EMPLOYMENT TRIBUNALS

Claimant: Mr H Singh

Respondent: B & Q PLC

Heard at: Liverpool **On:** 4 and 5 July 2018
27 July 2018
(in Chambers)

Before: Employment Judge Horne

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr D Piddington, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The respondent did not discriminate against the claimant because of race or religion in respect of anything allegedly done after 15 June 2017.
2. In respect of anything allegedly done prior to 15 June 2017, the Tribunal has no jurisdiction to determine whether or not the respondent discriminated against the claimant because of race or religion. The claim was presented after the expiry of the statutory time limit and it is not just and equitable for that time limit to be extended.
3. The Tribunal has no jurisdiction to determine whether or not the respondent harassed the claimant because of race or religion. The claim was presented after the expiry of the statutory time limit and it is not just and equitable for the time limit to be extended.

REASONS

Acknowledgements

1. Both the claimant and the respondent were represented to a high standard by counsel. Their efficient, focussed, and sensitive approach to both their conduct of the hearing and their written submissions meant that we were able to conclude this hearing with the parties' attendance only being required for two days. For a case involving multiple historic allegations, six witnesses and approximately 300 pages of documents, this was quite an achievement. It has saved expense to their lay clients and, just as importantly, avoided the prolonged anxiety that would otherwise have been caused by a part-heard adjournment.

Jurisdiction to sit without lay members

2. Prior to the hearing the tribunal's administrative staff informed the parties that there was a shortage of lay members from one of the panels, such that it would not be possible to convene a fully-constituted tribunal. Helpfully the parties consented in writing to my hearing the case sitting alone.

Issues

3. The claimant's race falls into the group widely known as Black, Asian and Minority Ethnic, or "BAME" for short. He follows the Sikh religion.

4. By a claim form presented on 14 October 2017, the claimant raised the following complaints:

   4.1. Direct discrimination because of race contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");

   4.2. Direct discrimination because of religion contrary to the same provisions;

   4.3. Harassment related to race, contrary to sections 26 and 41 of the EqA;

   4.4. Harassment related to religion, contrary to those same provisions.

5. The factual allegations were set out in the claimant's grievance letter appended to his claim form. These were clarified by further and better particulars and by further details provided by Mr Mensah on his behalf at the start of the hearing. The allegations were:

   5.1. On Saturday 29 October 2016, on the claimant's return to work following absence with conjunctivitis, Mrs Ward issued the claimant with an "amber warning" and spoke to him in an uncompassionate manner. Later that day, Mrs McAnally also spoke to him without compassion.

   5.2. Both Mrs Ward and Mrs McAnally told the claimant that he did not talk loudly enough when speaking to customers and that they could hear all other staff when they spoke but not the claimant. This is said to have

occurred approximately every other week from the weekend of 5-6 November 2016 until June 2017.

5.3. Both these individuals told the claimant that he did not scan accurately. The claimant disagreed with that criticism. It is said to have been made every month from the weekend of 12-13 November 2016 until June 2017.

5.4. Mrs McAnally did a roll play with front end staff playing the role of a customer. When it was the claimant's turn and the claimant asked her to place her small items on the checkout in a cocky manner she replied "no". The claimant thought that Mrs McAnally was being deliberately harsh to him. This incident was said to have taken place on 27 November 2016.

5.5. During the weekend of 3 or 4 December 2016 Mrs McAnally got her husband to "mystery shop" the claimant. When her husband confirmed that the claimant had done everything right, Mrs McAnally said "well done" in a sarcastic manner. The claimant's case is that he was being set up to fail.

5.6. Approximately twice per month from the weekend of 14 and 15 January 2017 until June 2017, Mrs McAnally would say, "I'm paying you" either in response to holiday requests or when the claimant attempted to leave at the end of his shift.

5.7. On 4 February 2017, Mrs McAnally said, at the end of the claimant's shift, "You're going to leave Jake (a front end colleague) on his own". When claimant replied, "I've finished", Mrs McAnally replied "Go if you're going then, Harjit".

5.8. The claimant was told by Mrs Ward to collect trolleys every Sunday for the last half an hour of his shift even though it was not in his job description and was a specific role for another member of staff. He was told on one occasion that he did not collect enough trollies and was asked why. At the start of the hearing it was clarified that the half hour trolley duty occurred every other Sunday from about November/December 2016 until June 2017.

5.9. On 25 February 2017, Martin, a front end colleague, asked the claimant to move an item that had not gone through to the returns area. The claimant did as he was asked. When Mrs McAnally and Mrs Ward saw him, they both asked him what he was doing and when the claimant explained they replied, "Don't listen to Martin, no-one listens to him".

5.10. On 11 or 12 March 2017, Mrs McAnally's daughter, Josie, started at B & Q Chester. She had been there for about a week when Mrs McAnally said to the claimant, "Don't get any funny ideas". This implied to the claimant that Mrs McAnally did not want somebody of his race or religion having romantic designs on her daughter.

5.11. On 29 and 30 April 2017, the claimant went on holiday to his father's cottage in Conwy. The weekend before, the claimant spoke to Mrs McAnally and told her that he was going to North Wales. She replied, "Not my area I hope".

5.12. In December 2016 the claimant asked either Mrs Ward or Mrs McAnally if he could take Sunday 26 February 2017 as annual leave so that he could be with his mother on her birthday. That request was refused. On 26 February 2017 the claimant attended work to find that the store had more staff than it needed. He complaint to Mr Paul Cleland that he had been mistreated.

5.13. In May 2017 the claimant asked to take a period of leave so that he could attend his cousin's wedding due to take place in August 2017. He was due to be working at the Doncaster store at that time. Mrs McAnally refused his request.

5.14. On Saturday 4 March 2017, Ms McAnally and Mrs Ward told the claimant that if he had any issues he should stop raising them with Paul Cleland and raise it directly with them instead. The claimant said that if he had an issue to raise with Mr Cleland he would do so. Mrs McAnally simply replied, "Stop going to Paul" and parted.

5.15. On Saturday 22 April 2017 the claimant had his appraisal with Mrs Ward. She brought up "nitty gritty" things, such as the need to speak louder with customers and to collect more trolleys. She said nothing positive.

5.16. On 23 April 2017, the claimant was bringing in trolleys and the door was locked. The claimant knocked on the door several times but nobody opened it. He came in using a different door. Once inside, Mrs Ward was laughing and Mrs McAnally remarked, "We told the girls that we would leave Harjit outside".

5.17. On Sunday 30 April 2017, the claimant was running late due to the bus being late. He phoned the store and spoke to Mrs Ward. As it happened, he managed to get to work just on time. When he arrived Mrs Ward told him that he was supposed to come in 15 minutes before his shift started.

5.18. On 6 May 2017, Mrs McAnally told the claimant to come to the next shift wearing a washed apron. The claimant's apron was not even dirty at the time and had already been washed. In the claimant's opinion other employees' aprons did not look as clean as his.

5.19. From November 2016 until June 2017 Mrs McAnally and Mrs Ward would never chat with the claimant in the same friendly manner that they did with other employees, and made him feel isolated.

5.20. During May and June 2017, the claimant asked Mrs McAnally and Mrs Ward if he could work overtime. His requests were refused despite the fact that overtime was regularly given to white colleagues.

