



EMPLOYMENT TRIBUNALS

Claimant: Mr G Brando-Calderon

Respondent: Co-operative Group Limited

Heard at: Cardiff **On:** 14 - 17 May 2018

Before: Employment Judge P Davies
Members: Ms Lovell
Ms Mangles

Representation:
Claimant: Mr Phillipe Brando (Son)
Respondent: Miss Gough (Counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

- (a) The Claimant suffered discrimination because of his race regarding career progression and work duties.
- (b) All other claims of direct discrimination because of age or race and/or harassment are dismissed.

REASONS

1. The Claimant describes himself as being of mixed race from Colombia. He is a British citizen with triple nationality namely British, Italian and Colombian. He was born on 16 December 1965 and is now 52 years old.
2. By a claim received on 3 September 2017 the Claimant complained of age and race discrimination and also that he was owed holiday pay, arrears of pay and other payments. The Response denies any form of discrimination or that any monies are owed to the Claimant. The Response also raises the Tribunals jurisdiction to hear the Claimant's complaints to the extent that

they relate to acts that are alleged to have taken place more than 3 months before the date the complaint was presented to the Tribunal.

3. The Case Management Hearing on the 17 November 2017 set out the precise claims being made by the Claimant namely claims of direct race or age discrimination on the basis he was repeatedly overlooked for promotion and experienced difficulties in pay compared to colleagues, was harassed on grounds of race being allegations about offensive posts on Facebook, offensive comments and feeling excluded in relation to time issues for any of the allegations potentially out of time the Tribunal may not have jurisdiction if so can the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period and is such conduct accordingly in time, as was any discrimination complaint presented within such other period as the Employment Tribunal considers just and equitable.
4. The Tribunal heard from the following witnesses namely the Claimant; Mr Giles Jenkins, Area Manager; Miss Sarah O'Mahony, Area Manager; Mr Edd Howe, Regional Manager. There was also a statement provided from Mr Mark Thomas, former Store Manager at the Taffs Well store, who was not called to give evidence and whose statement was not agreed.
5. The Tribunal's Findings of Fact are as follows:
The Claimant started work with the Respondents on 26 February 2002 as a Customer Assistant in the South East region of England. The Claimant was promoted several times and became a Store Manager in 2004. The Claimant remained a Store Manager in the South London region until 14 July 2013. The Claimant's salary at this time was £31,776.73 per annum. The Claimant never had any problems with his performance or management of staff during this time and we accept his evidence that South London was a very demanding area with a very high stock rotation and required the exercise of high skills in order to deal with security issues, on one occasion for which he was commended, and with the different ethnic origins of staff and customers.
6. After purchasing a property in Wales in 2013 the Claimant decided to move with his family to live in Wales. He spoke to his Area Manager, Mr Ross Watson, about transferring to the South Wales area and to a store there. The property that the Claimant had purchased was in the Rhondda Valley in South Wales. The Claimant also mentioned to his Regional Manager Mr Bob Taylor about making a transfer to a store in South Wales. Mr David Parker, the Chief Executive Officer of the South East Region, spoke to the Claimant and Mr Taylor and invited the Claimant to contact Mr Gary Thomson, one of the South Wales Area Managers, to enquire about a position for him in South Wales.

7. The Claimant contacted Mr Gary Thomson and met with him on 26 July 2013 for an interview and was advised that at this time a Manager position was not available. The Claimant was told he would need to make a provisional demotion until a Store Manager position became available if he wanted to remain with the Respondents.
8. The Claimant wanted to continue with the company and accepted the position as a Deputy Manager. The Claimant started as a Deputy Manager in the Garden Village store, in Giffach Goch, in October 2013. The Claimant met Mr Gary Thomson at the store and says there was a verbal promise which will be fulfilled soon for him to become a Store Manager.
9. The salary that the Claimant was receiving was £15,392.52. That was a substantial reduction by more than 50% from his salary as a Store Manager. In the same store was another Deputy Manager Mr Glen Waters who was receiving a salary of £19,972.02. The Claimant's salary increased on 12 January 2014 to £16,218.85. Mr Waters salary remained unchanged. In October 2014 the Claimant's salary increased to £16,413.48.
10. Miss O'Mahoney said that the Claimant had accepted a salary that he was offered when he transferred to Wales and that he could have declined that offer of salary but he did not. The offer was within a fair pay within the band for the store. At that time the banding was based upon turnover of the store. There were bands 1 to 3 and the Claimant started on the lower band. Mr Jenkins described how people would usually go in on the lower end. Although at this time Mr Jenkins had responsibility for Gwent, there was a change of boundaries and then he had responsibility for the Garden Village store. Miss O'Mahoney said that the Claimant started from scratch when appointed a Deputy and he started at the bottom of the pay scales. It appears no account was taken of his length of service with the Respondents or his experience when setting the Deputy Manager's salary. It is clear that at this time the Respondents operated a system of payment of Deputy Managers, and others, which meant that people doing the same job would be paid different rates of pay depending on matters such as length of service, experience, size of the store and skills. There was no uniform rate for a particular position within the Respondents organisation. There was considerable flexibility in the allocation of salaries within the Respondents organisation. Mr Jenkins emphasised that the bandings regarding salary are now based on hours for stores as opposed to turnover which was the position before 2016.
11. The Claimant started as a Team Manager in the Garden Village store on 7 October 2013 after coming back from holiday. The Claimant spoke to the Store Manager Mr Stuart Adams, when he was back off a period of sick leave, about increasing his salary to a salary of £20,000 as he was doing the same job as the previous Team Manager Mr Glen Waters. We accept

the evidence of the Claimant that he was told on a number of occasions that Mr Adams needed to speak with the Area Manager about his salary and was told in the first week of October 2014 that the Area Manager refused to increase his salary.

