



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Rizvi**

**v**

**TJX UK**

**Heard at:** London Central  
**23 – 29 April 2019**

**Before:** Employment Judge Hodgson  
Mr D Eggmore  
Ms Bradfield

## **Representation**

**For the Claimant:** in person  
**For the Respondent:** Ms N Joffe, counsel

## **JUDGMENT**

- 1. The claim of victimisation fails and is dismissed.**
- 2. The claim of direct discrimination fails and is dismissed.**
- 3. The claim of detriment contrary to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 fails and is dismissed.**
- 4. The claim of unlawful deduction from wage fails and is dismissed.**

# REASONS

## Introduction

- 1.1 By a claim present to the London Central Employment Tribunal, the claimant brought claims of unlawful deduction from wages, failure to permit or pay paternity leave, sex discrimination, discrimination because of religion, victimisation, and detriment for trade union membership or activities.

## The Issues

### Direct discrimination - section 13 Equality Act 2010

- 2.1 Did the respondent treat the claimant less favourably than it treats or would treat others?<sup>1</sup>
- 2.2 If so, was such treatment because of a protected characteristic?
- 2.3 The protected characteristics relied on are sex and religion. There was no claim of race discrimination and the claimant did not apply to amend to include one.
- 2.4 The allegations of detriment relied are as follows:
- 2.4.1 Allegation 1: in April 2016, unlawfully deducting wages following the claimant's dispute with his supervisor. [1.4.1]<sup>2</sup>
  - 2.4.2 Allegation 2: in February 2016 by Ms Patel failing to permit the claimant to take paternity leave. [1.4.2]
  - 2.4.3 Allegation 3: by the respondent failing to pay paternity pay in February 2016. [1.4.3]
  - 2.4.5 Allegation 4: by moving the claimant from the night shift in April 2016. [1.4.5]
  - 2.4.6 Allegation 5: by Ms Patel removing union leaflets from the staffroom on some date prior to June 2016. [1.4.6]
  - 2.4.7 Allegation 6: by Ms Patel, orally inviting the claimant to a grievance meeting, it being the claimant's case that the grievance was in part about Ms Patel, in June 2016. [1.4.9]
  - 2.4.8 Allegation 7: by Mr Cook rejecting the claimant's grievance appeal in August 2016. [1.4.10]

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<sup>1</sup> The parties were given the tribunal's list of issues on day 3. Those issues reflected the entirety of the claim, including all amendments. The issues as produced here are the same as those given to the parties, save that the tribunal has amended any obvious or typographical errors, and the numbering of the allegations has been rationalised to assist the reader.

<sup>2</sup> The numbers in square brackets refer to the paragraph where the allegation is referred to in the respondent's draft list of issues. We have left the numbers in for ease of reference for the parties. They may also assist in understanding the decision on amendment.

2.4.9 Allegation 8: by Mr Cook leaving two grievance issues unresolved being medical records and paternity leave in the outcome to the grievance appeal August 2016 [1.4.12]

Victimisation - section 27 Equality Act 2010

- 2.5 Did the respondent victimise the claimant by subjecting the claimant to a detriment?
- 2.6 If so, was such treatment because of a protected act?
- 2.7 The claimant relies on one protected act being the claimant's grievance of 30 April 2016. It is not admitted that this is a protected act.
- 2.8 The specific detriments relied on are allegations 6 , 7, and 8.
- 2.9 Was the evidence or information or allegation false? If so, was the evidence or information or allegation made in bad faith?<sup>3</sup>

Detriment the trade union activities.

- 2.10 The claimant is a trade union member of Unite. He holds no official position. He alleges that he sought to recruit colleagues by leaving membership forms in the staffroom in May 2016. He alleges a number of detriments:
  - 2.10.1 Allegation 5: as set out above.
  - 2.10.2 Allegation 9: by Ms Patel in May 2006 insisting the claimant produce his staff card for discount shopping, rather than his staff number.

Wages

- 2.11 By failing to pay the claimant money due after his transfer from night shift to day shift in April 2016, following a dispute with the supervisor of 16/17 March 2016. The claim is unspecified. There had been reference to the claimant requiring payment of £380.
- 2.12 By failing to pay the claimant paternity leave pay in February 2016, it being the claimant's case that he was given holiday, albeit he is unclear whether he was paid.

Jurisdiction

- 2.13 The respondent asserts that to the extent any claim is out of time, time should not be extended.

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<sup>3</sup> Whilst this was recorded in the issues given to the parties, it was not pursued.

### **Evidence**

- 3.1 The claimant gave evidence.
- 3.2 For the respondent we heard from the following: Mr Hilpa Patel; Mr Kaheel Rehman; Mr Bekir Bayram; Mr Timothy Price; Mr Stephen Cook; and Mr Kamal Abdulkadir.
- 3.3 We received a bundle of documents.
- 3.4 The claimant produced further documents which we will refer to as necessary in these reasons.
- 3.5 The respondent filed written submissions.
- 3.6 The claimant did not rely on written submissions.