5.21. From the weekend of 13 and 14 May and for the following two weekends, Mrs Ward would speak to the claimant when he broke for his lunch. She would say that the time was 1.30pm and told him to make sure that he was back for 2.00pm. In doing so she was ordering the claimant and making him feel as if he did not know or did not stick to the times.

5.22. On 27 or 28 May 2017, Mrs Ward said to the claimant that she had been watching the news and that they were reporting about a criminal who

was called Harjit. She said, “I thought to myself it could be you”. She said, “I thought it was you but he was wearing a turban”. The claimant replied that he wore turbans on formal occasions. Mrs Ward then asked the claimant, “Are there a lot of people called Harjit in your culture?”. She added, “Ah well, it must have been someone who looks like you then”. The claimant felt that direct reference to the words “turban” and “culture” confirmed his belief that his ongoing mistreatment was racially motivated and further, the use of the word “criminal” compounded the hurt that he felt.

5.23. The respondent refused the claimant's request to transfer back from Doncaster to Chester in August 2017. White colleagues were given a transfer. Mrs McAnally communicated the decision to the Doncaster store rather than directly to the claimant.

6. All of the above incidents were relied on as allegations of direct discrimination. In addition, Mrs Ward’s conduct during the conversation about the man featured on *Crimewatch* was said to have amounted to harassment.

7. During the course of the hearing, Mr Mensah helpfully confirmed that there was no separate complaint of race discrimination arising from the way in which the claimant's grievance was handled.

8. In response to these allegations, the respondent initially raised the defence under section 109 EqA, often referred to in the jargon as “the statutory defence”. Once the evidence had concluded, Mr Piddington confirmed on the respondent’s behalf that the statutory defence was no longer pursued.

9. In relation to the complaint of direct discrimination, the issues were therefore as follows:

   9.1. Did the respondent treat the claimant in the manner alleged?

   9.2. If so, what was the reason why the claimant was treated as he was? Was it because is not white? Was it because of his Sikh religion? Or was it wholly for other reasons?

10. The complaint of harassment raised the following further issues in relation to the *Crimewatch* conversation:

    10.1. Did Mrs Ward conduct herself as alleged?

    10.2. Was that conduct related to the claimant's race?

    10.3. Was that conduct related to the claimant's religion?

    10.4. Did her conduct have the purpose or effect of violating the claimant's dignity or creating the adverse environment described in section 26 EqA?

11. The Tribunal also had to determine an important issue relating to its jurisdiction. It was common ground that the claim had been presented within the time limit in respect of any act or discrimination or harassment that had been done (or should be treated as having been done) on or after 15 June 2017. So far as any act of discrimination or harassment was alleged to have taken place before that date, the Tribunal had to determine:

11.1. Whether that act was part of an act extending over a period which ended on or after 15 June 2017; and

11.2. If not, whether it would be just and equitable to extend the time limit.

12. In considering whether or not particular acts were part of an act extending over a period, I had to consider not just whether acts of the same kind (such as criticising the claimant's scanning) that were alleged to have continued "until June 2017" were ever repeated on or after 15 June 2017, but also whether those acts, or any others, formed part of the same ongoing discriminatory state of affairs that included the handling of his request for a transfer in August 2017.

Evidence

13. I considered documents in an agreed bundle initially running to page 252, but to which two substantial policy documents were added during the course of the hearing. I concentrated on those documents to which the parties had drawn my attention in witness statements and orally during the course of evidence and submissions.

14. The claimant gave oral evidence on his own behalf. The witnesses for the respondent were Mr Andy Richardson, Mrs Rachael Woodcock, Mrs Erica McAnally, Mrs Sue Ward and Rob Owens. All of these witnesses confirmed the truth of their written statements and answered questions.

15. This is a convenient opportunity for me to record the impressions, in broad terms, that the various witnesses made on me:

15.1. The claimant spoke with conviction and his description of events came across in a believable manner. His evidence was, however, demonstrably wrong about the dates on which many of the events about which he was complaining had happened. These included events said to have taken place on 4 February, 4 March and 30 April 2017. Getting the dates wrong does not, of course, mean that he was not telling the truth about what had happened. What it did illustrate, however, was the difficulty inherent in trying to piece together recollections of things that had occurred many months ago. Many of the disputes in this case turned on the claimant's perception of other people's behaviour. What could have been perfectly innocuous interventions by supervisors were said to have been inappropriate because of the supervisors' "telling off" approach or facial expressions or "sarcastic manner". The reliability of the claimant to make an accurate assessment of these things depended in large measure on the degree of objectivity with which he could assess them. I found that the claimant's objectivity was very substantially undermined by his insistence that two contemporaneous documents had been forged. As I will explain, in relation to one of them, the alleged forgery would have had to involve as a conspirator Mrs Woodcock, whose evidence struck me as straightforward and entirely honest.

15.2. In my view the evidence of Mr Richardson, Mrs Woodcock and Mr Owens was straightforwardly given and unshaken in cross examination. I was able to place a considerable degree of reliance on their evidence.

15.3. Mrs McAnally was very upset whilst giving her evidence. Whilst I took her distress to be completely genuine, I had to be careful not to allow her emotions to sway my approach to the facts. Nobody likes to be accused of race discrimination. It may be just as upsetting to be found out as to be falsely accused. Moreover, experience shows that people may discriminate on the grounds of race without even knowing that they are doing so. Mrs McAnally might have been genuinely appalled by the allegations, but that of itself would not mean that they were untrue.

15.4. Mrs Ward came across in an apparently credible manner. I had to bear in mind, however, that she, like Mrs McAnally, would have a strong incentive to deny the allegations.

16. Part of the evidence in the bundle was an exchange of messages on the social media platform, Snapchat. The conversation took place between the claimant and Ms Naeema Ali. In that conversation, the claimant asked, "Wouldn't you agree they were more friendlier with the white collages [colleagues] i.e. they didn't like us because they were racist?". To this question, Ms Ali replied, "Yeh man, definitely. I'm not gonna get involved but I agree".

17. The claimant relies on this exchange as evidence that Ms Ali witnessed racist behaviour. I was not able to place any real weight on this assertion. There are a number of reasons for this. First, Ms Ali did not give oral evidence and the respondent had no opportunity to test her assertion. Second, it was made in response to a question which led her straight to the answer. Third, there is no detail. Fourth, Ms Ali left the respondent's employment in circumstances that could at least suggest that she might be aggrieved with the respondent for reasons entirely unconnected to race.

Facts

18. Before reciting the facts, I ought to make clear that there are many areas where I was simply unable to resolve points of dispute. These gaps in the story generally occur where it is just the claimant's word against that of another person, and there were indicators that the passage of time had adversely affected the quality of the evidence. What follows is based mainly on the common ground, the evidence of the three most reliable witnesses, and the contemporaneous documents.

19. The respondent is a well-known DIY retailer. As most readers of this judgment will know, it operates in a similar way to a conventional supermarket. A typical shopper will collect a trolley, wheel it around the store, collect items and pass through the checkout to pay for them. At the checkout, their items will be scanned and, following payment, the trolley will be wheeled out to the car park.

20. The claimant grew up in Doncaster. His father is a solicitor. Along with his family the claimant follows the Sikh religion.