Complaint 7 October 2014

12. The Respondents have a whistle blowing policy (page 349). This policy states that a whistle blowing matter can be raised with a Manager in the team or business area or Co-Op Senior Manager or the person may contact "Speak Up" which is an anonymous free and confidential service operated by a third party provider and is an organisation with staff trained to handle whistle blowing calls. The third party will pass all the information given apart from a person's name if they so wish, to the relevant risk and internal audit teams for them to look into. This is what the Claimant did by contacting "Speak Up". It is also noteworthy that under the heading of "outcomes" it is said because the Respondents may need to keep things confidential they may not be able to tell a person about any investigation they do or action they take about the issue that they have been told about. But wherever they can they will try to let the person know the outcome.
13. The complaint made by the Claimant involved irregularities and what he deemed to be gross misconduct on the part of some employees at the Garden Village store. There was an issue regarding cash being a self payment from money kept in the safe. Several employees were misusing the company coupons scanning them several times in the same transactions and giving customers illegal discounts. These customers were mainly relatives and friends. The Claimant says that he spoke to staff about this but they began to harass bully and discriminate him.
14. Mr Giles Jenkins was asked to investigate the complaint made by the Claimant to Speak Up. Mr Jenkins said that he remembered dealing with the Speak Up line.

Additional grievance 13 October 2014

15. In an email sent to the administration to be added to report CL21411 (the whistle blowing report) the Claimant wanted to add to his original complaint some issues which he describes as being bullying discrimination and harassment. This email is on pages 92 and 94 of the bundle. Mr Giles Jenkins was provided with this grievance and therefore was dealing with two issues namely the issue of the whistle blowing and this additional complaint made by the Claimant. Mr Jenkins says that following his investigation regarding the whistle blowing complaint the individuals that he investigated were invited to attend formal disciplinary hearings. He was not involved in the disciplinary process but believes that the outcome was that file notes were put on the individuals files and no formal disciplinary action

taken because individuals had not received training about the issue regarding coupons.

16. In relation to the additional complaint made by the Claimant, Mr Giles Jenkins said that he investigated that together with Julie Morgan (HR Adviser), who was based in the regions as opposed to the central HR organisation called PRCC. The HR function has been reorganised since that date, but at this time regional based HR Advisers would assist Managers. Mr Jenkins spoke to Mr Stuart Adams about the allegations made by the Claimant. Mr Adams strongly denied the allegations and Mr Jenkins made the point that Mr Adams was very much affected by them to the extent that he subsequently went off sick with stress. Mr Jenkins was pressed about the outcome of that investigation. It is the Claimant's case that he was never told the outcome of that complaint grievance that he had made. Mr Jenkins says that if he had had a meeting with the Claimant with Julie Morgan, notes would have been taken and signed by the Claimant and that he would have interviewed colleagues with Julie Morgan. Mr Jenkins does not specifically recall delivering the outcome to the Claimant but says that he would have done so. In his evidence Mr Jenkins said that he did not write to the Claimant because he fed the outcome via the Speak Up line. Miss Julie Morgan would have kept all the notes and he had no notes or particular recollection of delivering any outcome.
17. We reject the evidence of Mr Jenkins that he would have spoken with the Claimant about the allegations at a meeting or otherwise as this is something which would have been remembered as it concerned a serious allegation of discrimination. We accept the evidence of the Claimant that he had no meeting with Mr Jenkins nor did he receive any feedback in relation to that particular allegation. The Respondents have provided the log details of feedback requests (p 307) which were made by the Claimant on 28 October 2014 and which indicate that a Risk Manager has investigated and the findings are being followed up by operations and that on 11 November 2014 feedback was given and that the caller will see if there has been further feedback in two weeks time. The log ends on 26 November 2014 with a note "was going to make an addition but changed their mind halfway through. Said they would contact Head Office. Case is still open." It is difficult to fully understand that note except that we accept the evidence of the Claimant that he was never provided with feedback by HR or from Speak Up or Mr Jenkins regarding his additional complaints made 15 October 2014. The Tribunal notes that there is a grievance policy which was not expressly followed by the Respondents in the investigation of this complaint because it was recorded as an original complaint to Speak Up.
18. It is surprising that the Claimant was not informed of the conclusions reached by Mr Jenkins which is that there was nothing to substantiate the Claimant's allegations. There were a number of discreet allegations made

by the Claimant which included not to speak Spanish to his wife who worked in the store, he had no access to the password which had been changed, rotas were planned by a DTM Angela Phillips and were unfair to himself, he was told to use a CTM uniform and not allowed to use his uniform as a Tier 2 employee. The Claimant describes how employees were angry towards him who were the employees that he had named as being involved in discrepancies. Other staff were shy towards him as they were afraid of being treated as traitors. Both himself and his wife were excluded from conversations and would leave the canteen if they went there to have a break. In addition to that, customers starting making ugly remarks calling him a foreigner and mocking his accent saying that he was angry when he was not. The Claimant complained to Mr Adams. Mr Adams took the involved staffs side and mocked his use of wearing a tie. The Claimant says that false complaints were made against him of which he complained to the Speak Up line.

