mrs Dove about under-performing members of staff, one of whom was the Claimant. A contemporaneous email from Ms Murray to Mr Cabral refers to a choice either to review and provide guidance in an extended probationary period or to terminate employment. The email attached a Probationary Period Review form to be completed. The Claimant's case is that the contents of this email and the attached form are evidence of a predetermined decision by Mrs Dove to dismiss him. We disagree. The email makes explicitly clear that Mr Cabral had a choice and that the form was to be completed whichever option he decided upon.

36 On 28 January 2018, there was a discussion between the Claimant, Mr Cabral and Evelina.

37 The Respondent's case is that this was a performance review meeting to discuss the difficulties and reach a decision either to extend the Claimant's probationary period or to dismiss him. The review form was completed by Mr Cabral and describes poor attitude towards work, failure to carry out instructions, not a team player and standards of work. Under the general comments it says that the Claimant is always arguing when told how to do the work and that he sees himself as a very good cleaner. It recommends that the Claimant be dismissed on notice.

38 Attached to the review form is a handwritten file note by Evelina in which she records that during the discussion on 28 January 2018, the Claimant became aggressive, rude, used inappropriate language, raised his voice shouting and would not listen to anything they were saying. Evelina says that the Claimant told her that she was not a real supervisor, was not wearing uniform and referred to previous occasions reported to management when the Claimant had shouted at her when she tried to discuss his performance.

39 Consistent with that file note is an email sent the same day by Mr Cabral to Ms Murray and Mrs Dove in which he describes the Claimant as having been aggressive, rude, argumentative, shouting and swearing at them. Mr Cabral states that he sent the Claimant home and, in response to a request by the Claimant for holiday, told him to complete the required form.

40 By contrast, the Claimant's case is that there was no meeting, rather he had asked Mr Cabral why Mr Haque had been allowed paid holiday and a locker. In response, he says that Mr Cabral ordered him out of his office, criticised his work and sent him home. He denies that he was confrontational or argumentative or making the comments to Evelina. He says that he did not have a chance to say what he wanted to, Evelina and Mr Cabral had said he was not doing his job, that his work was very bad, that they did not want him and that he should go home. He did not believe that he had been dismissed.

41 In resolving this dispute, we had regard to the contemporaneous evidence of concern about the Claimant's performance raised by the client and the need to decide how to proceed with his employment. Whilst we accept that it was not a pre-arranged meeting, we prefer the Respondent's evidence and find that the discussion was initiated by Mr Cabral and was about the Claimant's performance. As with his response to the audit referred to above, we find that the Claimant did not and still does not accept that there are any valid grounds for concern about his cleaning. On balance, we accept as accurate the description of the discussion in Evelina's file note and Mr Cabral's email which is consistent with the Claimant's behaviour at the subsequent appeal hearing to which we refer below.

42 The Claimant did not attend his shift the next day. The Respondent believed that he had resigned. The Claimant's evidence was that he believed that, having been sent home, he was not permitted to return until contacted by the Respondent.

43 On 5 February 2018, the Claimant sent an email alleging race discrimination by

Mr Cabral. As in this claim, he said that because he was Chinese he had been over-criticized, omitted from employment, not spoken to in the same way as colleagues, told that he was not wanted and that he complained too much. He said that a Bangladeshi comparator had been treated more favourably with regard to holiday. On 28 January 2018, his performance had been criticised, he was shown photographs which he did not know where they came from and complained that he was the only new joiner given four floors to clean. Tellingly, he added his view that his performance was better than theirs (Mr Cabral and Evelina) at which Mr Cabral became annoyed and told him to go home as they had no job for him. The Claimant asked for confirmation of his current employment status. His position in evidence and during the subsequent appeal hearing of failing to accept that there were grounds for concern about his performance and criticism of Evelina is consistent with her file note on 28 January 2018.

44 In her reply, Mrs Dove advised that there had been some confusion as the Respondent believed that he had resigned when he had not returned to work. Mrs Dove invited the Claimant to a meeting on 15 February 2018. In fact, the Claimant attended Mrs Dove's office on 8 February 2018. Mrs Dove was not expecting him and spoke to the Claimant in the corridor.

45 The Claimant's evidence is that she told him that he had resigned, the Claimant said that this was not the case and he wanted to return to work. In response, the Claimant says that Mrs Dove said that she would meet him next week but asked what he would do if he remained unhappy after the meeting. The Claimant said that he would take legal action. Later that afternoon, he received an email from Mrs Dove in which she terminated his employment.