21. In September 2015, when the claimant was 17 years old, he began employment with the respondent on a fixed term contract based at the respondent's Doncaster store. He was assigned to the "front end" where his principal duty was to operate the checkout. Early inductions show that the claimant learned his job well. He performed at the expected levels for somebody at his stage of training.

Occasionally he needed coaching to scan items correctly, but his progress was sufficiently well rated that his contract was made permanent on 20 February 2016.

22. On 27 February 2017 the claimant took a period of sickness absence. On his return to work he was given a Green Return to Work Form under the respondent's sickness absence policy. The form had no immediate consequences but it meant that a second absence within the next 12 months would trigger an "Amber" warning.

23. In September 2016, the claimant went to university. By this time he was 18 years old. He took up residence in Chester. It was his first time living away from his parents. Wanting to keep his weekend job, he successfully applied transfer to the respondent's Chester store. Except for periods of leave and sickness, he worked every weekend at the Chester store until his university year was over. His last day of work in Chester was 17 June 2017 following which he immediately transferred back to Doncaster.

24. The Store Manager at Chester was Mr Andy Richardson. He was supported by a Deputy Manager, Mr Paul Cleland. The front end staff were managed by a team of three supervisors who reported to Mr Cleland. These were Mrs Ward, Mrs McAnally and Ms Karen Holden. Mrs McAnally in particular adopted an informal manner and was seen as something of a mother figure to the front end staff, many of whom were students.

25. Staff rotas were displayed so that all front end staff could see them. Underneath the weekly rota, the supervisors would display messages addressed to the entire team.

26. I happen to know that the City of Chester has an almost overwhelmingly white population. So did the respondent's Chester store. Of between 24 and 31 front end employees in that store, there were only three BAME employees when the claimant arrived. Their number reduced to one when the claimant transferred in June 2017. Beside the claimant, the BAME employees were Emine, who is Turkish, and Ms Ali, who is Asian.

27. The claimant initially got on well with his supervisors and the rest of the team. He made no secret of his Sikh religion and wore a bandana to cover his hair.

28. Generally, Mrs Ward and Mrs McAnally would speak to employees in an informal, friendly manner. Topics of conversation would include where they were going on holiday. The claimant was no exception. The claimant says, in general terms, that their manner with him after the first month was different from how they spoke to other employees. It is very hard for me to gauge whether or not this was the case. This is because many of the indicators of friendliness, such as body language and tone of voice, depend very much on perception. The claimant's lack of objectivity and the passage of time make it hard for me to know whether his impressions in this regard are accurate or not. As for precise language used, which would be another indicator, of how friendly they were, the details have become lost due to fading memories.

29. On 22 October 2016, the claimant attended for work with his father. He was suffering from conjunctivitis. Although he would have been willing to work, he was, quite understandably, sent home for the whole weekend. On a strict application of the sickness absence policy, the claimant qualified for an Amber warning because

he had had a previous absence during the preceding 12 months. When he returned to work on 29 October 2016, he was asked into a meeting by Mrs McAnally. On the table in front of them was a bright orange form that had been supplied by Mrs Woodcock. By the time of the meeting, Mrs Woodcock had already written onto the form the claimant's name, employee number and his reason for absence. During the meeting, Mrs McAnally completed the remaining details. She explained to the claimant that he was being given an amber warning and that future absences could trigger disciplinary action. The claimant signed the document. He felt put out because he would have worked the previous week had he been permitted to do so.

30. This brings me to the claimant's allegation of forgery. He refuses to accept that his signature is genuine, despite having seen the original version of the document. It is necessary for the claimant to maintain this stance, because otherwise his allegation that it was Mrs Ward who behaved unsympathetically to him in the meeting could not possibly be right. Part of the claimant's basis for alleging forgery is that the document that he says he signed was not of the same colour as the one which he was shown during the course of the Tribunal hearing. For that contention to be right, Mrs Woodcock's evidence would have to have been wholly untrue. She would have had to have taken another blank form at some point after the meeting, inserted the details retrospectively and then lied to me about it. I simply cannot accept that this is what happened.

31. It follows from my finding in relation to the forgery that I cannot rely at all on the claimant's evidence of how Mrs McAnally allegedly behaved. Nor can I place any weight on what the claimant says about Mrs Ward's conduct that day.

32. On an occasion which I was unable to pinpoint in time, Mrs McAnally was on the returns desk when a customer brought back some tiles along with his receipt. Examination of the receipt showed that the claimant had been the checkout operator at the time of purchase. Comparison of the receipt to the returned items revealed that the claimant had incorrectly scanned a set of tiles. Mrs McAnally raised the matter with the claimant. The manner in which she did so is a matter of dispute. Because of the passage of time it is very difficult for me to make any finding about her tone of voice or the precise language used.

33. I do not understand it to be part of the claimant's case that he should not have been challenged for incorrectly scanning the tiles on that occasion. Rather, he contends that he was pulled up more frequently than others for this kind of mistake and that the manner in which they did so was one of "telling off". If I have misunderstood the claimant's contention, and he maintains that the mere fact of taking him to task over incorrect scanning was because of his race or religion, I would make a positive finding that his race or religion had nothing to do with that decision. The respondent, in mid-2016, had failed a store report based on a mystery shopper visit. One of the grounds on which the store had failed was that items had been incorrectly scanned. It was entirely justified for supervisors to call out incorrect scanning whenever they saw it. Accurate scanning lies at the heart of effective stock monitoring and ensures revenue maximisation. It was a criterion on which stores could pass or fail in their store reports. This, I am sure, would have been the

overwhelming factor in the minds of all supervisors to the exclusion of any improper considerations of race or religion.

34. The failed store report caused the supervisor team to engage in a training programme to improve the scanning accuracy from its front end staff. One exercise in this programme was a role play devised by Mrs McAnally. In the role play she pretended to be a customer with three tins of paint in her trolley. The tins looked very similar, but were in fact differently priced. When Mrs McAnally approached the claimant's checkout, the claimant asked her to put all the tins on the conveyor belt. Mrs McAnally declined. The tone of voice in which she did so and the reason which she gave is a matter of dispute. At any rate, the claimant walked around the checkout and scanned the items individually. This is exactly what he should have done. Mrs McAnally told the claimant that he had passed the role play, but nevertheless the claimant felt that he had been set up to fail. Other than Mrs McAnally's evidence, there is nothing to indicate either way whether Mrs McAnally conducted the role play any differently with any of the other front end staff. As for the manner in which Mrs McAnally declined to lift the tins of paint, this is a finding of fact that is especially difficult due to the passage of time.

35. In late 2016, another mystery shopper visited the Chester store. They reported that whilst this time items had been correctly scanned, the checkout operator had not acknowledged the customer engaged naturally. On that criterion, therefore, the store had failed. This second failure caused the supervisors to take another series of corrective measures. Mrs Ward reminded the claimant to speak up to customers. The frequency with which she did this is a matter of dispute. So is the context. Mrs Ward says that she had observed the claimant simply nodding his head towards customers rather them greeting them verbally. It is her evidence that she reminded him of the importance of actually speaking to the customer rather than gesturing. The claimant, on the other hand, says that he was told to speak up because customers could not hear him. It may be that he is talking about a different incident. Either way, it is almost impossible to resolve the subtle differences between the claimant's and Mrs Ward's account.

