Case No: 2302913/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Ms L Grayson**
Mr N Shanks

BETWEEN:

Mr M Mahenthiraraja

Claimant

and

Wm Morrisons Supermarket plc

Respondent

ON: **1-6 November 2018 (4 days)**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr N Singer, Counsel**

REASONS FOR THE JUDGMENT DATED 6 NOVEMBER 2018 (REQUESTED BY THE CLAIMANT)

1. In this matter the claimant complains that he was unfairly dismissed, directly discriminated against because of his race and that the respondent breached its duty to make reasonable adjustments. The issues arising in those claims were set out in the Order of Employment Judge Williams QC dated 23 January 2018. Since then the respondent has conceded that the claimant, who was diagnosed in late 2013 with narcolepsy with cataplexy, was disabled pursuant to the Equality Act 2010 ('the 2010 Act') at all material times. The tone of the proceedings, and particularly cross-examination of the claimant, was kept as calm and non-confrontational as possible in light of the claimant's condition. **Evidence**

2. We heard evidence from the claimant and for the respondent from:
    a. Mr P Owens, Senior Manager;
    b. Mr P McKenna, Customer Service Manager;
    c. Mr P Melton, Store Manager;
    d. Mr A Murrell, Senior Manager; and
    e. Mr D Wooden, Senior Manager.

We were also referred by the respondent to a signed witness statement of Ms A Martin, People Manager. We read this but afforded it appropriate weight to reflect that Ms Martin was not present to attest to its truth or be questioned about its contents.

3. We had an agreed bundle of documents before us and both parties made oral submissions at the close of the evidence.

Relevant Law

4. Unfair dismissal: by section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

5. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

6. In this case the respondent relies upon conduct and therefore the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

7. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
    a. genuinely believed the claimant was guilty of misconduct;
    b. had reasonable grounds on which to sustain that belief; and
    c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

8. Further, the Tribunal must assess – again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

9. If a dismissal follows earlier disciplinary warnings issued to a claimant and those warnings were taken into account by the respondent, the Tribunal's task remains to consider whether it was reasonable for the employer to treat

the conduct, taken together with the earlier warning(s), as sufficient reason to dismiss. The Tribunal will not re-open and examine those earlier warnings unless it has cause to consider that they may have been issued in bad faith, for an oblique motive or were manifestly inappropriate (Davies v Sandwell MBC [2013] IRLR 374 CA).

10. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

11. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

12. Direct race discrimination: section 13 of the 2010 Act provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Race - which includes colour, nationality and ethnic or national origins - is a protected characteristic

13. To answer whether treatment was "because of" the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

14. It is a matter for the Tribunal to determine what amounts to less favourable treatment to be interpreted in a common-sense way and based on what a reasonable person might find to be detrimental.

15. Section 23 of the 2010 Act refers to comparators and says that there must be no material difference between the circumstances relating to each case. The relevant "circumstances" are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC 2003 IRLR 285).

16. The position on burden of proof in claims of discrimination is set out at section 136 of the 2010 Act. In summary, if there are facts from which the Court could decide, in the absence of any other explanation, that the claimant has been discriminated against then the Court must find that that discrimination has happened unless the respondent shows the contrary. It is generally recognised however that it is unusual for there to be clear evidence of discrimination and that the Tribunal should expect to consider matters in accordance with these provisions and the guidance set out in Igen v Wong and others ([2005] IRLR 258) confirmed by the Court of Appeal in Madarassy v Nomura International plc ([2007] IRLR 246). In the latter case it was also confirmed, albeit when applying the pre-2010 Act wording, that

a simple difference in protected characteristic and a difference in treatment is not enough in itself to shift the burden of proof; something more is needed (although that 'something more' need not be a great deal – Deman v CEHR [2010] EWCA Civ 1279).

17. It is important in assessing these matters to consider the totality of the evidence and that the Tribunal is willing, where appropriate, to draw inferences and to pay due regard to the fact that discrimination is often not conscious. Furthermore, the evidence that racial factors contributed to a decision or a course of action may well emerge from surrounding circumstances and previous history, not just the alleged act of discrimination itself, particularly in cases where the decision taken or course of conduct complaint about is capable of being influenced, often not consciously, by idiosyncratic factors or subjective analysis (Anya v University of Oxford [2001] ICR 847CA).