46 Mrs Dove's evidence was that the Claimant asked to return to One Canada Square, she told him that she thought that he had resigned but the Claimant was adamant that he had been dismissed by Mr Cabral on 28 January 2018 when he was sent home. Mrs Dove told the Claimant that she would investigate further and respond to him in writing as soon as possible. Mrs Dove describes the Claimant as being quite aggressive, raising his voice and saying as he left: "**I will take you to court**". Following the meeting, her evidence is that she contacted Ms Murray and they agreed that the Claimant's employment should be terminated due to his behaviour on 28 January 2018 and his poor performance. She therefore wrote to the Claimant that afternoon and again the next day confirming the termination of his employment, advising him of his right of appeal but that she still wished to meet with him on 15 February 2018 to discuss the matters raised in his grievance.

47 On balance, we prefer the evidence of Mrs Dove to that of the Claimant. Her evidence that the Claimant told her that believed that he had been dismissed on 28 January 2018 (an assertion the Claimant flatly denied at this hearing) is consistent with his email on 5 February 2018 in which he stated that Mr Cabral had told him that he had no job.

48 The Claimant appealed against his dismissal, asserting that Mr Cabral had made the decision to send him home first and then made up the story about his performance. He believed that his dismissal was an act of discrimination and victimisation. In correspondence which followed, the Claimant was asked to provide any evidence to support his assertions and Mrs Dove stated that these could then be

further investigated and discussed at the meeting on 15 February 2018. In his email with further details sent on 13 February 2018, the Claimant repeated his earlier complaints but did not include the alleged comment on 6 December 2017 about Africans, that Mr Cabral did not chat, that he was left until last when jobs were allocated or that there had been refusal to register him on the fingerprint system.

49 The appeal was heard on 15 February 2018 by Mrs Pursglove. We found her to be an impressive witness who remained calm in the face of the Claimant's cross-examination which at times verged on the aggressive. Notes of the appeal hearing were taken by an HR representative and we accept Mrs Pursglove's evidence that they are an accurate record of what is said. When asked in the hearing to look at the photographs provided by the client, the Claimant's response was that he did not need to as:

> **"I am good and a better worker than most on this site. I told Carlos this and I told him that he did not know what he was doing and he does not do a good job**".

Later on, he said:

> "**The supervisor and manager do not know what they are doing, the supervisor's perfume is too strong and they do not dress appropriately for the job. I have been a cleaner for over 15 years, including a supervisory role. I tried to discuss this with Charles before**".

50 Contrary to his evidence at this Tribunal, at the appeal the Claimant said that when he first started employment he was a floater and had wanted a permanent place but felt that he was not liked or wanted. In the appeal, the Claimant denied that he had been dismissed due to concerns about his performance. He described these as "**rubbish**", suggesting that the Respondent needed to improve, questioning the experience of Mr Cabral and Evelina whom he did not regard as a supervisor and maintaining that on 28 January 2018 he had told Mr Cabral that he was a better cleaner than other staff and that Mr Cabral was running things all wrong.

51 Whilst the hearing on 15 February 2018 considered the allegations of victimisation and discrimination made against Mr Cabral by the Claimant as part of his appeal against dismissal, Mrs Pursglove made it clear that the meeting was not to discuss any grievance as none had been raised before employment ended. The references in the notes make clear that the grievance to which the Claimant was referring was his email sent on 7 December 2017.

52 The notes of the appeal hearing record several occasions where the Claimant raised his voice and/or spoke across Mrs Pursglove. The Claimant's stance in the appeal hearing and the way in which he expressed himself was consistent with his conduct of the case at Tribunal. At times in his own evidence and in cross-examination of others, the Claimant raised his voice and talked over others in a manner which could reasonably be considered as confrontational. On a few occasions, he laughed at answers given by Mrs Pursglove in a manner which the Tribunal considered to be disrespectful and inappropriate even allowing for the stress of an adversarial hearing conducted in a language which is not the Claimant's native tongue.

53 Later on 15 February 2018, the Claimant asked for a grievance meeting to

consider his complaint of race discrimination and his appeal against dismissal (although there had been an appeal morning that same morning). Mrs Dove refused the request for a grievance meeting as his allegations were made only after employment ended and therefore the normal procedure would not apply. This decision was repeated in her email dated 22 February 2018 confirming that the appeal against dismissal had not been successful. The Claimant was paid one week's notice and for one day in lieu of holiday in the pay run on 9 March 2018.

Law

Direct discrimination because of race and/or victimisation

54 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that race had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

55 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

56 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

57 Section 27 of the Equality Act 2010 prohibits victimisation. The Claimant does not need to show a comparator but must prove that he did a protected act and was subjected to a detriment because of it. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation; it is enough that the protected act was a significant or material cause.