36. In approximately December 2016, Mrs McAnally arranged for her husband to visit the Chester store as a mystery shopper. For whatever reason, he chose the claimant's checkout. Mrs McAnally observed the claimant serving her husband appropriately and well. She immediately told the claimant that she had passed a mystery shopper visit and said, "Well done". Her remark was accompanied by either a genuine smile or a sarcastic grin depending on whose version one is to believe. The surrounding circumstances do not point convincingly to either interpretation. It is unclear why the claimant's checkout in particular was chosen. On the other hand, a supervisor would normally want all of their team to perform well and would naturally be pleased if a member of their staff passed a mystery shopper test. Again, resolution of this dispute depends on subtle interpretation of facial expression. In this task I have been deprived of the benefit of any recent recollection or objective description.

37. At some point in December 2016, the claimant asked Mrs Ward and Mrs McAnally if he could take annual leave on 26 February 2017. The purpose of his request was so that he could be with his mother on her birthday as he had done every year

since he had been born. Sunday 26 February 2017 fell on the second weekend of the school half term holidays. Rota modelling from previous years suggested that that weekend would be busier than usual. Mrs McAnally and Mrs Ward therefore made the decision to refuse the claimant's request. They explained to him that the store would be short-staffed if his request was granted.

38. At some point in late December 2016, Mrs Ward spoke to the claimant about collecting trolleys. This was not his main role, and there was an employee whose principal task it was to collect trolleys in the car park. Nevertheless, it was expected of all employees as and when required that they would occasionally help out. Mrs Ward saw the claimant pushing one trolley at a time around the car park. The claimant may have had good reason for taking such a cautious approach. The car park is likely to have been busy in the run-up to Christmas and it would have been necessary to take particular care to avoid pushing a large column of trolleys into a parked car. At any rate, Mrs Ward asked the claimant to collect more than one trolley at a time. The tone and manner in which she did so is disputed. Once again, I have found it very difficult to resolve this clash of evidence. Both the claimant and Mrs Ward appear to have had a reasonable point of view. There is nothing about the circumstances that suggests that either the claimant's or Mrs Ward's account of the tone and manner of the conversation is inherently more likely.

39. Over the December holiday period the claimant took authorised leave to spend time with his family. By the time he had transferred to the Chester store he had already used up his leave entitlement for the entire year. He therefore needed permission to take additional leave, which was approved by Mrs Ward, albeit on an unpaid basis. Mrs Ward's flexibility in this regard tends to point away from any inclination to make life difficult for the claimant.

40. The claimant returned to work in January 2017. It is alleged that from 14 January 2017, Mrs McAnally started saying to the claimant, "I'm paying you", either in response to requests for holiday or when the claimant tried to leave at the end of his shift. This allegation is flatly denied by Mrs McAnally. There is no supporting evidence either way. There are general indicators that supervisors were prepared to be flexible in accommodating the claimant's holiday requests. Otherwise, there is nothing to suggest that one version of events is inherently more plausible than the other. The passage of over a year has made it difficult to explore the matter any further.

41. On 4 and 5 February 2017, the claimant took two days of annual leave. It is alleged by him that on the first of those days, a conversation happened at work in which he was accused of leaving a colleague on his own when he legitimately attempted to leave at the end of his shift. This is denied. It is, of course, impossible for the incident to have happened on the date alleged by the claimant. Whether it happened on any other date or not is another of these disputes that the passage of time has made difficult to resolve.

42. In advance of week commencing 26 February 2017 the weekly rota for that week was displayed on the staff notice board. Underneath the rota was a message stating, "Can all operators remember that they should be at their checkout 15 minutes before the start of their shift".

43. The claimant contends that on 25 February 2017, a Saturday, he was attempting to help a colleague called Martin when Mrs McAnally and Mrs Ward asking him what he was doing. Further details of this episode appear in the list of allegations. It is denied by both Mrs McAnally and Mrs Ward that this conversation ever happened. There are no witnesses. I found it very difficult to decide either way.

44. The next day, Sunday 26 February 2017, was the claimant's mother's birthday. Having no choice in the matter, he turned up for work. To his disappointment he saw that the store appeared to be over-staffed. That day's rota certainly suggests that staffing levels were generous compared to other weekends. Feeling aggrieved at having missed his mother's birthday for no good reason, he went to speak to Mr Cleland and complained. There is a dispute as to whether, in addition to complaining about this particular incident, he complained more generally about mistreatment at the hands of Mrs McAnally and Mrs Ward and whether he gave any particular examples. Seven months later, when interviewed as part of a grievance investigation, Mr Cleland denied this. It is hard for me to know exactly what the claimant said. If I were to try and make a finding based simply on the inherent likelihood of each version, I would tend to the view that the only thing that the claimant complained about was his mother's birthday. The thoroughness with which Mr Owens subsequently investigated the claimant's grievance leads me to believe that grievances were taken seriously. Had the claimant raised numerous incidents of bullying with Mr Cleland, I think it is likely that he would have taken it further. As it was, I preferred not to make a positive finding because of the passage of time.

45. On Saturday 4 March 2017 the claimant took another's day's leave. It is alleged that on this day he was told to "stop going to Paul" as described more fully in the list of allegations. The date of the conversation is clearly incorrect. What is harder to establish is whether this conversation happened at any other time. It is perhaps natural of the claimant, trying to reconstruct events many months later, to have chosen the weekend after his conversation with Mr Cleland as being the occasion when this conversation was most likely to have happened. That would be the most convenient fit with the remainder of his case. That fact suggests that there is at least the possibility that the claimant may have adapted his recollection to suit his case rather than the other way around. It is factor which, if I were forced to make findings of fact, I would have to take into account. Aside from that, all I have to go on is the claimant's word against that of Mrs Ward and Mrs McAnally. Even on the balance of probabilities, it is difficult to be able to reach a positive conclusion.

46. Some time around March 2017, Mrs McAnally's daughter, Josie, started work at the Chester store. She and the claimant got on well. They started sending messages to each other on social media. It is alleged that, about one week into Josie's employment, Mrs McAnally said to the claimant, "don't get any funny ideas". Mrs McAnally denies having said this. There are no witnesses. Both versions of events are inherently plausible. I found it difficult to say whose version I would prefer. It depends on fading memories.

47. In preparation for week commencing 26 March 2017, a notice was displayed underneath the rota for that week. It invited front end staff to approach the supervisors if they wanted overtime. It also warned them that they were

approaching the peak period of the year and asked front end staff not to book any holidays during that period.

48. On 19 March 2017, during the claimant's working hours, he went outside, sat on a bollard and struck up a conversation with a colleague whose shift had ended. Mrs Ward observed the claimant doing this and thought he was time-wasting. There is a dispute about whether she happened to find him outside or had been secretly monitoring his movements using the CCTV equipment. On this, I only have Mrs Ward's evidence which, if pushed, I would accept. At any rate, Mrs Ward told the claimant that she was taking action against him for time-wasting. Their conversation was documented on an A4 sheet with printed fields on either side. The reverse field was for a review in four weeks' time. Following the conversation, Mrs Ward caused an entry to be made on the respondent's computer system. This is most likely to have been done by somebody reading the form that had been completed. The entry stated that the claimant had been subjected to "informal action" for time-wasting. The sheet itself has gone missing.