18. Breach of duty to make reasonable adjustments: section 20 and schedule 8(20) of the 2010 Act make provisions with regard to the duty to make adjustments. If an employer applies a provision, criterion or practice which puts a disabled person at a substantial disadvantage in comparison with persons who are not disabled, that employer has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not arise if the respondent did not know, and could not reasonably be expected to know, that the claimant was disabled and was placed at that disadvantage (Wilcox v Birmingham CAB Services Ltd 2011).

19. Section 212(1) states that "substantial" means more than minor or trivial.

20. The test whether it was reasonable to make a particular adjustment is an objective question for the Tribunal to answer (Tarbuck v Sainsbury's Supermarkets 2006 UKEAT).

21. In the case of Environment Agency v Rowan ([2008] IRLR 20), the Employment Appeal Tribunal held that in a claim of failure to make reasonable adjustments the Tribunal must identify:
    a. the provision, criterion or practice applied by the employer;
    b. the identity of the non-disabled comparators where appropriate; and
    c. the nature and extent of the substantial disadvantage suffered by the claimant.

22. Time limits: any complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act complained of or such other period as the Tribunal thinks just and equitable (section 123 of the 2010 Act). Where the alleged discriminatory act is one of the failure to act, sections 123(3) & (4) provide that the failure occurs when the person in question decided on it and in the absence of evidence to the contrary, that failure is taken to occur when that person does something inconsistent with doing the act, or otherwise on expiry of the period in which they might reasonably have been expected to do it.

23. It is clear that the burden is on the claimant to convince the Tribunal that the discretion should be exercised (Robertson v Bexley Community Centre [2003] IRLR 434 and O'Brien v Department for Constitutional Affairs [2009] IRLR 294 CA) and that the Tribunal has a very wide discretion in determining whether to do so. It is entitled to consider anything that it considers relevant subject however to the principle that time limits are exercised strictly in employment cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so.

24. The Court of Appeal has also confirmed that when considering this discretion, Tribunals should adopt as a checklist the factors mentioned at section 33 of the Limitation Act 1980 (Chief Constable of Lincolnshire Police v Caston ([2010] IRLR 327).

Findings of Fact

25. Having assessed all the evidence, both oral and written, we find on the balance of probabilities the following to be the relevant facts.

26. Background

27. The claimant is dark-skinned and of Sri Lankan, Tamil origin. He commenced employment with the respondent, a large well-known national supermarket, in November 2011. He was employed as a customer services assistant at the Mitcham branch.

28. The respondent has a series of well-established internal policies which applied to the claimant; in particular grievance, disciplinary and social media policies. All contained the sort of provisions one expects to see in such policies from a large, well-organised employer.

29. Specific provisions in the social media policy were:

> 'In short, we want social media to be used for constructive conversations, so please don't post, comment or upload inappropriate content relating to Morrisons, your colleagues…
>
> Key Points…
>
> • Breaching the policy can result in disciplinary action'
>
> and
>
> 'Please don't post comments that undermine your business. Be smart, respectful and confidential:
>
> • Smart: Your comments can affect our reputation and could be in place for a long time'
>
> and
>
> 'Don't - Upload anything that could show Morrisons in a negative light or damage anyone's reputation.'

30. The claimant acknowledged receipt of the employee handbook and also his responsibility to familiarise himself with the respondent's policies issued from time to time. The copy of the social media policy before us was last updated in August 2017 and there was a copy poster issued by the respondent (although the claimant did not recognise it) which referred to the social media policy in similar terms. This was last updated on 26 November 2012. These documents indicate that from at least 2012 the respondent had been notifying its employees of their responsibilities in this regard and the claimant could reasonably be expected to have been aware of them.

31. In February 2017 Mr Owens, already an employee of the respondent but relatively inexperienced in management, started working at the Mitcham store as a senior manager. He reported to the store manager (then Mr Tarigopula and later Ms Hemsley) and had a number of team managers reporting to him. One of those teams was the grocery team in which the claimant worked.