19. On page 89 of the bundle are complaints laid against the Claimant by Daniel Hughes. It is noted that the complaint was in writing dated 30 September 2014 but received on 1 October 2014. It appears the complaint was about the Claimant interrupting a meeting and also about an incident some weeks before with the Claimant's wife regarding the pricing of an item. There was another complaint about the Claimant on 10 October 2014 where it is said that Mr Adams called regarding there had been received multiple customer complaints regarding the Claimant and his wife. It is recorded that "Mr Adams is finding it difficult to manage a husband and wife Gerardo and Doris both from Colombia both in the same store". There was reference to the Claimant saying customers were racist towards his wife, but he had not had any direct abuse himself. It is noted they are good workers and the action is linked with the colleagues complaints and the advice was for the Store Manager and Operations Manager, Mr Jenkins, consider the nature of the complaints and whether if they were genuine there be potential disciplinary action or if there is a potential making up of complaints to get the couple moved on it was important to establish what it was and a note there was concern as to whether the catalogue of customer complaints are genuine or part of a coordinated hate campaign from the local community the Store Manager addressed this once the linked colleague complaint had been resolved.
20. The Claimant says that Mr Jenkins designated a Tier 2 employee Team Manager Mr Matthew Hooper to investigate the complaint. The Claimant was concerned about this level of person investigating and also because of the friendship which existed with the persons being investigated since Mr Hooper had worked in the store before. The Claimant says that Mr Hooper disregarded any complaints of discrimination and salary inequality and started to bully him saying his wife was not allowed to park outside the shop

to wait for him after work or to come to the store as a customer and he was not welcome in the town.

21. Mr Jenkins does not recall the Claimant being subject to a hate campaign and does not recall appointing Mr Hooper to carry out an investigation. We do not accept the evidence of Mr Jenkins and do accept the evidence of the Claimant about this matter. Mr Jenkins's recollection of the investigation is vague in the extreme or non-existent. We are satisfied that the Claimant was raising these issues and pressing these issues as set out in his email because they were matters which concerned him and his wife at this time.
22. The Claimant alleges that he was contacted by Mr Jenkins who told him to leave the store and not attend for work. The Claimant regards this as a suspension. However an analysis of the time records indicate absence for sickness for 3 days in early mid October and normal working for other periods except 2 days on Saturday 1 November and Monday 3 November which the Claimant accepts as being genuine periods of sickness. Nowhere does it indicate in the records that there was a period of suspension and we accept the evidence that the computer system allows that code to be entered if that is the reason for absence. There was no such entry and we do not accept the evidence of the Claimant that he was suspended for that period of time. There is no doubt that there was an absence from work and we accept this was a distressing time for the Claimant as witnessed by what he said in his communications to Speak Up and his grievance. However we do not accept that there was a formal suspension at this time.
23. The Claimant says that during this time he met Mr Jenkins at the Church Village store to talk about Daniel Hughes's complaint against him. He went to the meeting. We accept that evidence of the Claimant. Mr Jenkins says that he did meet the Claimant and with Mr Stuart Adams to resolve the complaint and that they were happy with the discussions.
24. The Claimant says that he sent an email to Mr Jenkins when he was aware that there was a managers vacancy at the Penygraig store. The Claimant could not produce a copy of this email and said that he had misplaced the printed copy that he made at the time. The Respondents say that there is no record of such an email being received. Mr Jenkins denies receipt of such an email. The Claimant alleges that at the meeting at Church Village that the email was discussed and that Mr Jenkins accepted receiving a copy of it and said that he had temporarily promoted Mr Hooper to that post and that the Claimant needed to undergo training of the Co-Operative Way (TCW) before he could be appointed a Manager. The Claimant alleges that as a result of this discussion he went home with mixed feelings that Mr Hooper did not do the TCW course but was appointed a Manager and that he was being treated differently. However in the course of the hearing the Respondents produced a record referring to Mr Hooper being sent to

undertake this course after he was appointed the Manager. We accept the evidence of Mr Jenkins that he did not say to the Claimant that he had received the email or that he should undertake a training course. The training course was something which would take place after appointment and not before. The Claimant had applied for promotions successfully in the London area and had achieved the post of Store Manager and was not unfamiliar with the processes regarding the appointment to positions within the Respondents organisation. Even if there were informal discussions about the vacancies that existed within the Respondents, nevertheless a formal process had to be undertaken in order to achieve appointment to a permanent position.

25. The Claimant says that he was then transferred to the Ferndale store for a short period of time and whilst there received contact from Mr Wayne Tyler regarding his rotas. We accept that the Claimant, who was unhappy at the work situation at the Garden Village store, did ask to move from there which would explain his temporary move to the Ferndale store and then the move to the Taffs Well store on a permanent basis. The Claimant says that he did not remember asking to move from Garden Village but asked for protection. The Claimant refers to the fact that in the Garden Village store it was situated in a close community where people are all related and that he was better in Taffs Well which has a more metropolitan mix of people and he felt more comfortable to work there. Mr Jenkins says that some time after these matters he was contacted by the Claimant and his wife who were unhappy and wanted to move and that he could have done nothing but he felt duty bound to resolve the complaint and to assist in the move. This was a matter that had already been referred to as something in the ERCC (Employee Relations Contact Centre) notes regarding complaints. It was a solution that suited all parties at this time.

The Claimant's transfer to Taffs Well store December 2014

26. The Claimant received the same basic salary upon his transfer to Taffs Well but in addition received £1,500 per annum equivalent to £30 per week because of the additional travelling. The salary of the Claimant was then £18,000. Mr Jenkins says the salary band for Team Managers in Taffs Well at the time of transfer was higher than the salary band for the Garden Village store and in fact the lowest salary in the band at Taffs Well was higher than the Claimant's salary in Garden Village. Mr Jenkins says that he offered the Claimant a salary at the bottom of the band which he accepted. The Claimant says that the previous Team Manager Jane Watson was earning £19,399.68.
27. The Claimant was unhappy that his salary continued to be less than that of a previous Team Manager. The Claimant asked his new Manager, Mark Thomas, to request his salary to be levelled equally to other employees. Mr Jenkins did not consider that there was a need to increase the salary.