    The claimant told me that he recalled seeing the word "warning" on the sheet. (To my mind it is not especially important whether or not his recollection of that detail is accurate). There is no documentary evidence to suggest that the four week review took place. Certainly there is no suggestion that there was any repetition of the claimant's time-wasting behaviour, or of any further management intervention to tackle it.

49. On the fringes of this incident there are disputes of fact about what Mrs Ward said to the claimant. Did she make a disparaging remark to him about the use of his legs? Was Mrs Ward's approach hypocritical when judged against her own alleged tendency to engage in conversations with Mrs McAnally on the shop floor? Were her actions justified in particular, as she says, by her having recently instructed the claimant to clear away trolleys in the car park and the claimant's apparent disobedience of that instruction? As to these matters, it is the claimant's word against that of Mrs Ward. I found it difficult to prefer one version over the other.

50. At some stage before 9 April 2017, a staff rota was displayed with an accompanying message informing all front end staff that "apron standards have slipped". This brings me onto an occasion on which Mrs McAnally spoke to the claimant about the presentation of his apron. It could well have been on 6 May 2017, as alleged by the claimant, but his reconstruction of the dates of incidents is unreliable. The one undisputed fact is that Mrs McAnally pointed out to the claimant that his apron was dirty. Other than that, the competing versions of the conversation differ markedly. It is Mrs McAnally's recollection that on the only occasion she can remember speaking to the claimant about his apron, she retrieved a clean one for him to wear. The claimant's recollection is that she did not do this, and that his own apron was in fact cleaner than those of his colleagues. Where the truth lies if difficult to establish. Nobody witnessed the conversation apart from the two protagonists.

51. On or about 22 April 2017, the claimant had an appraisal meeting which was documented on a form. Unfortunately, the form has gone missing. Ordinarily, this would not happen. Completed appraisal forms would be placed on Mrs Woodcock's desk where they would accumulate with other documents until Mrs Woodcock got

around to filing them. In the normal run of things, the document, once placed on the desk, would have been safely stored. One possibility is that the document was never placed there. It is unlikely that it would have gone missing from the filing cabinet because that was kept locked by Mrs Woodcock whose evidence I trust. Upon the claimant's transfer to Doncaster, all the documents in the filing cabinet were sent securely to the Doncaster store.

52. Beyond the fact of an appraisal meeting, virtually nothing is agreed. The claimant recalls that it was conducted by Mrs Ward. This is denied by Mrs Ward, who says that the meeting was conducted by Ms Holden. None of the three supervisors had any greater responsibility for appraising the claimant than any other. Where there has been a previous dispute of fact about the identity of a manager conducting a meeting with the claimant, I have found the claimant's evidence to be unreliable. On this basis I would tend towards a finding that it was Ms Holden and not Mrs Ward who conducted the meeting. As to what was said, in the absence of the document, it is hard to tell. Much depends on fading memories. I am alive to the possibility that an inference could be drawn from the respondent's failure to produce the document itself. Even allowing for the possibility of that inference, I do not think it is easy to find exactly what happened because of the unreliability of the claimant's evidence as to which manager conducted the appraisal.

53. During one weekend (because of the claimant's inconsistency about dates, I could not be sure which weekend this was), the claimant went to his father's holiday cottage in Conwy. He spent the whole weekend there. It is alleged by him that, the weekend beforehand, he had a conversation with Mrs McAnally in which he said he would be going to North Wales. His evidence is that Mrs McAnally replied, Not my area I hope?". Mrs McAnally recollects the conversation rather differently. She says that she showed an interest, found out from him where the cottage was, and told him that he would be travelling past the junction where she lived in Conwy. Nobody else witnessed the conversation. Of the incidents described so far, this is one of the more overtly hostile actions alleged against Mrs McAnally. In order to try and get a the truth of what happened, I have asked myself whether there is any reason why Mrs McAnally would have taken a personal dislike towards the claimant. Most of the things she is alleged to have done up to this point relate to the way in which she has handled performance issues. One possibility, of course, is that Mrs McAnally had a personal animosity towards the claimant because of his race or religion. If that was the case, I do not understand why it did not manifest itself at all for the first month. Relations on either version of events only appear to have got worse following occasions of either absence or imperfect performance. If forced to choose between the two versions, I would hesitantly prefer that of Mrs McAnally. Far less controversially, my view is that the fact-finding process here is extremely difficult and that the passage of time has contributed to the difficulty.

54. On another occasion of uncertain date, the claimant was collecting trolleys in the car park at closing time. It is the claimant's evidence that when he tried to return to the store he found the door locked, he entered the store by a different door to find Mrs Ward and Mrs McAnally making fun of him in the way described in the list of allegations. The only occasion that Mrs Ward recalls that bears any similarity to this alleged incident is one in which a colleague of the claimant had been tasked with collecting the trolleys but had failed to do so. Mrs Ward told me that she had

reprimanded that colleague, effectively taking the claimant's side. These two versions of events do not live in the same world and may indeed have happened on two entirely separate occasions. According to the claimant, the incident was witnessed by two front end members of staff. The respondent did not pro-actively explain why those witnesses did not give evidence. Nor did the claimant ask for such an explanation. Without the reasons for witnesses' nonattendance having been explored in evidence or submissions, I did not feel it safe to draw any inferences adverse to the respondent. What I am left with is the claimant's version against that of Mrs McAnally and Mrs Ward. It is very difficult for me to untangle it.

55. Round about April 2017, the claimant was travelling to work by bus when it became stuck in traffic. I was unable to attribute a more precise date to this occasion because the claimant's evidence on this point clashes with the alleged dates of his holiday in Conwy. Be that as it may, it is common ground that when the claimant realised he was likely to be late, he telephoned the Chester store and spoke to Mrs Ward. He then continued on his journey. As it happened, he arrived at work just in time. It is the claimant's case that on his arrival, Mrs Ward told him that he should have been there 15 minutes early. This is denied by Mrs Ward, who says that she would have had no reason to chide the claimant who had a legitimate reason for being late and who had appropriately notified her. I have not found it easy to establish where the truth lies. Assuming, however, that the claimant's version is correct, Mrs Ward would be doing no more than reiterating the general statement of expectation communicated to all staff underneath the rota for week commencing 26 February 2017. There is nothing to suggest that the claimant's race or religion would be a factor.

56. By May 2017, the claimant had only a few weeks to go before he was due to transfer back to Doncaster for his 12 week summer break. He had been invited to his cousin's wedding which was due to take place in August 2017. The wedding was at a weekend and would clash with one of his Doncaster working days. He naturally wanted time off work to attend the wedding. His first port of call was Mrs Ward. He asked her to authorise his leave. She told him that that would be a matter for the Doncaster store to decide. She made a telephone call to a woman called Vanessa in Employee Relations at the Doncaster store. Vanessa informed Mrs Ward that the claimant would not be allowed to take leave, either paid or unpaid, and would be expected to work. The claimant also sought the intervention of Mrs McAnally. She spoke to a supervisor in Doncaster by the name of Anne. Consistently with Vanessa, Anne told Mrs McAnally that the claimant would be expected to work for the whole of the 12 weeks whilst he was in Doncaster.