### **Concessions/Applications**

- 4.1 There has been difficulty identifying the claims in this case. On 3 July 2017, Employment Judge Goodman noted the difficulty. She set out what she believed to be the claims "in outline." She identified claims of unlawful deduction from wages, failure to permit or pay paternity leave, sex discrimination, discrimination because of religion, victimisation, and detriment for trade union membership or activities. She recorded "it was decided that the best way towards clarifying the claims and issues was by sequential disclosure of witness statement, with a further preliminary hearing for case management being listed in case further information was sought, or the respondent considered an application to amend was necessary."
- 4.2 The matter was next considered by Employment Judge Davidson, on 11 September 2017, this discussion was largely concerned with the admissibility of certain documents, albeit no specific order was made. The issues were not considered further.
- 4.3 On 2 November 2018, Employment Judge Walker considered the issues further. There had been a schedule of issues produced by the respondent for a previous hearing. She considered that list of issues, with a view to identifying whether each issue was addressed in the ET1 and in the witness statements. She ordered the respondent to file an amended statement of issues to reflect the discussion. No specific amendment was sought or allowed.
- 4.4 The tribunal noted at the start of the full merits hearing that there was no definitive statement of the issues and there had been no formal amendment allowed. We considered the draft list of issues as produced by the respondent. It is apparent that a number of the allegations were unclear, and some did not appear in the claim form. The respondent's list

was not adopted. It was not possible to proceed with the case until the claims were identified and clarified.

- 4.5 The tribunal noted that the claims must be set out in the claim form. The addition of facts, new claims, and new causes of action all require amendment. The tribunal considered each of the claims as set out in the draft list of issues and considered whether each was clear and whether each needed an amendment.
- 4.6 It was noted that there were no clear claims set out in the claim form. A number of the general assertions in the claim form had been expanded on during the course of previous hearings in an attempt to identify, at least in outline, some specific claims. The respondent consented to a number of the claims proceeding by way of amendment. The remaining difficulties were identified, the parties were invited to give further submissions on day two.
- 4.7 On day one, the claimant alleged that the respondent's witnesses had produced false witness statements and sought clarification of the law on perjury. The tribunal confirmed that perjury was a criminal offence and that the obligation on all witnesses was to be truthful. There was nothing further for the tribunal to do in relation to his general allegation.
- 4.8 The claimant indicated that he wished the tribunal to remove the respondent's witnesses, as he believed that their listening to his evidence would allow them to collude. This matter was left over to day two.
- 4.9 The claimant indicated he had made a number of recordings. The relevance of the recordings was disputed. The tribunal indicated that it was for the claimant to produce transcripts and where appropriate to seek translations. It cannot be assumed that the tribunal would provide an interpreter to listen to and translate recordings, particularly when the relevance was disputed. It was noted that one of the respondent's witnesses, Ms Maria Patroklou, was not available and the respondent had difficulty locating her. The claimant indicated he wanted a witness summons for Ms Maria Patroklou and others. He was told he must apply. He would need to provide an explanation explaining why the witnesses should be ordered to attend.
- 4.10 The tribunal adjourned on day one to read the statements.
- 4.11 On day two we dealt with a number of matters. In summary, we finalised the issues; we allowed a number of amendments and refused others (the reasons were reserved). We considered the claimant's application to exclude the respondent's witnesses from the hearing during the time he was cross examined; we dealt with a number of miscellaneous matters which will detail below.
- 4.12 We will deal first with the finalisation of the issues. This process had started on day one; we had worked from a draft list of issues produced by

the respondent. That list had been considered previously and the respondent had been asked to finalise it by Employment Judge Walker. At no stage had any employment judge either agreed a final version of the list of issues, or consented to any amendment, whether implicitly or explicitly.

- 4.13 The original claim form raised a number of general assertions but lacked any specific allegations. The detriments said to amount to direct discrimination or victimisation were not identified. The protected act, if any, relied on for victimisation was not identified. The specific detriments relating to trade union activities were not identified, nor was the basis on which it was put. The claim of unlawful deduction from wages was no more than an assertion.
- 4.14 During the case management discussions, various employment judges had identified potential allegations for each head of claim. As no specific claims had been identified in the claim form, each allegation was new.
- 4.15 It was clear from the discussion on day one that a number of those claims still remained unclear. On day two, we further considered the various possible allegations contained in the list of issues, which we had started to consider on day one. The respondent accepted it would be appropriate to allow, by way of amendment, those claims which were clear, and which could reasonably be dealt with by the respondent. We allowed the following amendments:
- 4.15.1 Allegation: in April 2016, unlawfully deducting wages following the claimant's dispute with his supervisor. [1.4.1]<sup>4</sup>
- 4.15.2 Allegation: in February 2016 by Ms Patel failing to permit the claimant to take paternity leave. [1.4.2]
- 4.15.3 Allegation: by the respondent failing to pay paternity pay in February 2016. [1.4.3]
- 4.15.4 Allegation: by moving the claimant from the night shift in April 2016. [1.4.5]
- 4.15.5 Allegation: by Ms Patel removing union leaflets from the staffroom on some date prior to June 2016. [1.4.6]
- 4.15.6 Allegation: by Ms Patel, orally inviting the claimant to a grievance meeting, said to be about Ms Patel, in June 2016. [1.4.9]<sup>5</sup>
- 4.15.7 Allegation: by Mr Cook rejecting the claimant's grievance appeal in August 2016. [1.4.10]
- 4.15.8 Allegation: by Mr Cook leaving two grievance issues unresolved being medical records of paternity leave in the outcome to the grievance appeal August 2016. [1.4.12]
- 4.16 The claim of victimisation was amended to permit the claimant to rely on an alleged protected act being the claimant's grievance of 30 April 2016.