32. Comments by both Ms Martin and Mr Murrell confirm that this store had not been particularly well run before the arrival of a new management team during 2017 and with that new team there was a renewed focus on compliance with rule and procedures.

33. <u>March/April 2017</u>

34. On 17 March 2017 Mr Owens challenged the claimant about the speed with which he was unloading a pallet of goods. The respondent has a standard 'case rate' which suggested that the task could be done in about an hour. Mr Owens was aware, from the claimant, that he had a medical condition although he was not too sure about the details. He was however willing to accept that it could take the claimant two hours to perform the task but the claimant told Mr Owens that it would take him four hours. Mr Owens felt that this was unacceptable. No formal action was taken by Mr Owens on this occasion.

35. On the same day however the claimant raised a grievance about Mr Owens conduct. He said:

> 'We have a new senior manager, he's been picking on all staffs including me, and he has seen my work. Today he has picked on me by saying that i have to finish 2 pallets of bws and a pallet of health and beauty. He's also aware of my medical condition which is narcolepsy with cataplexy. I have been with the company for 5years and I have never been treated in this way. Can you please take this matter serious and find a solution, if you want more witnesses, I'll provide you with their details. Now i feel depressed and want to go home.'

36. That grievance was subsequently investigated by Mr McKenna as described below. We accept the explanation given by him for the delay in holding the grievance interview which was that it took time to find a suitable manager. It is also likely that this was compounded by the store generally not being very well run at that time.

37. In the meantime, there was a further incident between the claimant and Mr Owens. On 24 March 2017 the claimant was due to finish his shift at 10pm

but Mr Owens observed him leaving the store early. He called the claimant back into the store and asked him why he was leaving early. The claimant said he had finished his work and was leaving as he had to catch a bus at 10pm and if he missed that one he would have to wait another 14 minutes. Mr Owens told him that was unacceptable. The situation escalated into an altercation during which the claimant behaved aggressively towards Mr Owens to the extent that when Mr Owens later left the store he was escorted to the station for his own safety.

38. On the following day Mr Tarigopula held investigatory meetings with Mr Owens, a store colleague who wished to remain anonymous and the claimant. Other potential witnesses had not wished to be interviewed. As a result of those meetings the claimant was suspended.

39. As part of the disciplinary process the claimant was, with his agreement, referred to occupational health (OH). On 12 April 2017 a report was received the relevant parts of which are as follows:

> '[the claimant] stated that he can generally feel the condition [cataplexy] coming on when he feels some facial weakness and therefore he takes himself outside for some fresh air. He stated that he has never had a full attack whilst being at work, although during his breaktimes if he sits down for long enough he can fall asleep, as he does at home.
>
> I understand that [the claimant] is currently suspended from work, due to an alleged incident at work. Fortunately, [the claimant] did not have a cataplexy attack and therefore it would appear that it was just pure frustration and emotions in play here and nothing to do with his medical condition…
>
> Currently, [the claimant] has not had any side effects from his medication. He does occasionally experience slight headaches and if these becomes severe enough he will take pain relief and occasionally request to go home. Other that this he has managed his condition fairly well…
>
> It is not anticipated his condition would cause a loss of control of anger or emotions rather, as you have noted, it is better to manage emotion to prevent exacerbation of his condition…
>
> It is not anticipated medication would impact upon control of anger or emotions.'

40. On 13 April 2017 Mr McKenna wrote to the claimant inviting him to a meeting to consider his grievance of 17 March 2017. That meeting took place on 22 April 2017.

41. On 25 April 2017 Mr Tarigopula wrote to the claimant inviting him to a disciplinary meeting in respect of the events of 24 March 2017. That letter set out an allegation of aggressive and threatening behaviour, enclosed notes of the investigation, advised him of his right to be accompanied and warned him he was at risk of dismissal. It also advised that the grievance which had been investigated by Mr McKenna would be resolved as part of the disciplinary hearing and if appropriate would be considered as mitigation.