57. Mrs Ward relayed the bad news to the claimant. She tried to explain Doncaster's standpoint in a way that would have particular relevance to him. She knew that the claimant was studying Business Management at university. She therefore decided to use the analogy of a business plan to help explain to the claimant the importance of predictable working times. The precise wording by which she did this is a matter of dispute. On either version, however, the gist was the same. She was trying to explain that for a business to operate effectively it needed to predict when employees would be working and when they were not. To the extent that the claimant's allegations in this respect depend on the manner and tone with which she tried to convey this explanation, it is very difficult for me to find exactly how she

said it. If pushed to make a finding, I would lean towards the conclusion that Mrs Ward was trying to be supportive. She had taken the trouble to think about how to put her explanation into a relevant context. It also shows that she had taken sufficient interest in the claimant to know what degree he was studying. To my mind this points away from behaviour motivated by personal dislike.

58. On 15 May 2017 an email was sent from the Doncaster store to the Chester store about potential requests for leave by the claimant. It specifically instructed managers in Chester not to authorise any holidays for the period when he was supposed to be working in Doncaster.

59. I am satisfied that both Mrs Ward and Mrs McAnally tried to help the claimant get time off for his cousin's wedding intervening in what was essentially a matter between the claimant and his managers in Doncaster. It is hard to imagine how anybody, white or BAME, Sikh or not, could have been treated more favourably by either Mrs Ward or Mrs McAnally in this respect. To the extent that they could have been expected to do any more, I am quite satisfied that they were not influenced in any way by considerations of race or religion. The reason why I have been able to reach a positive finding in relation to these events and not in relation to others is because of the contemporaneous notes that both Mrs McAnally and Mrs Ward took. I do not find the claimant's allegation that these notes were forged to have any more substance than his similar allegation in respect of the Amber warning form.

60. It is alleged by the claimant that, from mid-May 2017, Mrs Ward started micromanaging the claimant's timekeeping at lunchtime, as more fully set out in the list of allegations. This is denied by Mrs Ward. Her uncontradicted evidence is that she closely monitored the timekeeping of a white colleague. As for whether she resorted to this practice in the claimant's case, it is her word against that of the claimant. The delay has made that dispute harder to resolve.

61. In about May 2017, Mrs Ward struck up a conversation with the claimant. She told him that she had been watching the BBC programme, *Crimewatch,* on television and seen a suspect whose first name was Harjit. Mrs Ward's uncontradicted evidence to us was that the suspect's full name was Harjit Singh. She asked the claimant whether the name (be it Harjit or Harjit Singh) was popular in the claimant's culture. Those facts are undisputed. It is the claimant's case that Mrs Ward also said, "I thought it was you, but he was wearing a turban". When the claimant pointed out that he, too, wore a turban on formal occasions, Ms Ward allegedly replied, "Ah, well, it must have been someone who looks like you". These remarks are denied by Ms Ward.

62. Following the conversation, the claimant did not show any sign of being taken aback. On his own evidence, it was only later that he thought Mrs Ward's remarks were inappropriate.

63. I am able to find positively as a fact that Ms Ward did not say, "it must have been someone who looks like you". Such a remark would have been obviously offensive. It would have immediately have given the impression that Mrs Ward thought that Sikhs all looked alike. I would have expected the claimant to have realised straight away that Mrs Ward's comment had been inappropriate. I would also have

expected that comment to have featured in the claimant's father's subsequent lengthy grievance letter. It did not.

64. What is left is a dispute about whether there was any conversation about the *Crimewatch* suspect wearing a turban. That dispute I have found much harder to resolve. It is the claimant's word against that of Mrs Ward and both their memories of the conversation are likely to have faded.

65. Part of this claim relates to the claimant's requests for overtime in May and June 2017. I was unable to make findings about how many requests the claimant made, to whom he made them or when they were made. Nor was there any evidence of how much overtime the claimant's colleagues were given to do. Although disclosure of the colleagues' payslips would be an indicator of how much overtime they did, there would remain a central dispute of fact, namely the timing of the claimant's requests compared to those of his colleagues. If the colleagues' requests came in first, it would suggest that overtime was allocated on a "first come first served" basis and had nothing to do with race or religion. If, on the other hand, the claimant was first to ask for overtime, and was still refused it, I might look more closely into the possibility that race and/or religion were factors in overtime allocation. Who, then, put their requests in first? The question is easy to ask, but hard to answer because it depends on witnesses' recollections.

66. The claimant's last day of work at the Chester store was 17 June 2017. I am quite satisfied that that particular day the claimant was not mistreated in any of the ways of which he now complains. Despite having specifically alleged that certain events happened on particular days, at no stage has the claimant ever alleged that anything untoward happened on 17 June 2017. I have taken into account the claimant's clarified case that certain types of discriminatory behaviour (such as criticising the claimant for not talking loudly enough, criticising his scanning, saying "I'm paying you", etc) are alleged to have continued until "June 2017". In theory this could include 17 June 2017, but in reality the possibility is very unlikely. Had there been an incident of this kind on the claimant's last day of work, he would have mentioned it. In his oral evidence, the claimant told me that he had attributed specific dates to particular occasions of discrimination by "putting them in order from first to last using the weekends I worked as a framework". That being the case, I would have expected any event that had occurred on his very last day to be something that he could more easily pinpoint in time than those which allegedly occurred earlier. It is significant in my view that of all the alleged occasions on which the claimant was criticised for having a dirty apron, the claimant could only remember one date upon which this had happened. This date was relatively late on in the claimant's time at the Chester store.

67. At no time whilst the claimant was working at the Chester store did the claimant complain to Mrs Woodcock about the way he had been treated, nor did he complain to Mr Richardson.

68. On 19 July 2017, the claimant exchanged messages on social media with Mr Lee Hughes-Jones, a fellow university student who had worked with him in Chester. His role was not "front end", but in the tiles section of the store. Mr HughesJones lived in Rhyl and, like the claimant, had transferred back to his home store so that he could work during the holidays. Their message conversation revealed that Mr

Hughes-Jones had been granted a transfer back to Chester for his second year at university. Though the claimant did not know this, the reason why Mr Hughes-Jones had been offered a transfer was because an employee in the tiles section of the Chester store had resigned, creating a vacancy. When the claimant read Mr Hughes-Jones' message, he was confident that he, too, would be able to return to Chester.

69. On 7 August 2017, the claimant telephoned Mrs McAnally to enquire about transferring back to Chester after the holidays. Mrs McAnally told the claimant that she would not be able to give him a definite answer until after the Chester store assessment centre day when decisions were made in respect of external applicants. The assessment centre was due to take place on 15 August 2017. In an exchange of emails on 7 August 2017, Mrs McAnally and an HR administrator from Doncaster provisionally agreed the claimant's annual leave from the Chester store for October 2017. It was also provisionally agreed that the claimant would have a new contractual working pattern when he returned to Chester.

70. The assessment centre went ahead on 15 August 2017. Unfortunately, shortly beforehand, Mr Richardson was instructed by his Regional Manager to impose a recruitment ban at the Chester store. Selectable candidates from the assessment centre were not offered immediate roles but were "kept warm" for when vacancies became available. More relevantly to this claim, there was no room to accommodate a transfer for the claimant back from Doncaster. Mrs Woodcock passed on the news, and its unwelcome implications for the claimant, by email to the Doncaster store on 17 August 2017.