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<sup>4</sup> Please see footnote 2.

<sup>5</sup> The claimant did not wish to proceed with the allegation originally labelled 1.4.8.

The victimisation claim was amended to include specific allegations of victimisation being 1.4.9, 1.4.10, and 1.4.12, above.

- 4.17 The claim of detriment for trade union activities was amended to allow the following allegations to proceed:
- 4.17.1 Allegation: by Ms Patel removing the application forms on a date unspecified (see [1.4.6] above.)
  - 4.17.2 Allegation: by Ms Patel in May 2006 insisting the claimant produce his staff card for discount shopping, rather than his staff number.
- 4.18 The following allegations, as identified in the draft issues in relation to direct discrimination and victimisation, were not allowed to proceed and the application to amend to include them was refused:
- 4.18.1 Allegation: by Ms Maria Patroklou inviting the claimant disciplinary proceedings on 20 January 2016. [1.4.4]
  - 4.18.2 Allegation: by misappropriating the claimant's medical notes supplied in January 2016 said to been sent to HR in April 2016. [1.4.7]
  - 4.18.3 Allegation: by Mr Tim Cook not dealing properly with an alleged confession of Ms Patel in November 2016. [1.4.11]
- 4.19 In addition, the application to include the following allegations of detriment on grounds of trade union membership or activity was refused:
- 4.19.1.1 Allegation: the claimant being refused service when shopping after the grievance meeting in May 2016 on dates unspecified.
  - 4.19.1.2 Allegation: by Gail Kellman checking the claimant's belongings when leaving day shift on dates unspecified.
  - 4.19.1.3 Allegation: by Ms Patel asking the claimant to open his locker on a date unspecified.
  - 4.19.1.4 Allegation: by Ms Kamal telling the claimant he must not recruit staff into the union in the workplace and the date not specified.
- 4.20 The claim of unlawful deduction from wages was put as follows, and allowed as an amendment:
- 4.20.1 By failing to pay the claimant money due after his transfer from night shift to day shift in April 2016 following a dispute with the supervisor of 16/17 March 2016. The claim is unspecified. There had been reference to the claimant requiring payment of £380. However, it is the claimant's case that he was offered £380 by way of ex gratia payment and that it was not at any stage wages.
  - 4.20.2 By failing to pay the claimant paternity leave pay in February 2016, it being the claimant's case that he was given holiday, albeit he is unclear whether he was paid.
- 4.21 It follows that a number of claims were allowed to proceed by way of amendment. A number of the specific allegations, which were new claims

based on new facts, were not allowed to proceed. The reasons were reserved. We deal with those reasons at the end of this section.

- 4.22 Following our ruling on amendment, we considered the claimant's application to exclude witnesses. His original objection to the witnesses, on day one, had been that, if they listened to his cross examination, they may collude and fabricate evidence. The claimant indicated he believed that they would commit perjury. On day one, he gave no indication that he was uncomfortable proceeding in their presence.
- 4.23 On day two, after we had dealt with the amendment, and whilst we were dealing with the application to exclude witnesses, the claimant indicated he had sent an email to the tribunal. Employment Judge Hodgson therefore made enquiries, obtained the email, and printed it. The claimant had brought neither an electronic copy, nor a printed version. The claimant had not sent it to the respondent, despite the tribunal's direction on day one that the parties exchange any documents sent to the tribunal.
- 4.24 On day two, the claimant developed his oral submissions to suggest that, in some manner, he would feel uncomfortable if the respondent's witnesses observed him when he was being cross-examined. The respondent was invited to consider whether it would voluntarily agree to its witnesses remaining outside during the claimant's cross-examination. Following an adjournment, the respondent agreed that its witnesses would stay outside during the time the claimant was cross examined, provided that they could review any notes of cross examination, and provided they could be present at all times after cross-examination of the claimant was completed. The tribunal noted there was no power to prevent the witnesses reviewing notes of the hearing. The claimant indicated he was happy with the respondent's proposals and it follows the tribunal made no ruling on the claimant's application.
- 4.25 Later in the morning, the claimant suggested that there had been some impropriety in the tribunal deciding the amendment issue without previously reading his email sent the evening before. The tribunal confirmed that the claimant had not brought to its attention the existence of the email during his oral submissions on amendment, or at any time prior to the decision being made. The tribunal confirmed that it was open to the claimant to apply at any time for an amendment, and any further application should be made, as far as practicable, in writing. The tribunal said it would read the email to see if it were material to its reasons for refusing a number of amendments, and if so, it would bring that to the attention the parties and invite further submissions. The claimant's email was read during the lunchtime. When the hearing resumed, the tribunal confirmed that it contained no matter which was material to the tribunal's decision on amendment.
- 4.26 During the course of the claimant's cross-examination, he was asked about his religious belief by counsel. Thereafter, the claimant requested that counsel's pupil, who was taking notes on a laptop, should be ordered



to take no notes and be excluded from the hearing. The tribunal refused that application, as it was a public hearing and it was appropriate for the respondent to take notes.