42. The disciplinary meeting took place on 28 April 2017 and was chaired by Mr Melton who was then based at the Wimbledon store. The claimant was not accompanied but he confirmed that that was his wish. Mr Melton asked the

claimant to talk him through the events in question which the claimant did. Mr Melton asked appropriate questions and referred to the examples of misconduct and gross misconduct set out in the employee handbook as well as the OH report. The claimant confirmed that his medical condition 'had nothing to do with it'. During the meeting Mr Melton did not specifically deal with the grievance other than to simply say, towards the beginning, that it had been heard and there was no case to answer.

43. After an adjournment of approximately one hour, Mr Melton reconvened the meeting and informed the claimant that he would be issued with a final written warning. The claimant was either given a copy of a letter to that effect on the same date or it was posted to him on the same day. The claimant's right to appeal against the disciplinary sanction was explained in the letter. No written outcome of the grievance was given to the claimant nor any communication of his right to appeal that.

44. The claimant's case is that he submitted an appeal against the warning on 5 May 2017 but nothing happened. He set out in his witness statement 10 detailed points that he says were in his letter of appeal. We acknowledge the respondent's suspicion that the claimant can remember in such detail those points if he no longer has a copy of the appeal letter. In any event, the respondent's case is that no appeal letter was received although both Mr Tarigopula and Mr Marsh, the then people manager for the store, are no longer in the respondent's employment and therefore have not been able to confirm their position. Mr Melton did tell us (although it was not in his statement) that he asked Mr Marsh within a week or two of the outcome of the disciplinary whether an appeal had been received and was told that it had not. The claimant did not chase what he said was an outstanding appeal at the time although he did later refer to it in a grievance meeting on 15 September 2017 described below. At that meeting he said that he had appealed the warning and was still waiting for it to be dealt with; Ms Martin said she was not aware of that but agreed to check through his file; and the claimant said he had left it with the last HR manager but nothing had happened.

45. Ms Martin's written evidence was that she carried out a full search of the claimant's file and the people manager's office in Mitcham but found no evidence of any appeal; that she met the claimant again and advised him that she could not find the appeal and could not take any further action as they had reached a dead end; and she felt that the claimant accepted this.

46. On balance we conclude that the claimant did hand an appeal letter to Mr Tarigopula following his warning but it was overlooked. Our assessment of the claimant is that he is likely to raise matters if he is unhappy with them and therefore is likely to have appealed. We also take into account that the store seems not to have been well run at this time and therefore it is quite possible that an appeal would not be processed correctly. Although the claimant did not chase for an outcome until 15 September 2017, we note that this was at a grievance meeting at a time when he did not know that disciplinary action was being considered in respect of his Facebook content. This suggests his query was genuine.

47. Working on Sundays

48. The claimant's case is that from very early in 2017 he raised with Mr Tarigopula that he did not want to work late shifts on Sundays because there were fewer other employees in the store after 6pm to help him keep awake and provide support for him. In the claim form he said that his manager agreed to make adjustments and failed to do so. In his written statement, although he said he had spoken to Mr Tarigopula several times regarding this and no action was taken, he did not say that adjustments had been agreed. In his oral evidence he said that unspecified adjustments had been agreed but nothing was done. There were no contemporaneous documents to suggest that specific adjustments had been agreed by the manager. There are other documents, however, that are relevant to the issue.

49. On 15 May 2017 the claimant raised a grievance with HR about his treatment by a manager, Mr M Valand, on the late shift the day before, a Sunday. His grievance read:

> 'I was put to work late shift on Sunday… on my own and a manager. While I was working, I started to get pain in my back. I went to the manager and told him that my back is hurting and he told me to go and sit in the canteen because I can't go home and leave him on his own. After a while the pain was moving to the whole body and I was left to suffer for nearly three hours because there wasn't a first aider to assist me or some one to assist the manager so I could go home or to the hospital. This matter is very serious and I'm thinking of taking legal action against the company.'

We note that the claimant did not refer to any earlier complaints to his manager about working lates on a Sunday nor to any alleged agreed adjustments which we would expect him to have done if they had been made.