28. In December 2014 Mr Chris Ford joined as a Team Manager. The salary for Mr Chris Ford was £18,500. He had been previously paid this salary at the Brackla store where he had been working until the transfer to the Taffs Well store. On page 332 of the bundle is a summary of payments in salaries of the comparators and of the Claimant.
29. The Claimant complains that in relation to undertaking work that he was “the donkey in the shop” in that he would be doing all the shops standard work such as deliveries out and the stock which was a harder job but not undertaking any administrative tasks. Although the Claimant agreed that being a Manager is hands on and not a desk job he said that what work Deputy Managers should be being should be balanced but it was not. He did not know that Mr Thomas had a fused disc although he heard Mr Thomas complain about a back problem. The majority of administrative duties were undertaken by Chris Ford and none were undertaken by himself. We find that the Claimant is correct in this analysis and accept his evidence.
30. The Claimant helped to train Managers who came to his store and he talks about four new Managers “passing by” his store. All of them young and British. The Claimant says he was not allowed to apply for a Manager’s position until he took the CWT course. He blames Mr Jenkins for purposely not allowing him to take the course. That meant he was denied the opportunity to compete with others for the position as Manager. We reiterate that we have found that Mr Jenkins did not tell the Claimant he had to undertake the course before applying for the Manager’s position. It is the fact that the Claimant did not apply for any positions as Manager. He was clearly aware that positions were being filled because he knew people were coming to the store to be trained. He would have had access to the intranet regarding any vacancies and would have known in his many years experience in London that vacancies do occur from time to time. Mr Jenkins accepted that the Claimant said on several occasions that he wanted to be a Manager to which Mr Jenkins answered that there was a process. We have accepted the evidence of Mr Jenkins on this matter. Mr Jenkins said that he would not phone anyone and say to them to apply because lots of Team Managers show an interest in being a Store Manager. We accept this evidence of Mr Jenkins.
31. Mr Jenkins described the process for Store Manager which involves making an application. Mr Jenkins was clear that the process then is that people are shortlisted and they have to pass an assessment centre before any training can commence. Mr Jenkins said that they need to be high performing in order to move on to that level. Miss O’Mahoney said that potentially she would expect to see “exceed expectations” on a performance appraisal and that a person would be taking on additional responsibilities. If

a person applies and is put forward to an assessment centre and if they pass the assessment centre the next cohort would be sent for training which would make them able to apply for a vacancy. We accept that evidence of Miss O'Mahoney as to the process.

32. On 1 October 2015 the Claimant's salary was increased to £18,671.44 per annum. Comparator Mr Chris Ford's salary was increased to £18,870.00 per annum.
33. The Respondents have 6 monthly performance reviews and there is included in the bundle the performance reviews for March 2016 and August 2016. In the career aspirations section it is said that the Claimant's is to be "Store Manager". The March 2016 performance review also talks about involving the store in more community based events with the training being more in depth training of Tara/my team training on SCO checkouts in respect of maintenance and problem solving. The overall performance rating was "meets expectations". In the August 2016 performance review there was a reference to developing a colleague Chris Jones to be a potential Team Leader but the overall performance was still "meets expectations". There is a reference to the valued support given to the Store Manager by the Claimant.
34. At the end of December 2016 the Claimant was suffering from depression and took sick leave. In January 2017 he was diagnosed with severe depression and started treatment with medication and mental health counselling. The Claimant has not returned to work since this time.

Facebook posts seen by the Claimant in June 2017

35. In June 2017 the Claimant looked at Facebook posts made by Mr Mark Thomas. The Claimant saw that in January 2017 Mr Thomas had said in his Facebook page that he was getting so sick of people saying RIP NHS. He refers to "stop going to the GP for stupid reasons" "stay out of A & E unless it is an actual emergency". The Claimant interpreted that as an attack upon himself because he was the only staff member off at that time. Other posts included Mr Thomas putting a page that said the hardest part of my job is being nice to stupid people. There was reference to a comedy programme Father Ted and Mr Thomas saying that he has conversations like this in work referring to having to tell people what should be obvious. Mr Thomas also refers to having conversations with a depot driver and saying that not everyone say "tidy" in Wales. Mr Thomas says that he was being racist. Mr Thomas's Facebook also included a reference to a quotation about do you ever just look at a colleague and think "I'd fucking love to knock you out". There was also a page which shows a Chief Inspector Steven Drew sacked for sharing posts calling for Sharia Law ban and saying Muslims should be loyal to UK and that opposing a Mubarak 7th Century legal system is not

racism and give the man his job back immediately share if you agree. Mr Thomas shared that document.

36. The Claimant said that he felt discriminated because all these showed an aversion to foreigners in general.

Grievance 14 June 2017

37. The Claimant put in a grievance on 14 June 2017 (page 104 to 108 of the bundle). The Claimant referred to the earlier events from when he transferred to Wales, his experiences in the Garden Village shop and speaking to the "Speak Up" line to complain. He says that he was patient and waiting for the Area Manager to call him to fulfil the promise of promotion to Manager. The Claimant complains of age and race discrimination because less experienced employees were promoted over him and all of them were young and white Welsh. He complains that no action was taken in relation to his earlier complaint. He says he is writing the letter as a last resort.
38. This grievance was sent to the Human Resources Department Manchester. The grievance was passed to the Area Manager Miss Erin O'Mahoney. Miss O'Mahoney wrote to the Claimant to say she would be dealing with the grievance and to invite him to attend a grievance hearing. This would be in accordance with the grievance policy of the Respondents. On 3 July 2017 there was a meeting. The Claimant was accompanied by a Union Representative Miss Rose Bevan. The notes of the meeting are on pages 134 to 167 of the bundle. The Claimant said in relation to the Facebook posts that in his country he was a human rights lawyer and he came here due to civil war. He used to fight for human rights in his country and people were kidnapped at home but he was not there and that he feels that a Facebook post was based towards the radical fundamentalists and that if he sees anyone use different and fights for their own goals within or without the realms of the law are branded extremists and he feels that everything is different is not right or accepted by people here. The Claimant said that he may look calm externally but internally it feels like hell.
39. Immediately after the grievance meeting there was a welfare meeting with the Claimant. These notes are on pages 168 to 182 of the bundle. The welfare aspect was subsequently dealt with by Mr Luke Cain.
40. After speaking to PR Services, HR, Miss O'Mahoney wrote to the Claimant to say that his sick pay would not be extended as it did not fall within the type of extreme circumstances where the Respondents would agree to an extension of the normal company sick pay policy which was 6 months at full pay. Miss O'Mahoney had advised of the numerous factors influencing an individual's pay including length of service, performance and moving store bands. Miss O'Mahoney established the Claimant was in the

correct pay band for the store that he was in. Mr Jenkins was also seen by Miss O'Mahoney. That was on two occasions and on one occasion she spoke to Mr Mark Thomas.