- 4.27 On the evening of day 2, the claimant sent to the tribunal numerous further documents. A number of those documents appeared to have little or no relevance to the case. However, it is appropriate that we should note them in outline. Most were sent in the early hours of 25 April 2019. The email sent at 04:08 contain two statements of fitness for work from December 2015. The email sent out 03:06 stated it provided the name and address of forensic labs which could be used by the respondent should it allege forgery of documents.
- 4.28 The email of 02:27 referred to an appeal against the decision to "disallow amendment list of issues." It referred to points 1.4.4, 1.4.7, and 1.4.11. It made further comments about the allegation the claimant had forged a document. The email of 05:56 PM (24 April) appeared to be a complaint against the administration for failing to forward the email in time for the hearing on day two.
- 4.29 The email of 04:08 forwarded two documents sent to the police, but the relevance of documents was not clear. The letter to the police is largely concerned with representations concerning his ongoing complaints to his employers, Domino's Pizza and the respondent. His email sent at 07:36 appeared to forward numerous other emails, the purpose of which was unclear.
- 4.30 The claimant's email to the tribunal of 06:49 appears to be concerned with the amendment decision and alleges the respondent had obtained decisions on amendment by chance. It suggests that the respondent had not set out the background to the pre-hearings and concluded by saying, "In my humble submission, I cannot let this happen and will not be cross examined today."
- 4.31 His email of 17:57, 24 April again refers to the email which had not been forwarded in time for the hearing and states, "I am also making an application for the amendment again."
- 4.32 At the start of the hearing on day 3, we noted we had received a number of emails from the claimant. We clarified that he wished to make an application to vary our previous order on amendment. The effect of his application, sent at 02:27, was that he wished us to reverse our decision in relation to those allegations we had not allowed to proceed by way of amendment. We declined to vary our original order. We gave full oral reasons at the time and do not repeat them here.
- 4.33 During the discussion, the claimant indicated that he did not wish to cross-examine any of the witnesses. We were concerned that the claimant may believe that there was some constraint on his right to cross-examine. If that were his view, it was unclear why. We therefore explained to the

claimant that he had a right to cross-examine the witnesses and that the tribunal had not sought to limit, in any sense, his right. When each witness was called, we reiterated his right to cross-examine that witness. The claimant chose to cross-examine only Mr Cook.

- 4.34 After he cross-examined Mr Cook, the claimant indicated he wished to leave. He told us that he was tired and that he had not slept much the previous evening. It was by then 11:40. The respondent indicated it had one more witness to call. The claimant said that he did not wish to cross-examine that witness in any event. We therefore indicated we would take a 15-minute break. If the claimant wished to return, he could do so. However, if he maintained the position that he did not wish to cross-examine the final witness, there was no need for him to return. Before adjourning, we confirmed, as previously agreed, the parties would file written submissions. The claimant requested further time. We were not satisfied that further time was necessary. Whilst we accepted the claimant may be tired, it was clear that he did undertake work during the evening. We suggested the claimant get some rest and then he should set out such submissions he wished to make. If it proved impossible for him to produce appropriate submissions by 09:00, Friday, as previously agreed, he would need to make an application and we would consider it then. However, he should file what he was able to produce, as previously agreed, by 09:00 on day four.
- 4.35 The claimant did not return following the break. The respondent's final witness adopted his statement and the case was adjourned to chambers.
- 4.36 The respondent filed written submissions on day 4; the claimant filed no written submissions at that time, nor did he make any further application at that time. He has not filed submissions since then.

Reasons for refusing application to amend

- 4.37 It is for the claimant to set out his case. Therefore, it is for the claimant to plead the case properly in the first instance. It is common, particularly when individuals are not represented, for there to be deficiencies in the initial documentation. Those deficiencies are sometimes addressed by what are generally referred to as further and better particulars. Rather than being a necessary part of the process of pleadings, the need for further and better particulars is a demonstration of a failure of process.
- 4.38 If amendment is necessary, a specific application is normally required, and the decision made is recorded. An order for further and better particulars, whether on the motion of the tribunal itself or otherwise, is not an amendment of the claim. As regards the status of the issues, the issues are a distillation of the pleaded points. It is a way of identifying what are the specific allegations which are to be determined by a subsequent tribunal.