50. No formal action was taken with regard to that grievance but on 26 June 2017 the claimant emailed the environmental health team at Merton Council as follows:

> '... I have made a complaint about health and safety issue at work to my manager. The problem is every sunday after 6pm I work on my own along with one manager. The store closes at 4pm and by 6pm all staffs are gone except me and manager until 9pm. I have a long term health condition… which my management is aware of. Few weeks ago (14/05/17) I had a severe back pain while working on a sunday. I told the duty manager he said i can't let you go home because he has no one to stay with him till 9pm and told me to sit in the canteen. I sat and suffered with pain for nearly 3hours. There was no first aider to help me. I sent an email to the head office on the 15/05/17. They asked the store manager to investigate it, so me and him had a chat and he told me that it wont happen again. Up to this date nothing has been done. I'm still doing the shift. I am really worried about the situation because they are putting my life at risk. Anything could happen, any time to me because of my illness. I worked yesterday and had a heavy migraine and I left. I hope you understand what I'm going through and take action ASAP…' which suggests that the 15 May 2017 grievance was informally discussed by the claimant and Mr Tarigopula.

51. On 10 September 2017 the claimant raised a further grievance with HR about his treatment that day by the duty manager, Mr J Palanivel, in relation to listening to music on his own phone on the shop floor. In that email he said:

'…[I] have already made a complaint about working on sundays on my own after the store closes and the risk of no first aider available. I have tried my best to work on my own by listening to music… Im really worried and I think they are targeting me because of my disability. Please can you look into this ASAP. Im so stressed out and dont know what to do. Thank you. … I'm attaching the letter that I wrote.'

52. The attachment was a handwritten note dated 10 September 2016 (presumably 2017) that said:

'I told Jega that I'm working on my own so I'm listening to music to keep me going. He refused to let me listen to the music as I've been doing this for the last six years. I'm working on a Sunday at the store closed on my own without anyone expect a manager. I have already complained to the previous store manager about health and safety issues for me working on my own on Sundays as I'm suffering with long-term illness. No action has been taken and now my manager Jega wants me to resign my job. I feel stressed and I'm going home.'

53. On 12 September 2017 Mr Murrell, who is black, wrote to the claimant confirming receipt of that grievance and inviting him to a grievance hearing on 15 September 2017.

54. The grievance hearing was convened as planned on 15 September 2017 with Ms Martin present. The claimant attended alone and was reminded of his right to representation. He was asked why he did not want to work late on Sundays and he said:

'Because I have to work on my own and I don't want to. I don't get any Sunday premiums and there used to be more people on Sundays. I am also sick, I have narcolepsy. It's not safe.'

55. Mr Murrell confirmed that there was someone working in the same store at the same time as the claimant, a duty manager, and the claimant confirmed that the duty manager was aware of his health issues. They then discussed the issue about use of the phone.

56. The claimant was also asked about his reference to disability and he confirmed he had had narcolepsy for a few years, that it was under control and that he had not had real trouble for some time. He also said he was diabetic and had to take medication. He was asked if this affected the way he works to which he said:

'Not really. My medication controls everything but with the narcolepsy I have to control my emotions - cannot get angry or laugh too much - it can be affected by that.'

57. The claimant agreed to send a copy of the previous OH report to Ms Martin and that they would reconvene on 22 September 2017. In the event the claimant did not send a copy but one was found on his personal file.

58. On the morning of 22 September 2017 an environmental health inspector from Merton Council attended the store further to the claimant's email. Having made enquiries the inspector concluded that no follow up action was required.

59. Mr Murrell and Ms Martin met with the claimant again on 22 September 2017 and gave him a letter with the outcome of his grievance, namely that it was not upheld but that his Sunday hours would be adjusted within the next three working weeks to accommodate his request to no longer work alone. In the letter Mr Murrell recorded that he had asked the claimant in the grievance meeting if this was due to medical issues or simply a preference and that he had confirmed it was a preference. The meeting notes do not reflect this (see above) but the letter, drafted by HR, is detailed and was not challenged by the claimant at the time. We have no reason to find that the contents of the letter are inaccurate.