41. On 3 October 2017 Miss O'Mahoney met with the Claimant to deliver her decision and read through the outcome letter that she had prepared prior to the meeting (page 216 to 218). Miss O'Mahoney referred to the complaint filed in 2014 and that it had been dealt with and was now a historical incident. This part of the complaint was not upheld. Miss O'Mahoney referred to the fact that the Claimant had not gone on to apply for any further vacancies and there was no evidence of an agreement to revert the Claimant back to a Store Manager role without completing the process for re-training and no evidence that the Claimant was proactive in applying for any other role and so this part of the grievance was not upheld. In relation to salary it was difficult to give a definitive answer because of the age of some of the allegations but there are a number of different variables and as the offer was within the banding that would apply to equal pay for that individual. In relation to Facebook this was being dealt with and the matter investigated. There was no upholding of the application for Store Manager of Penygraig as there had been no application for the post. In the circumstances none of the complaints were upheld.

Appeal of grievance outcome - 4 August 2017

42. The Claimant wrote to Mr Pengelly, Regional Manager for Wales, appealing against the grievance decision. It was by post to the address given in Miss O'Mahoney's letter. It is unfortunate that this appeal letter was never processed by the Respondents. The Claimant's Union Representative contacted the Respondents HR Department on 30 August 2017. The Claimant did not get a response so he contacted HR again on 18 September 2017 only to be asked for his employee number. He was then contacted by Mr Brendan Tucker of the Respondents on 5 October 2017 who said he was going to set an appointment for the appeal. On 9 October 2017 a letter was sent from Mr Brendan Tucker telling the Claimant that he was not pursuing his appeal. The Claimant wrote on 10 October 2017 clarifying that he did not waive his right to appeal and was pursuing the appeal. On 16 October 2017 the Respondents informed him of the appeal meeting proceeding on October 26 2017. Mr Edd Howe was the Appeals Officer.
43. Mr Edd Howe who is the Regional Manager was asked to take the appeal. He was assisted by Mr Jason Rosenblade PR Services. Mr Rosenblade was present at the appeal as a notetaker. Miss Rose Bevan of USDAW Union represented the Claimant. The Claimant's wife was also present. The notes of the meeting are on pages 232 to 246 of the bundle. Mr Howe contacted Miss O'Mahoney in order to investigate some specific points the Claimant had raised and received a statement from Miss O'Mahoney. Mr

Howe also contacted Mr Jenkins and there was email correspondence. Mr Ross Watson had no recollection of any discussions taking place in relation to the move to South Wales and the Store Manager's job. The email referred to by the Claimant to Mr Giles Jenkins regarding the Penygraig job was unable to be found.

44. Mr Howe wrote to the Claimant (page 252 to 257 of the bundle) on 28 November 2017. Mr Howe looked at various Office of National Statistics and concluded there was nothing to indicate they were preferring white British applicants over any other racial groups. From March 2016 to March 2017 20 job vacancies were filled in the region where the Claimant worked. 13 of the successful applicants were under 35, 7 were over 35 the oldest being 52 years old. These statistics do not indicate age discrimination. Mr Howe could find nothing to support the assertion of the promise given to the Claimant to be given a Store Manager's position in Wales. Mr Howe said that he does accept that Mr Jenkins had not taken any steps to encourage the Claimant to apply for any Store Manager positions but that there was no evidence that the reason for this was to do with race or age. It is clear the reason was to do with concerns that your behaviours and capabilities were not of the required level for him to be successful. Mr Howe apologises that this has not been discussed openly and honestly with the Claimant. Going forward Mr Howe says he is recommending that the Claimant is fully supported in creating a career development plan.
45. In relation to suspension Mr Howe says that suspension is not a disciplinary sanction. It does not mean any decisions have been taken and that the Claimant was paid full pay for the period of time off work although he does say it is very difficult to find out why the particular decisions were made. The Claimant relies upon this as showing that it was accepted he was suspended. We do not agree that this is the right interpretation of what is set out there. In relation to the payment of salary Mr Howe did not find that salary differences was because of discrimination as many factors indicate salary including historical terms and conditions, different levels of experience and skill sets and different lengths of service. In the result the appeal was unsuccessful and the Claimant's appeal was not upheld.
46. **Submissions**
Both the Claimant and Respondent made written submissions. In addition both supplemented their written submissions by making oral submissions. It is not the intention of the Tribunal to set out in detail all of the submissions made. The Respondents written submissions began with reference to relevant statutory provisions and reported cases. It was submitted that a view could be taken of the case on the facts and divide it into a pre and post move to Taffs Well by the Claimant. Matters in relation to the first grievance are plainly out of time. There have been difficulties in providing documentation from the earlier period and in any event treatment that is

alleged to have taken place whilst the Claimant was at Garden Village store arise from the whistle blowing complaint rather than race or age. Mr Jenkins was a straightforward witness, it is not suggested that the Claimant was lying but was mistaken about matters. Whilst there ought to have been an outcome in writing Mr Jenkins thought the matter had been resolved by the Claimant moving to a new store. There was no reason to tell the Claimant he has to do the Co-operative way of training first. There is no evidence that any personal development plan or other additional performance measures beyond the bi-annual review were ever completed for any staff by Mr Jenkins or Mr Mark Thomas. There are no facts from which less favourable treatment can be inferred. There was nothing to inhibit the Claimant from bringing his claim and the only new matter is in relation to disclosure of statistics. It was submitted that fees were not the reason for not bringing the claim and that it was the Facebook offence matter that was the trigger. The fact is that the Claimant did not apply for promotion.