- 4.39 This tribunal has regard to **Land Rover v Short UK EAT 496/2010** before, as he was then, Mr Justice Langstaff. The case recorded that if the issues are unclear, and a dispute arises, it is for the tribunal to make a ruling in relation to that. We also have regard to **Price v Surrey County Council and another, UK EAT 450/2010** Lord Justice Carnworth presiding. This is authority for the proposition that the tribunal must exercise control over the form of the issues, even if agreed by the parties. In that case, the issues were described as a confused amalgam of factual allegation and major issues. The point we note is the tribunal should not simply accept the issues provided by the parties, even if the parties agree them between themselves. It is part of the tribunal's role to exercise control over the way in which the issues are presented.
- 4.40 Further and better particulars are for clarification of factual matters already raised in the claim form, or indeed the response. They are not a substitute for the pleadings, but where they raise questions that are truly the province of amendment, the tribunal should consider that matter as a specific application for amendment.
- 4.41 We have regard to **Selkent Bus Co Ltd v Moore 1996 ICR 836**. There has come to be recognised different types of amendments. First, amendments which are designed to alter the basis of existing claims, but without purporting to raise a new distinct head of complaint. Second, amendments which add or substitute a new cause of action, but which is linked to or arises out of the same fact. Third, amendments which add or substitute a new cause of action which is not connected to the original claim at all.
- 4.42 In relation to the first and third types of amendment, it is clear that there may well be new facts which are relied on. The pleading of those new facts themselves will constitute an amendment to the claim.
- 4.43 Further and better particulars may clarify something which is already in the claim form. An example may be that a claimant says a particular person said racist words to me. Clearly asking when and what words could be seen as a request for further and better particulars. Whilst the inclusion of those points of clarification may involve new facts, generally it is accepted that that will not require a specific amendment. On the other hand, there may be a more general position, for example, if it is simply stated "I was treated badly and this is discrimination," asking when, who and what may not be a clarification of an existing allegation but as an invitation to add new claims based on new facts. The new allegations may not be identifiable at all from the claim form. The distinction may not always be entirely clear. In general terms, the more that it can be said that the further and better particulars are simply clarifying a specific fact pleaded, the less likely it is that the tribunal will say that an amendment is necessary. The more it can be said that the alleged clarification identifies matters which have not been raised before, even where there is a general allegation of discrimination, the more likely will be the need for amendment.

4.44 If a claimant wishes to amend the claim, there is considerable onus placed on that party to make the application clear. The Court of Appeal's decision in **Housing Corporation v Bryant** 1999 ICR 123 emphasises the importance of clarity of pleading. In that case, the claimant alleged unfair dismissal and sex discrimination. The dismissal was not said to be an act of sex discrimination. All the claims of sex discrimination predated the dismissal and were out of time. Later, the claimant sought to allege the dismissal amounted to victimisation. It was clear that the fact of dismissal was pleaded, there was reference to sex discrimination, and there was reference to victimisation. However, the claim form did not specifically refer to the causal link of retaliatory victimisation as a reason for the dismissal. The mere fact that elements existed within the claim form did not mean the claim had been brought; there needed to be the statement of causal connection. Buxton LJ put it as follows:

**...it is not enough to say that the document reveals some grounds for a claim of victimisation or indicates that there is a question to be asked as to the linkage between the alleged sex discrimination and the dismissal. That linkage must be demonstrated, at least in some way, in the document itself.**

**...the words making the necessary causative link between the making of the complaint of discrimination and the dismissal were absent from the application. But if this is to be taken as a question of construction, as a matter of law, and not merely of the judgment and assessment of the Chairman, the absence from the document of any such linkage must be fatal: because the issue of construction is whether the document makes a claim in respect of victimisation.**

- 4.45 As regards amendment, it is necessary to consider the balance of hardship.
- 4.46 What are the relevant circumstances? It is not possible to list them definitively. However, they will normally include the following matters. What is the nature of the amendment, is it major or minor? What kind of amendment is it? If it is a new cause of action it is necessary for the tribunal should consider what are the applicable time limits? What is the timing and manner of the application?
- 4.47 The tribunal can also have regard to other relevant factors such as: the steps taken to obtain advice; the explanation for the delay; the cogency of the evidence; and the question of cooperation. Implicit is consideration of the date the claimant knew he or she could bring the claim.
- 4.48 When considering hardship, the tribunal may consider whether there is absence of hardship to the claimant for example can the original claim proceed? The tribunal can consider whether there is a greater risk of hardship to the respondent. If the amendment were allowed the tribunal can consider whether the hearing will be longer and whether there will be an increase in costs. However, no single factor is conclusive, and it is important to undertake a balancing exercise.