60. Facebook Issue

61. Also on 22 September 2017, Mr Murrell was asked by Ms Martin to raise with the claimant an issue that had arisen with regard to his use of social media. This was done in a meeting after the grievance outcome meeting.

62. None of the respondent's witnesses were able to help us with how the issue about the claimant's Facebook profile had come to its attention. There is a reference, however, in the notes of the second meeting on 22 September 2017 where the claimant asked who had been looking at his profile and 'AM' (it is not clear whether this is Mr Murrell or Ms Martin) said 'they have spoken in confidence'.

63. In any event it was put to the claimant that his Facebook profile, a copy of which was shown to him, referred to him as 'Slave at Wm Morrisons' together with a photo of him in his work uniform taken at work and that this was damaging to the respondent. The claimant was referred to the social media policy. The claimant initially said it was an old profile that he had not used for about six years but it was pointed out to him that the uniform he was wearing in the photograph had only been issued about a year before. The claimant was advised that 'this was serious' and to remove the post as soon as possible and the situation needed further investigation. The claimant agreed to remove the post.

64. The claimant did change the Facebook profile either that day or very shortly afterwards. He changed it to show a photograph of a man in army uniform very clearly holding a machine gun and described himself as 'BOSS at Wm Morrisons'.

65. On 23 September 2017 Ms Hemsley wrote to the claimant suspending him from work until further notice.

66. The claimant attended an investigatory meeting with Mr M Horwood, Senior Manager, and Ms Martin on 25 September 2017. They discussed the initial profile and the profile once it had been changed, the implications of it and the social media policy. During this meeting the claimant said that he did not need to explain himself to Mr Horwood, that he believed the reason for this situation was the complaint he had put into environmental health, that he did not see how he had damaged the brand and that it was just put up for fun. When asked why he did not take the matter seriously after he had

been spoken to about it, the claimant said he did not really think about it and repeated that it was just for fun.

67. Mr Wooden, based at the Sutton store, was appointed as disciplinary manager and later that day wrote to the claimant notifying him that he was required to attend a disciplinary hearing to answer allegations that he had posted offensive wording on Facebook and that it was in breach of the social media policy. The suspension was continued and the relevant documents, including the disciplinary policy, were attached. He was informed of his right to be accompanied to the hearing, warned that a potential outcome could be dismissal for gross misconduct and reminded that there was a live final warning on his file. Mr Wooden confirmed to us that it was not his decision that the matter warranted a disciplinary hearing; that decision had already been made elsewhere.

68. The disciplinary hearing took place on 28 September 2017. The claimant confirmed he had received all the relevant documents and that he did not wish to be represented.

69. The claimant told Mr Wooden that the reference to 'Wm Morrisons' did not necessarily mean his workplace and that the Facebook profile was not linked to the respondent. He confirmed however that the first picture posted was of him and that when Mr Murrell spoke to him he understood that it was a serious matter and he had been asked to remove it. Further, that he had changed it to 'boss' but said it was social media and fun. He also said he was angry that someone would look at and complain about his Facebook page and he still had not been told who had reported it. He also confirmed that he did use his Facebook accounts although he had not looked at the profile for some time. He also confirmed that the gentleman in the second picture was the leader of the Tamil Tigers.

70. After a brief adjournment the claimant said that the reasons he wanted to call himself a slave was because he had been bullied and harassed and called mental. Also, that the manager concerned had had a promotion and left the store and that he had appealed against the final warning but no one can find the letter. They then discussed the final warning for the earlier incident including the claimant's belief that he had appealed.

71. After a further adjournment Mr Wooden told the claimant that he was dismissed on notice for breach of the social media policy by posting offensive wording on Facebook in conjunction with the live final written warning for conduct on his record. He gave the claimant a letter setting out the decision and a summary of the reasons for it. The claimant was advised of his right to appeal but no appeal was received. His termination date was 28 September 2017.