47. In relation to the Appeal there were breakdowns in communications but eventually this was actioned by Mr Howe. In relation to the pay issue, the Respondent has provided details as to the move of Mr Chris Ford onto a higher salary for promoted role to the larger store in Brackla. And since 2016 the Claimant has been paid more than Mr Ford. The Facebook posts are plainly not directed at the Claimant or his protected characteristics. There is no ground for finding discrimination in the conduct of the grievance for appeal. The Facebook could not be harassment. An analysis of the Facebook shows it is not directed at the Claimant and nothing to do with age or race. There is no vicarious liability in any event. In all the circumstances all the claims should be dismissed.
48. In the Claimant's written submissions it was summarised that the issues were firstly in relation to s.13 the Respondents had treated him less favourably in a number of ways to start his transfer was conducted informally and promises made to revert the Claimant to his original role and promises were not kept. Legacy salary was not taken into account and it was because the protected characteristics of race and age that the only differing characteristics between the Claimant and comparators. It was submitted that the Claimant has not been supported or considered for career progression despite voicing his desires on many occasions. Through wilful inaction the Respondents did not facilitate his career progression. Only during the grievance appeal was behaviour and performance concerns ever discussed. In relation to the 2014 grievance that had not been resolved this was due to discrimination of race and age characteristics. Mr Jenkins's cordiality was nothing more than a façade. In relation to the 2017 subsequent grievance appeal the Claimant was treated with contempt and dismissiveness. Mr Howe in the appeal used data from a single region in South Wales to generalise for the whole region and disclosure during the hearing showed that 100% of current and historical managers in the South

Wales region are white, Welsh and British. This was despite a significant ethnic minority population in the region.

49. In relation to s.26 the Respondent employees engaged in unwanted conduct that can only be harassment on the grounds of race and age. Reference was made to the behaviour of Mr Giles, Mr Giles Jenkins, Mr Matthew Hopper, Mr Stuart Adams, Mr Mark Thomas, as well as other colleagues. It does not mean that if the rotas showed management duties that the Claimant ever did them and was locked out of the system to do some tasks. Although in Taffs Well store he had all the codes there was no time to do that because of the tasks he was asked to undertake. In relation to time limit issues all the matters were linked and interwoven to the Respondents complacency to deal with the grievances and dishonest behaviours during procedures. It was submitted that the Claimant has given an honest and truthful account of events that are subject of the claim and that his evidence should be preferred to that of the Respondent.

50. The Law

S.13 of the Equality Act 2010 defines direct discrimination. By sub section (1) a person (A) discriminates against another (B) if, because of a protected characteristic, (A) treats (B) less favourably than (A) treats or would treat others. By sub section (2) if a protected characteristic is age, (A) does not discriminate against (B) if (A) can show a treatment of (B) to be a proportionate means to achieving a legitimate aim. By s.39 of the Equality Act 2010 under the heading of the chapter "employment etc.", by sub section (1) an employer (A) must not discriminate against a person (B) (a) in the arrangements (A) makes for deciding to whom to offer employment (b) the terms on which (A) offers (B) employment (c) by not offering (B) employment. By sub section (2) an employer (A) must not discriminate against an employee of (A)'s (B) (a) as to (B)'s terms of employment (b) in the way (A) affords (B) access, or by not affording (B) access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service, (c) by dismissing (B) and (d) by subjecting (B) to any other detriment.

51. In the case of ***Essop and others -v- Home Office [2017] UKSC Page 27*** Lady Hale said that direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The concept of discrimination obviously implies comparison between groups or individuals. S.23(1) provides that "on a comparison of cases for the purposes of s.13, 14 or 19 there must be no material difference between the circumstances relating to each case".

52. In paragraph 6 of the Judgment Lady Hale says "finally the Act deals with the burden of proof in civil proceedings before a Court or a list of Tribunals

which includes an Employment Tribunal. Relevant to these appeals are s.136(2) and (3) namely “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Court must hold that that contravention occurred. (3) but sub section (2) does not apply if (A) shows that (A) did not contravene the provision”. In paragraph 17 of the Judgment Lady Hale said the following “under the Sex Discrimination Act 1975 and the Race Relations Act 1976, direct discrimination was defined as treating a person less favourably than another “on the ground of their sex” or “on racial grounds”. Under s.13(1) of the Equality Act 2010, this has become treating someone less favourably “because of” a protected characteristic. The characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment: An example is ***Preddy -v- Bull [2013] UKSC 73*** where reserving double bedded rooms to “heterosexual marriage couples only” was directly discriminatory on grounds of sexual orientation. At other times, it will not be obvious, and the reasons for the less favourable treatment will have to be explored: An example is ***Nagarajan -v- London Regional Transport [2000] 1AC 501***, where the Tribunal’s factual finding of conscious or sub-conscious bias was upheld in the House of Lords, confirming the principal, established in ***R -v- Birmingham City Council Ex-Parte Equal Opportunities Commission [1989] AC1155*** and ***James -v- Eastleigh Borough Council [1990] 2AC 751***, that no hostile or malicious motive is required. ***James -v- Eastleigh Borough Council*** also shows that, even if the protected character is not the overt criterion, there will still be direct discrimination if the criteria used (in that case retirement dates) exactly corresponds with the protected characteristic (in that case sex) there is a proxy for it. In paragraph 25 of the Judgment Lady Hale says that direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. In paragraph 28, in the context of dealing with indirect discrimination, Lady Hale refers to the fact it is common place for dispirit impact or particular disadvantage to be established on the basis of statistical evidence. Statistical evidence is designed to show correlations between particular variables and particular outcomes and to assess the significance of those correlations. But a correlation is not the same as a causal link.