- 4.49 We now apply those principles to this application to amend. There have been numerous attempts to clarify this claim. The respondent has prepared as best it can. The case was been listed for a five-day hearing. It is undesirable for this claim to be adjourned, so that further preparation can be undertaken, and further documents identified.
- 4.50 Before considering the application to amend, we considered the claimant's statement and all of the respondent's statements. We were in a position to understand whether any particular amendment would require further evidence.
- 4.51 It was open to the claimant to clarify his claims at any stage prior to the final hearing. He has been encouraged to do so. The tribunal has invested considerable time in seeking to assist.
- 4.52 The claimant has given no specific explanation for the failure to set out his claims adequately, or for the delay in seeking to amend or provide adequate clarification by way of further and better particulars. Further, we note the claimant has been uncooperative in relation to at least one document which he considers important. The claimant alleges that there is a "confession" from Ms Patel. The respondent had indicated it is a forgery. However, despite repeated requests from the respondent, he refused to produce the original.
- 4.53 We have considered the balance of hardship in relation to all of the allegations. The respondent has consented to a number of claims proceeding as amendments. As to those which are disputed, we have agreed that allegation 1.4.6, being reference to Ms Patel removing the union leaflets in the staffroom, should be allowed to proceed. It is clear that this was understood to be an allegation, both in relation to discrimination and trade union activities, and there is no suggestion that the respondent would need further evidence in order to deal with the matter.
- 4.54 We refused the remainder of the application to amend. We can set out the position briefly.
- 4.55 None of the allegations were contained in the original claim form. They are all new claims based on new facts.
- 4.56 All the claims are now out of time, and this is one factor which we can consider. As to the allegation against Ms Maria Patroklou. Ms Maria Patroklou is not a named respondent and is no longer an employee. She is unwilling to attend. Had we allowed any amendment in respect of her, it would have been inappropriate to proceed without adjourning and explaining there was an allegation against her personally. We would have given her an opportunity to answer any specific claim against her. To do otherwise would be to risk a finding of discrimination against an individual without that individual be notified. That could be a breach of her right to a fair hearing. It would be necessary to adjourn, so that she could provide

an explanation, should she desire. Inevitably the hearing would have been postponed. The allegation against Ms Patroklou is a minor allegation and the claimant has the remainder of his allegations to proceed with. The hardship to the claimant is insignificant. The hardship to the respondent, and particularly Maria Patroklou, would be material. In the case of Ms Patroklou any failure to adjourn could be a breach of her human rights. In the case the respondent, adjournment would lead to significant additional expense.

- 4.57 As regards the remaining allegations of direct discrimination, they all display, to one degree or another, the same difficulties. First, they are all new claims based on new facts. Second, the allegations as identified are unclear.
- 4.58 We should consider each of the allegations that we have rejected briefly.
- 4.59 Allegation: by misappropriating the claimant's medical notes supplied in January 2016 said to been sent to HR in April 2016. During our discussion, the claimant was unable to identify accurately what medical notes were in issue, or the circumstances in which he says they were either supplied or lost. He seemed to suggest there was some form of theft. The factual and evidential basis was unclear.
- 4.60 Allegation: by Mr Tim Cook not dealing properly with an alleged confession of Ms Patel in November 2016. In relation to the allegation that Mr Cook did not deal properly with a confession, neither the circumstances in which it was raised, nor the basis on which it is said that he did not deal with it is set out. The concept of dealing "properly" is a subjective judgment and it does not adequately identify any behaviour which could form the basis of a factual finding or found a proper basis for the investigation of his thought processes.
- 4.61 There are a number of allegations already against Mr Cook concerning his handling of the grievance. If those amendments had been allowed, it would be necessary to undertake yet further particularisation in an attempt to understand the nature of them. Almost inevitably, this would have led to the need for further evidence and inevitable adjournment. The hardship caused to the respondent would be significant. There would be significant wasted costs.
- 4.62 We find the allegations we have refused to allow by amendment are minor points and of little overall significance. There is little or no hardship to the claimant whereas there is considerable hardship to the respondent.
- 4.63 As regards the trade union claims, we have allowed the two clear allegations to proceed. These relate to the action of Ms Patel in allegedly removing forms and thereafter refusing discount on 30 May 2016. She understands that those are claims to be answered, and she can deal with those without hardship. However, all of the remaining claims are

materially unclear. We do not need to set them out again, but we will refer to each briefly.

- 4.64 To the extent it is suggested he was refused service at any time, other than 17 May 2016, he set out no dates, or relevant circumstances. He has failed to identify who was serving him. Had this amendment been allowed, it would have necessitated further, significant investigation. It would need an adjournment, and potentially, further witnesses.
- 4.65 As regards the allegations that Ms Kelman checked his belongings, or that Ms Patel viewed his locker, the claimant fails to set out the circumstances or the dates. Therefore, it would be necessary to particularise these claims, necessitating yet further amendments and almost inevitably leading to an adjournment with the inevitable hardship to the respondent.
- 4.66 The allegation concerning Ms Kamal and the alleged conversations about not recruiting union staff is not particularised. In order for this claim to be met, the claimant would have to indicate the words used, when this occurred, and the circumstances, in general. Without that information, the respondent could not possibly prepare a defence. The respondent would wish to explore the circumstances and if necessary, identify witnesses who may be able to rebut the factual assertions. The allegation, as it stands, does not permit the respondent to take even the most basic steps in order to defend the claim. This is a wholly new claim. It is not clear when it happened and whether it would even have been in time at the date the claim form was filed. Given that there are other claims that the claimant can still pursue, there is little hardship in not being able to pursue this unclear claim. There would be serious hardship to the respondent, as it would not be able to meet the claim, unless it was particularised, and the relevant evidence obtained. It follows that the balance of hardship is against allowing that amendment.