72. The claimant's evidence was that he first contacted ACAS on 13 September 2017 and again after his dismissal. He took no legal advice and did not consult his union – USDAW – despite being a member. He said that because of his medical condition he has a limit on communication and does not speak to people a lot. He did his own research online as to his remedies

and then submitted his claim to the Tribunal on 14 October 2017. Taking into account the early conciliation provisions, it is apparent that any claim in respect of events prior to 14 June 2017 is prima facie out of time (this impacts the first four allegations of direct race discrimination only).

Conclusion

73. Unfair dismissal:

74. We conclude that the respondent, through Mr Wooden, had a genuine belief in the claimant's misconduct (the original and replacement Facebook posts). The claimant has said that the real reason for his dismissal was effectively a campaign to remove him as he had raised grievances both internally and externally as well supporting colleagues in their proceedings. We do not agree. Both disciplinary processes were conducted by independent managers from outside the claimant's store – Mr Melton and Mr Wooden. There is no evidence to support a finding that either was influenced by the claimant's grievances or were in any other way biased against him. The timing of the visit by the environmental health team appears to have been coincidental.

75. We also find that there were reasonable grounds for that belief. The fact of the Facebook postings was not disputed by the claimant though their significance was. He said at the time of the disciplinary action, and has maintained at this hearing, that they were just for fun and were private. It was not unreasonable for Mr Wooden to discount that argument especially in light of the respondent's social media policy of which claimant was, or ought to have been, aware and to which he was subject. It gives clear guidance, in a user-friendly way, as to what can and cannot be posted about the respondent and what the consequences of breach could be i.e. disciplinary action.

76. As to the claimant's argument that the postings were old, we find that the age of the original posting was not significant. It is clear that the claimant had changed his profile picture within the previous year and his account and what was on it was his responsibility. It was reasonable for the respondent to take action in respect of the postings regardless of how long they had been there.

77. Further, even after the claimant was told by Mr Murrell at the investigation meeting that the situation was serious and could be damaging to the respondent, the claimant changed the post to something equally inappropriate. The claimant showed no remorse, gave no apology and made no assurance of future compliance.

78. We also find that there had been a reasonable investigation leading to that belief. The lack of explanation as to how the postings had come to the attention of the respondent is not significant due to the claimant's admission that they were his.

79. The respondent followed a reasonable disciplinary process. The claimant was well aware of what the issue was and he had a full opportunity to address it. He had the opportunity to be represented but chose not to be. All meetings with the claimant were conducted properly and he was given every opportunity to put forward his case.

80. As to whether the sanction of dismissal on notice was reasonable, we find that it was well within the band of reasonable responses given the nature of the misconduct and that the claimant already had a final written warning on record.

81. There was nothing manifestly inappropriate about that warning. There was a reasonable finding of misconduct following a fair process during which relevant medical evidence was obtained and fully taken into account. The use of anonymous witness statements was – in all the circumstances – entirely reasonable. It was given in good faith by an independent manager and was well within the bands of reasonableness – the claimant himself said that he probably could have been dismissed for that offence alone. In coming to that conclusion we have taken into account our finding that the claimant did submit an appeal against the warning which was not progressed. Having reviewed the grounds of appeal he says he submitted, we conclude that even if they had been considered they were not at all likely to succeed. Notwithstanding that, the respondent should of course have processed the appeal when it was received. Perhaps when he raised it again on 15 September 2017, it would have been best practice for them to give him the benefit of the doubt and allow an appeal to take place then especially as the warning was being taken into account in deciding that dismissal was an appropriate penalty for related offence. However, the respondent's actions in this respect cannot be said to be outside the band of reasonable responses.

82. Accordingly we find the dismissal to be fair.

83. Direct race discrimination:

84. As identified above, the first four of the alleged acts of direct race discrimination are out of time. Having considered the claimant's evidence we conclude that there is no basis upon which to exercise our discretion and extend time in his favour. We have however, in the event that we are wrong about that, considered all the claimant's allegations of direct race discrimination

85. In assessing the merits of those allegations we note that at no time in the internal processes did the claimant ever raise any issue about race discrimination whether expressly or implicitly. Indeed at this hearing, he did not put any questions or allegations to the respondent's witnesses about race except in relation to Mr Wooden and even then only after prompting by the Judge and somewhat half-heartedly.