53. In the case of ***Zaphire -v- Glasgow City Council [1998] IRLR Page 36*** Lord Brown-Wilkinson, dealing with the concept of less favourable treatment, said “it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances.

54. In relation to harassment s.26 of the Equality Act 2010 says this “(1) a person (A) harasses another (B) if (a) (A) engages in unwanted conduct related to a relevant protected characteristic and (b) conduct is the purpose or effect of (i) violating (B)’s dignity or (ii) creating an intimidating hostile degrading humiliating or offensive environment for (B). By sub section (4) “deciding whether conduct is the effect referred to sub section (1)(b) each of the following must be taken into account – (a) the perception of (B) (b) the other circumstances of the case (c) whether it is reasonable for the conduct to have that effect. The relevant protected characteristics defined in sub section (5) include age and race.

55. It is clear that s.26 requires findings of fact and so an objective assessment by the Tribunal but that subjective perception of the conduct in question must also be considered (see ***Weeks -v- Newham College of Further Education UK EAT 0630/11*** where Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important. The liability of employers for acts of employees is referred to in s.109 of the Equality Act 2010 where anything done by a person in the course of his or her employment must be treated as also done by the employer. There is a statutory defence available to an employer provided that “(B) took all reasonable steps to prevent (A) from doing that act or from doing anything of that description. This may include acts which have taken place outside of the workplace.

56. **Conclusion**

During the final submissions made by the Claimant in closing, reference was made to statistics obtained from the Office of National Statistics concerning relevant statistics in 2011 which showed 80% of the population in Cardiff were white Welsh or British; in Swansea it was 91.5%; and in Newport 89.9%. No issue was taken about the fact that these were accurate statistics. Part of the reason the statistics were referred to was because in dealing with the grievance and appeal, and in the evidence in this case, the Respondent sought to counter any allegations of age or race discrimination by referring to the ethnic makeup of the stores in the South Wales area and the population being served by these stores.

57. As already referred to, the Tribunal ordered disclosure during the hearing of the Store Managers since 2013 in South Wales. In summary there were 81 stores in South Wales with 100% Managers being white British or white Welsh. The age range recorded in 5 yearly blocks from age 20 to 60 showed the greatest number in the block 25 to 30 being 21% and then reducing down to age 60 with 4.72% in the 55 to 60 range. This breakdown is relied upon heavily by the Claimant as indicating discrimination against non-white Welsh or white British who are within the Respondents organisation with respect to Managers.

58. The Tribunal reminds itself that it is dealing with the direct race and age discrimination claim, as opposed to an indirect race or age discrimination claim, and bears in mind what is said by Lady Hale regarding the use of statistics in indirect discrimination claims. Nevertheless the Tribunal considers that it is striking that in areas covered by the stores, particularly in the big urban centres of Cardiff, Swansea, and Newport that there are no managers who are non-white Welsh or white British. This in itself does not prove or show discrimination and the Tribunal bears in mind the careful analysis set out in the legal submissions of the parties.
59. Dealing firstly with the two of pay. The Tribunal has accepted the evidence given by the Respondents regarding the way that pay bands are structured at the material times. We accept the reason why the Claimant was given a lower banding upon commencing employment which was a demotion in South Wales. We further accept the evidence of the Respondents that the Claimant received appropriate pay upon transfer to Taffs Well store, which included an extra allowance for travelling. This of course boosted his average pay. Further the Claimant achieved pay increase which showed that since 2016 he had been paid more than Mr Ford. The Tribunal rejects the Claimant's assertions that he was paid less because of his age or race and accepts the explanations given by the Respondents.
60. Secondly in relation to the events which occurred when the Claimant and his wife first came to work at the Garden Village store in South Wales, and the various matters which are alleged to have occurred there being age or race discrimination, we find that these matters can and should be properly considered as a state of affairs which continued until the transfer of the Claimant to the Taffs Well store in December 2014. Whatever difficulties the Claimant had in the Garden Village store ceased in December 2014 and were not part of a continuing state of affairs or continued until the issue of the claim. The matters complained of are clearly outside the 3 month time limit for the bringing of claims and the Tribunal do not consider it just and equitable for the extension of the time limit in relation to matters relating to the Garden Village time period. The Claimant made a grievance at the time and did not pursue the grievance until matters arising in June 2017. The Tribunal considers that save in respect of one matter regarding promotion that the Claimant is time barred from pursuing claims arising out of alleged mis-treatment at the Garden Village store. We accept the submissions that the Respondents have been prejudiced by the delay in bringing such a claim, that they believed those matters had been resolved by the Claimant accepting a transfer to Taffs Well, and further in considering whether it is just and equitable the Tribunal accepts that it is highly likely that some of the alleged discrimination arises not from direct race or age discrimination but from the fact that the Claimant complained about his fellow workers and their conduct. In all the circumstances the claims made about events in 2014 cannot be pursued now by the Claimant.