### **The Facts**

- 5.1 The claimant started to work for the respondent on 22 August 2015 at its New Cross store as an associate. His initial contract, signed on 21 November 2016, records his contracted hours at 16 with a salary of £8.77 per hour. He was not allocated to any specific shifts. When he commenced work for the respondent, he also worked at Domino's Pizza. The claimant wished to work night shifts, of which there was one night shift a week at the New Cross store. He also, when required, worked in the afternoons.
- 5.2 The claimant was issued with a first written warning on 20 January 2016 for failure to comply with absence reporting procedures.
- 5.3 On 15 February 2016, the claimant's wife gave birth to their child. He worked that evening. The claimant had not requested paternity leave prior to his wife giving birth.

- 5.4 We accept that he spoke to Ms Patel, his immediate supervisor, in the afternoon of 15 February 2016 and she asked him to work that evening. Ms Patel's unchallenged evidence is that the claimant did not tell her on that day that his wife had given birth. He had not told her that his wife was pregnant. The claimant did not request any form of paternity leave at that time.
- 5.5 Ms Patel's unchallenged evidence is that the claimant told her on 11 March 2016 he wanted to take paternity leave to spend time with his new baby from 27 March to 9 April 2016. She took advice from HR and she was told the claimant should submit a MATB1 form and then submit a PNOL form. There is evidence of this advice in the HR printout (R1/93). The claimant said he would let her have the paperwork. The claimant never submitted the relevant paperwork to Ms Patel, or anyone else.
- 5.6 We have seen a draft holiday request form from the claimant (R1/359) which gives no requested dates. It refers to "childbirth" and states the date of the request is 13 February 2016. We accept the respondent's evidence that the holiday request form was never forwarded to the respondent. The claimant was unable to give any details of when he alleges the holiday request form was completed or sent, if at all.
- 5.7 As the claimant had not submitted any forms before 27 March 2016, Ms Patel allowed him to take holiday. The holiday was paid. She confirmed that the company would retrospectively convert the holiday to paternity leave, once he submitted the forms requested, but he never complied.
- 5.8 During the evening shift of 16/17 March 2016, the claimant was working the night shift. His colleague, Mr Khaleel Rehman, was a high performing associate who was acting, essentially, as the manager. It is apparent there was a disagreement. The claimant was involved in labelling discounted products. Mr Khaleel Rehman thought the claimant's work slow and inaccurate. He challenged the claimant, and this led to an argument the detail of which we do not need to consider. The result was that the claimant became very unhappy with Mr Rehman. He reported the altercation to Ms Patel the following day.
- 5.9 Mr Rehman took a number of photographs of the poorly labelled items (R1/77 – 79) to demonstrate the poor quality of the work. No action was taken against the claimant for either the altercation, or for the poor work. However, the Ms Patel's requested another assistant manager, Ms Patroklou, speak to the claimant about the quality of his work.
- 5.10 The claimant did not submit a grievance until 25 April 2016 (R1/100). Ms Patel received it on 30 April 2016. The vast majority of the grievance concerns the incident of 16/17 March and the claimant's unhappiness with Mr Rehman. There is some reference to Ms Patel toward the end of the grievance, where it is suggested that he felt let down by Ms Patel.



- 5.11 Ms Patel accepts that she did decide that the claimant and Mr Rehman should not work together on the night shift until the grievance was resolved. As Mr Rehman was running the night shift, the claimant was moved to the day shift. Her evidence is that this was not favouritism of any form; Mr I Rehman was running the night shift and could not be readily replaced.
- 5.12 By letter of 4 May 2019, the claimant was invited to a grievance meeting. At the grievance meeting on 17 May, the claimant and his trade union representative objected to Ms Patel hearing the grievance, as it was alleged that the grievance was, in part, against her. Ms Patel, on reconsidering the grievance, agreed that it should be heard by someone else and arrange for it to be heard by a manager from the Brixton store, Mr Bekir Bayram.
- 5.13 After the meeting ended on 17 May 2016, the claimant and his representative went to do some shopping. The representative wished to purchase some items and the claimant wished to use his discount card on the purchase. Use of his discount was refused, a decision supported by Ms Patel.
- 5.14 Employees are entitled to have discount. They each have a card themselves, and one other card, which can be given to a nominated person. As regards use of their own cards, it is governed by the respondent's policy (R1/483). The policies states "Associates may obtain discount when purchasing goods for themselves or when purchasing genuine gifts for family members, friends or relatives."
- 5.15 Ms Patel understood the purchase was being made by the trade union representative. Before us, the claimant has been inconsistent in his evidence on this point. At one point he suggested that he had decided to buy a gift for the trade union representative. This contradicted his earlier statements. We find on the balance of probability that it was the trade union representative who decided to do some shopping. She wished to buy some items for herself. The claimant then sought to use his discount in relation to her purchase. We do not accept, on the balance of probability, that the claimant was seeking to buy her any item as a gift.
- 5.16 The grievance was re-scheduled before Mr Bayram. The claimant objected to him and it was re-scheduled on 10 June 2016 before Mr Tim Price. The claimant cancelled the meeting. Mr Price thereafter wrote to the claimant on 10 June and rescheduled the meeting for 15 June 2016. The claimant failed to attend. Mr Price and the claimant's union representative attempted to contact the claimant at that meeting, but could not get in touch. The grievance investigation was completed, and an outcome letter sent on 20 June, informing the claimant of the decision made in his absence.
- 5.17 The letter considered and addressed the grievance raised. Mr Rehman was to be given feedback on how to manage teams effectively.