58 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of

primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Unauthorised deduction from wages

59 The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

60 A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA.

61 The Tribunal must first consider whether there has in fact been any deduction, in other words what amount was due to the claimant under the terms of his contract as set out above. In the event that it concludes that a lesser sum was paid, it must consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

Conclusions

Direct Discrimination because of Race

62 For the reasons set out in our findings of fact above, we have not accepted that the conduct of Mr Cabral set out in paragraphs 2.1(i), (iii), (iv), (vi) or (viii) in fact occurred. Nor have we accepted that Mr Taylor told the Claimant not to pursue a grievance or be sacked as alleged at paragraph 2.1(vii). There was therefore no detriment as alleged in any of these paragraphs.

63 As for the allocation of work, we understand paragraph 2.1(ii) to refer to the period during which the Claimant was working as a floater as from January 2018 he had a permanently allocated cleaning area. During that time, the Claimant would not have been given cleaning work until after it was known whether any allocated cleaners had failed to attend and after work had been given to agency staff. This system applied generally to all four floaters on any given shift, including the Claimant's named comparator Mr Haque who also worked as a floater in June 2018. The Claimant was not treated less favourably than Mr Haque or other cleaners of different race in the same or not materially different circumstances, namely permanent cleaners on the rota to work a shift as a floater. Even if the Claimant disagreed with the way in which the Respondent organised its staff, we have accepted that it was for genuine, non-race related reasons.

64 The Claimant was not paid on 8 December 2017 (the actual pay day rather than 10 December 2017 as stated in the issues). Nor was Mr Haque but he asked for a loan which the Claimant did not. There was no less favourable treatment of the Claimant compared to Mr Haque. The reason for the failure to pay was that neither had submitted the required paperwork to be signed onto the payroll system before the payment cut-off date. The Claimant had commenced employment on 26 November

2017 but did not sign his contract until 28 November 2017. The Claimant and Mr Haque were paid in full on the next pay day on 10 January 2018. Where the Claimant has shown that he was treated less favourably than other cleaners who were paid on time, we accepted the Respondent's explanation as set out above. It was not because of the Claimant's race.

65 Turning next to the Claimant's performance from January 2018, we have not accepted that the floors allocated to him required cleaning at a higher standard than for other areas. The inference that the Claimant draws is that this was so that his cleaning could be scrutinised and lead to his dismissal, essentially he submitted that he had been set up to fail. We do not agree. Bank of New York was an important client but no more so than clients on the other floors of One Canada Square. The Claimant was unhappy as a floater and was allocated floors 43, 47, 48 and 49 to replace a departing cleaner just as he was later replaced by Martha. This was in accordance with the promise made by Mr Taylor on 13 December 2017.

66 As we have set out in our findings of fact, the Claimant is firm in his belief that there were no genuine grounds for criticism of his performance or his conduct. He does not accept that his cleaning was below standard, despite the audit reports, photographic evidence and the client's dissatisfaction which led to the meeting with Ms Murray on 24 January 2018. Any evidence which does not fit with his own view of his performance is described by him as fabricated or produced in bad faith or, as above, a requirement to clean to a higher standard as a conspiracy to cause him to fail. We disagree. The audit, photographs and contemporaneous emails are genuine and reliable evidence of a very real shortcoming in the Claimant's standard of work. He was not the only cleaner whose performance was being reviewed and criticised. The Claimant's dogged insistence that the problem was not his cleaning demonstrates a lack of objective insight. It was Mr Cabral and Evelina's genuine concern about the Claimant's attitude and performance which led to the conduct/performance report on 10 January 2018, not race.

67 The unresolved performance issues and the Claimant's resistance to discussion about the standard of his work ultimately led to the discussion on 28 January 2018. It is clear that this was a difficult discussion and that the Claimant raised his voice and would not listen to what his managers were saying to him. We have accepted as accurate the contents of Evelina's file note which describe him as rude and aggressive. Mr Cabral sent the Claimant home. The decision to dismiss was not taken before the discussion but because of the Claimant's conduct on the day and his poor performance. The Claimant was still in his probationary period; Mr Cabral could have extended that probation but decided that it was not appropriate in the circumstances. This is in no sense whatsoever because of race. Any employee behaving as the Claimant did during his probationary period would have been sent home as the Claimant was. Moreover, Mr Cabral did not refuse the Claimant's request for holiday but simply asked that he complete the required form. This requirement applied to all cleaners. There was no less favourable treatment because of race.

68 As for the conduct of Mrs Dove on 8 February 2018, we do not accept that she became annoyed. The Claimant had been invited to a meeting on 17 February 2018; he attended instead on 8 February 2018 but Mrs Dove still spoke to him. In his witness statement, the Claimant does not claim that she became annoyed with him. We

conclude that this is because it did not happen. Rather, as we have found as a fact, it was the Claimant who raised his voice and was quite aggressive to Mrs Dove. This was consistent with his conduct in the appeal hearing and at times his raised voice and confrontational manner in the Tribunal hearing. Whilst the Claimant may not intend to be aggressive (and we would not say that his conduct at the Tribunal crossed the line into aggression although at times it was close,) he appears not to be aware of the way in which his behaviour may reasonably be perceived by others.