61. However the Tribunal does consider that there is one aspect of the claims which the Claimant puts forward as being direct age or race discrimination which it would be just and equitable to allow the Claimant to put forward. That is in relation to the claim of the conduct of the Respondents relating to career progression. It is clear that from an early stage on the findings made by the Tribunal that the Claimant was wanting to progress from his position to achieve that of a management position. We accept that the Claimant made this known during the time that Mr Jenkins had responsibility for the area, and during the time that the Claimant was at the Taffs Well store. He made it clear to Mr Mark Thomas that he wanted to progress. The Claimant's performance appraisals indicate that he wished to progress but these were not taken seriously by the Respondents. The Claimant was not informed that his appraisal of meeting expectations would not be sufficient to progress and that he needed to have a finding of exceeding expectations, according to the evidence of the Respondents. Further no steps were undertaken by the Respondents to put the Claimant on a personal development plan, as was recommended in the appeal that dealt with the 2017 grievance. No evidence was adduced by the Respondents about the extent to which individuals are put on these plans and this is said by the Respondents to show that there is no evidence of less favourable treatment to the Claimant. However the existence of personal development plans and their use can be properly inferred from the findings from the recommendation made by Mr Howe and the fact that others who, from the statistics, were white Welsh or white British, had been placed on these plans although the extent and proportion of persons placed on those plans had not been revealed in evidence. It would seem that the fact that the personal development plans exist at all shows that they are used by the Respondents to some extent in the business. Mr Howe said in evidence he was not sure why the Claimant did not have a career development plan and that he can think of examples concerning white Welsh managers who had taken personal development plans.
62. The Tribunal finds that Mr Jenkins was not interested in placing the Claimant on a personal development plan and did not mention this matter to him at all. Mr Jenkins stressed in his evidence the effect of complaints made by the Claimant upon the manager of the Garden Village store but failed to give the same degree of sympathy to the Claimant regarding the alleged treatment that he had received at the store. We find that Mr Jenkins either consciously or sub-consciously because of the Claimant's race, did not progress the Claimant in the way that was available. For the avoidance of doubt we do not believe that age had any consideration in decisions made by Mr Jenkins because it is clear that from the Respondents statistics of Store Managers that a wide range of Store Managers are employed across the age spectrum from 20 to 60 years old. No inferences could be drawn in relation to that information or other information or evidence given

by the Claimant. There is nothing to consider that age was a relevant characteristic or relevant factor.

63. As the Respondents have stressed the focus is not simply in relation to Mr Jenkins but other individuals who would have had responsibility for the Claimant and his aspirations from 2016 when the Taffs Well store was no longer in Mr Jenkins's area. Miss O'Mahoney took over the Taffs Well store in July 2017 as a result of a boundary change from the previous Area Manager Mr Kevin Renshaw. This would have been at the time that the Claimant had begun to raise his grievances during his sick leave. It is striking that the Claimant, who had previously been a Store Manager for the Respondents, and who had good record of employment, was not offered positive assistance by the Respondents to progress again to management level. The Respondents say this does not demonstrate less favourable treatment based on a protected characteristic. The Claimant could have applied for store management positions but did not. That is a fact which is not in dispute. The Claimant did not apply formally for a store management position. But based on his performance appraisals the Respondents also say it is unlikely that he would have been considered a candidate for progression. To an extent the issue comes back to that of a failure to actively put steps in place to allow the Claimant to progress. As Lady Hale said in the *Essop* case, there does not have to be a malicious motive in the mind of a discriminator in a direct discrimination claim, but a conscious or sub-conscious bias can be sufficient. The Tribunal finds that a proper inference can be made that the race of the Claimant was a material matter in why active steps were not made by the Respondents to properly discuss with the Claimant any obstacles to promotion, how they could be overcome, and to ensure that the Claimant understood what was required to be done in order to progress within the company. We find that there was less favourable treatment to the Claimant because of his race as compared to others of a white Welsh or white British ethnic make-up who have secured management positions in the South Wales area.
64. With regard to other aspects of the claim regarding direct age or race discrimination and or harassment, we reject the Claimant's assertions that the Facebook entries constituted anything of this nature. They may have been inappropriate in part but were satisfied they were not directed at the Claimant and that their context did not make it discriminatory or harassment of the Claimant. We accept the Respondents submissions regarding these matters. However there is one aspect of the evidence of the Claimant which we have accepted and that is the failure by Mr Mark Thomas to provide the Claimant with a range of administrative duties as well as other duties expected of a Team Leader. We have not heard evidence from Mr Mark Thomas and as the Claimant accepted the fact that Mr Thomas was nice to him does not mean to say that Mr Thomas consciously or sub-consciously did not discriminate against the Claimant. We accept the evidence of the

Claimant that the other Team Leader was given administrative duties, such as they were, and we accept the evidence that a manager's delegation of duties are often delegation of non-administrative duties, but that the Claimant was not afforded the same opportunity to broaden and strengthen his capabilities as others. We find that there was discrimination because of race in relation to this aspect of the claim. This may or may not be part of the culture in not encouraging non-white Welsh or non-white British employees to further themselves. We are satisfied that there was a causal link between this failure and the ethnicity of the Claimant. In effect the aspirations of the Claimant were ignored and the proper inference that this was because of race can be made. We do not consider that it is proper to infer that the treatment was because of age as a result of other information put before the Tribunal particularly the statistics regarding the age of managers in the South Wales area.

65. We do not find that the way the grievance and appeal was dealt with showed that there was discrimination because of age or race. We accept the explanations given on behalf of the Respondents, and particularly Mr Howe, that matters were dealt with in a manner that whilst could be criticised as being reasonably long, nevertheless were not causally linked to any of the protected characteristics alleged by the Claimant. We remind ourselves that just because there has been unreasonable behaviour does not infer that must be because of discrimination.

66. We find in respect of the two matters namely career progression and failure to involve the Claimant in administrative work at the Taffs Well store, discrimination because of race, all the other claims made by the Claimant are dismissed. The claims in relation to alleged age discrimination and harassment are also dismissed. In reaching our conclusions we have taken into account all the relevant facts and applied the burden of proof, and the applied relevant law referred to above. This is a unanimous decision of the Tribunal. Unless the parties are able to agree the issue of remedy, the case will be set down for a remedy hearing.

Employment Judge P Davies
Dated: 14 September 2018

JUDGMENT SENT TO THE PARTIES ON

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.....25 September 2018.....
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.