86. The list of issues recorded Mr Owens as the comparator for all the alleged acts which is not logical on the facts. We have given the claimant the

benefit of the doubt, however, and considered his claims vis-a-vis a relevant hypothetical comparator as well, namely a white British customer services assistant who behaved in the same way as the claimant.

87. In respect of all the allegations save 2(c), we conclude that the claimant has not proved facts that which, absent an explanation, could amount to race discrimination. The proved facts show that the claimant behaved in such a way as to entirely warrant the actions of the respondent. Accordingly the burden of proof does not pass to the respondent.

88. As far as allegation 2(c) is concerned – the failure to hold an appeal - the burden does pass. In respect of that matter (and for the sake of completeness all the other allegations in case we are wrong about the first stage), we conclude that the respondent's explanation of the facts is more than adequate; they were in no way related to race.

89. Specifically in respect of each allegation:

2(a) – no action was taken against Mr Owens as he had not done anything culpable.
2(b) – imposing a final written warning was an entirely reasonable response to the misconduct in question.
2(c) – the failure to hold an appeal was a result of oversight and poor management of the store.
2(d) – the refusal was for the reasons the claimant himself said that the manager gave i.e. the absence of anyone else on the premises.
2(e) – this grievance, dealt with by Mr Murrell, was in accordance with the respondent's policies and entirely reasonable in all the circumstances.
2(f) – the dismissal was a reasonable and fair response to the claimant's conduct taken together with his final written warning on record.

90. Accordingly we conclude that the claimant was not subjected to direct race discrimination.

91. <u>Reasonable Adjustments</u>:

92. The respondent has conceded that the claimant was disabled at the relevant times and that a practice of requiring him to work late shifts on Sundays was in place.

93. The issues to be determined therefore are whether as a result of that practice the claimant suffered a substantial disadvantage compared to those who were not disabled and if he did, whether the respondent had knowledge, actual or constructive, of the disability and that disadvantage, and if so did they fail to make a reasonable adjustment.

94. The list of issues record that the claimed disadvantage arose from the lack of other employees at the premises on Sundays to assist in keeping him awake/waking him up/providing support for him. It is clear from the evidence that there was never an occasion when the claimant actually suffered any disability-related incident at work, such as a seizure. A disadvantage was clearly suffered nonetheless and articulated by the claimant as a genuine

fear and worry occasioned by the risk he perceived of being taken ill during a shift and not being noticed because there were so few employees around.

95. These disadvantages are evidenced in particular by his email of 26 June 2017 to environmental health in which he referred to his long-term health condition and that he was really worried about the situation because he believed the respondent was putting his life at risk. He also referred to this these disadvantages when he emailed the respondent on 10 September 2017 when he referred to the store closing and the risk of no first-aid being available and that he was really worried and stressed out. A non-disabled person would not suffer that particular disadvantage.

96. As to whether the respondent was actually or constructively aware of the substantial disadvantage, we conclude that before the claimant's email dated 10 September 2017 there is not enough evidence to say that it was. However, once that email and the attachment were received by the respondent it is clear that the claimant had sufficiently set out his fears regarding his health so it then had that knowledge. At the meeting on 15 September 2017, however, Mr Murrell expressly explored with the claimant his reasons for not working lates on Sundays, namely was it personal preference or for medical.

97. The OH report was obtained and considered by Mr Murrell. He reasonably concluded, given its very clear advice, that there was nothing of a medical nature to cause concern or require any adjustment.

98. Accordingly we conclude that as at 22 September 2017 the respondent did not have actual or constructive knowledge of any substantial disadvantage to the claimant as a result of working late on a Sunday that was linked to his disability.

99. Accordingly there was no breach of the duty to make reasonable adjustments and the claim of disability discrimination fails. Further, in any event, the adjustment sought by the claimant was in fact agreed by Mr Murrell and would have been implemented some three weeks later if the claimant's dismissal had not intervened.

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Employment Judge K Andrews
Date: 11 January 2019

Judgment sent to the parties and entered in the Register on 9 February 2019

Mrs C Gangadeen
For the Tribunal Office