71. The decisions about whether or not to allow the claimant to transfer, and how to inform him that his transfer request was unsuccessful, were not made by Mrs McAnally.

72. Either that day or the following day, Ms Paul Clark, HR administrator at Doncaster, told the claimant the bad news. This prompted the claimant to do two things. He looked for other term time employment in Chester and immediately found a temporary job in Argos. He also did something that he had never done before. He complained to his father about the way the respondent had treated him. Initially the only sore point that he mentioned was his sense of unfairness at not being transferred back to Chester. It seemed odd to both the claimant and his father than he should have been led to believe on 7 August 2017 that he had a job to go back to, only to be told less than a fortnight later that there were no vacancies. Alarm bells also rang because Mr Hughes-Jones had not encountered any such difficulty. Mr Hughes-Jones is white and does not follow the Sikh religion.

73. The claimant's father's initial reaction was to put pressure on the claimant to ask the Chester store to reconsider. At this point, or at any rate within a few days, the claimant told his father than he did not want to go back anyway. This was not an easy thing for the claimant to tell his father. Breaking down in tears, the claimant said that he had been mistreated by Mrs McAnally and Mrs Ward over a long period of time. Together they discussed the detail of what had happened. The end product was a long grievance letter written by the claimant's father and dated 30 August 2017. The contents of that letter, by and large, form the basis of the allegations of discrimination and harassment that I have to consider.

74. Before briefly describing how the claimant's grievance was handled, I return to the question of why the claimant was not allowed to transfer back to Chester. I am satisfied that the reason was entirely due to the recruitment freeze. The circumstances of the claimant are materially different from those of Mr HughesJones. Mr Richardson had already committed the respondent to offering Mr Hughes-Jones a role before the recruitment freeze was announced. The decision to impose the recruitment freeze was completely out of the hands of Mrs McAnally, Mrs Woodcock and Mr Richardson. I accept Mrs Woodcock's evidence that the recruitment freeze affected not just new starters but applicants to transfer from other stores. This is not a case where there is any sign of subconscious discrimination. Mrs Woodcock was merely applying somebody else's high level management decision to everybody whom it affected, regardless of race or religion.

75. Investigation of the claimant's grievance was assigned to Mr Rob Owens, the Unit Manager at the Wallasey store. It is not necessary for me to go into the detail of his investigation. I am satisfied that it was careful and thorough. Mr Owens spoke to the claimant, Mrs McAnally and Mrs Ward. He interviewed five other members of staff at the Chester store including Ms Holden and Mr Cleland. Wanting a full picture of the claimant's experience at B & Q, the claimant arranged to speak with various members of staff at the Doncaster store over the telephone. They told him that the claimant had never raised any concerns about bullying or harassment from his time in Chester.

76. Having gathered the relevant evidence, Mr Owens set about making his decision. He did not find it easy. The claimant's allegations were denied by Mrs McAnally and Mrs Ward but none of them appeared to Mr Owens to be lying to him. He compared the differing versions of events against contemporaneous documents such as the rota messages. His ultimate conclusion was that there was no evidence that the claimant had been bullied or mistreated. Mr Owens communicated his decision to the claimant in a detailed letter dated 6 October 2017.

77. In the meantime, the claimant and his father were considering taking the matter out of the respondent's hands. The claimant had already resigned his employment with the respondent. By a letter dated 12 September 2017, the claimant indicated that he wanted his grievance investigating formally. His letter added, "I will be taking legal advice as I understand there are time limits to bring a claim in the Employment Tribunal and I need to ascertain when this time limit starts to run". On 14 September 2017 the claimant notified ACAS of his intention to bring a claim to the Employment Tribunal. He received his certificate from ACAS on 14 October 2017. When he received the grievance outcome letter, he replied stating his dissatisfaction with the decision. His reply indicated that, if necessary, he would seek legal advice with the intention of issuing a claim in the Employment Tribunal.

78. The claimant's father also replied to Mr Owens. His email stated: "It's biased people like you who inspire disgusting people like Erica McAnally and Sue Ward to commit racially motivated acts against innocent and vulnerable young people because you are allowing them to get away with it and they know it. That might be the outcome of your internal investigation but an Employment Tribunal will conduct itself impartially and with dignity."

Relevant Law

Direct discrimination

79. Section 13(1) of EqA provides:

> (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.

80. Section 23(1) of EqA provides:

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

81. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

82. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of

the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572*.*

83. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Harassment

84. Section 26 of EqA relevantly provides:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the … effect of— (*i*) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

> (4) In deciding whether conduct has the effect referred to in subsection (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.

85. Subsection (5) names race and religion among the relevant protected characteristics.

86. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Time limits

87. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

88. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”. I shall read out the

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'… 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

89. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

90. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

91. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

    91.1. the length of and reasons for the delay;

    91.2. the effect of the delay on the cogency of the evidence;

    91.3. the steps which the claimant took to obtain legal advice;

    91.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

    91.5. the extent to which the respondent has complied with requests for further information.

Burden of proof

92. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

93. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

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

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

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

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

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

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

94. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

95. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

96. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions

<u>August 2017 – refusal of transfer not discriminatory</u>

97. It follows from my finding of fact at paragraph 70 that the refusal to transfer the claimant back from Doncaster to Chester was not because of the claimant's race or religion.

98. As for the manner in which this was communicated to the claimant, the person who is alleged to have acted with the discriminatory motivation (Mrs McAnally) simply had no part in the decision (see paragraph 71). That was all down to Mrs Woodcock. Whether it was a good decision or a bad decision to let the Doncaster store break the news is open to debate. It was never put to Mrs Woodcock, however, that her decision in this regard was motivated in any way, consciously or subconsciously, by the claimant's race or religion. Had I been called upon to make a decision in this regard, I would have found the claimant's race or religion played no part in Mrs Woodcock's decision.

<u>No discrimination from 15 June 2017</u>

99. It also follows from my findings at paragraph 66 that there was no other discrimination or harassment on or after 15 June 2017. The claimant's only working day in Chester from that date was 17 June 2017. I have found that the claimant

was not mistreated on that day. If any discrimination or harassment occurred at all, it must have been done, or must be treated as having been done, earlier then 15 June 2017.

100. As I recorded at the outset, it is common ground that for all such discrimination and harassment the claim was presented after the expiry of the statutory time limit. I must therefore consider whether it is just and equitable to grant an extension.

Extension of time

101. The first factor I have considered is the length of the delay. Depending on the allegation under consideration, the delay ranges from a few days to approximately nine months. For much of that period, the claimant has a good reason. He was only a teenager, living away from home for the first time. He did not want to upset his parents by burdening them with his unhappiness at work.
Once he finally opened up to his father, however, that reason disappeared. Having delayed for so long, it was particularly important for him to act promptly. He knew about time limits. His father, being a solicitor, certainly ought to have known that time limits existed for bringing claims to tribunals. With some basic research, he could have found out what made the limitation clock start to tick. Assuming that his father's area of expertise was not employment law, he may not immediately have known about the effect of early conciliation and the importance of notifying ACAS within the primary time limit. If he did not know these things, however, he was well placed to find out. From the moment the claimant's father wrote the grievance letter of 30 August 2017, both the claimant and his father knew that most of his claim related to things that had happened before his last day at work in Chester. If he wanted to be sure of being able to present a valid claim in respect of those incidents, he should have realised the importance of notifying ACAS promptly.