69 It is the case that on 8 February 2018, Mrs Dove stated that she believed that the Claimant had resigned. She said this because she genuinely believed it to be true based upon the information available at the time. On 28 January 2018 the meeting had ended with the Claimant being sent home after he became argumentative. He did not attend work the next day or make contact until his email on 5 February 2018. In the circumstances, Mrs Dove's belief was reasonable and plausible. Once it was clear to Mrs Dove that the Claimant had not in fact resigned, she agreed to investigate and did so by contacting Ms Murray. Having done so, Mrs Dove corrected her error and wrote to confirm the Respondent's decision to terminate his employment. The Claimant has not shown any evidence from which we could infer that a comparator was or would have been treated more favourably. We accept that this mistake was entirely unrelated to the Claimant's race.

70 The final matter relied upon in the list of issues is the decision on 15 February 2018 to refuse the Claimant's request for a formal grievance hearing. Although there was no separate formal grievance meeting, the Claimant was able to discuss his believe that he had been discriminated against and victimised by Mr Cabral and that this had led to his dismissal for an untrue reason. To this extent, he was not prevented from discussing his complaints of discrimination and victimisation. What Mrs Pursglove would not consider, however, was any alleged grievance raised by the Claimant in December 2017 and which the Respondent regarded as only a request for relocation. Mrs Dove and Mrs Pursglove believed that the Claimant's employment terminated on 28 January 2018 and that the grievance came later. This was the reason why Mrs Dove decided that the normal grievance procedure did not apply. Again, it was in no sense whatsoever because of the Claimant's race.

Victimisation

71 For reasons set out in our Findings of Fact, we have rejected the Claimant's evidence about his discussion with Mr Taylor on 13 December 2017. He did not tell Mr Taylor that Mr Cabral did not want him because he was Chinese. This was not a protected act. By contrast, the email on 5 February 2018 was a protected act as it makes an express complaint about race discrimination and gives details in support.

72 As the protected act only occurred on 5 February 2018, it is only the conduct which occurred thereafter which is potentially capable of being an act of victimisation. In other words, the conversation with Mrs Dove on 8 February 2018 and the decision not to discuss the complaints of discrimination and victimisation. We repeat our conclusions at paragraphs 68 to 70 as to the Respondent's reasons for mistakenly stating that the Claimant had resigned and why a formal grievance hearing was not convened. These were not in any material sense caused by the protected act.

73 Having considered each of the issues, we also considered the case holistically. In his evidence, cross-examination and submissions, the Claimant demonstrated a tendency to make generalised allegations of discrimination and victimisation without substance and largely as a response to criticism of his performance or conduct which he does not accept. When pressed to identify the facts from which we could infer discrimination or victimisation, the Claimant gave answers which were little more than vague allegations that Mrs Dove "knew everything that was going on", knew that he was Chinese and should have wondered why he had withdrawn his grievance in December 2017. This was not persuasive. The Claimant was not being punished or set up for dismissal because of his race or any complaints of discrimination, rather his employment when he reacted in an unacceptable manner to genuine and well-evidenced concerns about his performance.

Unauthorised deduction from wages

74 The Claimant's case is that he did not resign on 28 January 2018 nor did he believe that Mr Cabral had dismissed him, rather he was waiting to hear from the Respondent. The Respondent's case is that it believed that employment ended on 28 January 2018 when the Claimant left the building, did not return and made no further contact with them until 5 February 2018 thereby treating himself as dismissed. In any event, if the Claimant had not been sent home due to his conduct on 28 January 2018 he would have been dismissed that day.

75 We have accepted the evidence of Mrs Dove about the conversation with the Claimant on 8 February 2018 in which he was adamant that he had been dismissed by Mr Cabral on 28 January 2018. We infer that having had chance to reflect, the Claimant was trying to persuade Respondent to give him back his job and not, as he now says, to return to work from suspension. The Claimant had not been suspended and was not contractually entitled to pay after 28 January 2018, either because the employment had terminated or in any event because he had failed to attend work.

76 It was an express term of the contract that holiday entitlement could not be carried forward into the new holiday year which started on 1 January 2018. The Claimant's entitlement to paid holiday was therefore to 2.5 days. He was in fact paid for one day of accrued leave. The payslips for December, January and February do not show any other leave taken. Accordingly, the Claimant is entitled to one and a half days' holiday pay in the sum of **£114.75 (gross).**

Employment Judge Russell

14 February 2019