102. This is not a case where the respondent has withheld information or, at any rate, where the timing of its disclosure of information has had any bearing on the delay in presenting the claim.

103. Virtually all of the behaviour of which the claimant complains was, on his own account, directly witnessed by him. Strictly speaking, it is not true to say that he knew prior to 15 June 2017 all the facts upon which he now bases his complaints of discrimination and harassment. It may be that having been turned down for a transfer in August 2017 helped him come to the realisation that the mistreatment he was allegedly suffering was because of his race or religion. Nevertheless, there are some facts which, if they were true, would have been known to the claimant considerably earlier than that, and which would have pointed towards a discriminatory motivation at that time. I have in mind in particular the claimant's version of the *Crimewatch* conversation.

104. I cannot ignore the marked effect that the delay has had on the quality of the evidence. By now it ought to be abundantly clear that the delay has severely hampered my ability to find the facts. For each allegation there is a dispute of fact that goes to the heart of the statutory test of whether there was discrimination or harassment or not. Dealing with the allegations individually:

104.1. *29 October 2016 Return to Work* – there is no reliable evidence from the claimant as to what treatment he received, so it is very difficult to speculate on how others would have been treated or the reason for his treatment.

104.2. *Telling the claimant to speak up* – although it is undisputed that this happened on one occasion, the essence of the complaint is that it happened frequently and in an unsupportive manner. That allegation is disputed. Unless the nature of the treatment can be established I cannot decide what the reason for the treatment was.

104.3. A similar difficulty exists in relation to the criticism of the claimant's scanning (see paragraphs 32 and 33).

104.4. *Role play* – see paragraph 34 for the difficulties in finding facts here. Key questions include how Mrs McAnally treated others and whether there was anything about the exercise that was detrimental to the claimant within the meaning of section 39(2) of EqA.

104.5. *Mystery shop* – On the respondent's version, the claimant could not reasonably have understood Mrs McAnally's treatment of him to be detrimental. I have explained at paragraph 36 why it was hard to decide whose version to accept.

104.6. *"I'm paying you"* – There is a dispute about whether or not this treatment occurred at all. See paragraph 40 for the difficulties in resolving it.

104.7. *4 February 2017 – End of Shift* – Paragraph 41 deals with this allegation. There is a dispute about whether the less favourable treatment happened or not. The claimant's evidence is weakened by the inconsistency over the dates. This is a symptom of the problems associated with delayed claims.

104.8. *Trolleys* – see paragraphs 54 and 38 for the difficulties in finding facts about the particular incidents. There are no records of how often each frontend member of staff was expected to assist with trolleys. It is only fading memories that would enable me to find whether or not the claimant was treated less favourably than others.

104.9. *Martin* – this is another allegation where the alleged treatment is flatly denied and which depends on one person's word against another's.

104.10. *Josie* – Again, the treatment is a matter of dispute. Paragraph 46 sets out why the delay has made it hard to resolve.

104.11. *"Not my area I hope"* – Paragraph 53 explains why I would be inclined to find on the balance of probabilities that the claimant was not treated in the manner that he alleges, but that a finding either way is particularly difficult because of the passage of time.

104.12. *Claimant's mother's birthday* – Here there is no real dispute about the way in which the claimant was treated: he was undoubtedly refused the day off. What I have to decide is the reason why the claimant was treated in that way. It involves examining the conscious and subconscious mental processes of Mrs McAnally and Mrs Ward at the time of refusal in December 2016. There is nothing to contradict their evidence that the last weekend in February was

expected to be busy. It would make sense that more people would be doing DIY jobs at home during school half term. It still does not automatically follow that this was Mrs McAnally's or Mrs Ward's real reason. Because of the delay, it is difficult to test whether it was or not.

104.13. *Cousin's wedding* – Here I was able to make positive findings of fact. The delay did not diminish the quality of the evidence because of the contemporaneous notes and e-mail. Nevertheless it would not be just and equitable to extend the time limit for this allegation, because it is doomed to fail on its merits. Mrs Ward and Mrs McAnally did not treat the claimant any less favourably than they would have treated – or indeed could have treated – others. In any event, the claimant's allegation of less favourable treatment is not made out, because Mrs McAnally did not make the decision to refuse the claimant's request. See paragraphs 56 to 59.

104.14. *"Stop going to Paul"* – The central question here is whether the alleged less favourable treatment happened or not. The reliability of the claimant's account is undermined by the inconsistency in dates, in this case suggestive of recollection having been tailored to fit the claimant's case: see paragraph 45.

104.15. *Appraisal* – See paragraph 52 for the problems the delay, and other factors, have caused in finding whether Mrs Ward even carried out the claimant's appraisal at all, let alone whether she treated the claimant any differently from how she would have treated others.

104.16. *Lock-out* – The difficulties in finding whether or not the alleged treatment occurred at all are out at paragraph 54. They

104.17. *15 minutes early* – There is a dispute about how the claimant was treated. The dispute depends on one person's fading memory against that of another. There is more reliable evidence, unaffected by the delay, about whether Mrs Ward would have treated others more favourably. That is the rota message. It tends to suggest that Mrs Ward expected everyone to arrive early, regardless of race or religion, but I draw back from making a finding in that regard, because of the difficulties in establishing what treatment the claimant received.

104.18. *Apron* – Again, the claimant's recollection clashes with that of Mrs McAnally and Mrs Ward as to how they treated the claimant. Only once the treatment is established can the tribunal properly examine the reason for that treatment.

104.19. *Lack of friendly manner* – the delay and the claimant's lack of objectivity has made it hard to determine in what Mrs McAnally and Mrs Ward spoke to him and how that compared with their conversations with others. See paragraph 28.

104.20. *Overtime* – The passage of time has made it difficult to find a pivotal fact that would help to establish the reason why the claimant was refused overtime. Paragraph 65 explains.

104.21. *Monitoring timekeeping at lunchtime* – Mrs Ward's uncontradicted evidence suggests that, if she did treat the claimant in the manner alleged, it was not because of race. I would not actually begin to make such a finding until I could find whether Mrs Ward actually did monitor the claimant's lunch break times or not. The delay has made that exercise more difficult.

104.22. *Crimewatch* – Some of the alleged unwanted conduct and less favourable treatment did not happen (paragraph 63). To the extent that I was able to make such a finding, it clearly would not be just and equitable to extend the time limit, because the claim would fail on its merits. There are other areas of disputed fact that were harder to determine because of the delay (paragraph 64)

105. It is the impact on the quality of the evidence which, amongst all the factors, weighs most heavily in the balance in this case. It would be unfair to extend the time limit because of the real risk that, on weak evidence, I might reconstruct a history of events which is entirely wrong. An extension of time is neither just nor equitable. The Tribunal therefore has no jurisdiction to consider any complaint of discrimination or harassment arising out of the events prior to 15 June 2017.

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Employment Judge Horne

Date: 2 August 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

22 August 2018

FOR THE TRIBUNAL OFFICE