Arrangements would be made for the claimant and Mr Rehman to meet after the claimant returned from sickness absence in order to ensure an effective relationship "going forward." It confirmed that the current contract did not specify night work and he would continue to work eight-hour day shifts.

- 5.18 We should note that whilst the initial contract referred to 16 hours, the claimant does not seek to argue that his contract, at the material time, was for more than one eight-hour shift, and nothing turns on this in any event.
- 5.19 The claimant appealed the outcome of the grievance. He sent a long email on 8 July 2016 (R1/161). The appeal was heard by Mr Stephen Cook. Mr Cook noted that the email appeared to raise matters which had not been raised in the original grievance. He invited the claimant to an appeal hearing on 29 July 2016. The claimant sent further information about his appeal on 27 July 2016. Mr Cook reviewed all the documents. Following further correspondence, the appeal was rearranged for 18 August 2016. The claimant attended with his union representative. The appeal was conducted by Mr Cook; Mr David Theobald (store manager) took notes.
- 5.20 At the outset of the appeal hearing, Mr Cook ascertained what the claimant was seeking by way of resolution, and the claimant clarified he was seeking the following: compensation for lost night shifts; return of his paternity leave and sick pay paperwork, or an explanation if they had been misplaced or disposed of (the claimant accepted he had not raised the issue of paternity leave in the original grievance); and return to work.
- 5.21 Mr Cook reached a number of decisions. First, the claimant was not employed to do only night shifts. He agreed that there should be more robust management of the night shift, and that another associate should not be acting as a supervisor. He concluded that, as a gesture of goodwill, the claimant should receive a payment to reflect additional money he may have earned if he had worked nights instead of days. This was a gross sum of £380. Second, he agreed that Ms Patel should have recognised she had been named in the agreed original grievance and should not have heard it herself. He concluded the claimant had not been disadvantaged, as Ms Patel had taken appropriate action when challenged. However, he did not agree that Mr Price should not have proceeded with the grievance. He concluded that deciding the grievance in the claimant's absence was appropriate. Third, he agreed to investigate the further claims raised by the claimant. The further claims were that he had been deprived of paternity leave and that Ms Patel had allocated the claimant shifts on the basis of being told (wrongly) by Mr Rehman the claimant no longer worked at Domino's. This involved a consideration of medical certificates.
- 5.22 Mr Cook wrote to the claimant on 8 September 2016 (R1/260) to confirm the outcome of the hearing. In that letter, the outcome of the grievance was set out. There are clear headings dealing with the allegations which

reflects the following: unprofessional behaviour of management by the night shift team leader; being let down by Ms Patel; and loss of earnings. The letter specifically sets out that he would further investigate the claimant's concerns about medical certificates and the paternity application. In addition, he referred to asking Ms Patel to clarify if she was informed by Mr Khaleel Rehman that the claimant no longer worked at Domino's Pizza. He agreed, in order to facilitate the claimant's return after his sick note expired on 15 October, that he return to a different store.

- 5.23 Mr Cook followed up on the matters he said he would look into. The claimant was assigned to a different store. He spoke to Miss Patel and ascertained the claimant had not been given paternity leave at the time because he had not submitted the correct paperwork, but that he had been granted holiday when he requested time off. He was not able to reach any conclusions about what had been said concerning the claimant's work at Domino's, but he asked Ms Patel to address it with the claimant. Mr Cook asked Ms Patel to apologise to the claimant for not resolving the issues concerning the sick notes. Whilst he sought clarification as to what happened to the sick notes, he was unable to get to a definitive answer.
- 5.24 The ex-gratia payment of £380 was paid to the claimant.
- 5.25 We have seen a document which the claimant has described as a confession (R1/263). This is a document which has been signed by Ms Patel. There is an argument about whether it is a forgery. Ms Patel accepts that the first paragraph, which concerns the claimant being employed as a night shift associate, was drafted by her. She disputes that the remainder of the content, which is alleged to contain a number of admissions, was drafted by her. The claimant accepts that he drafted the entirety of the document on his computer and presented it to Ms Patel for her signature. He alleges that she signed it after reading it. He alleges that he encouraged her to sign it by stating that if she did not, he would report her to the police for theft of his sick notes.
- 5.26 During the course of these proceedings, the respondent has repeatedly asked the claimant to produce the original. He did not produce it prior to the hearing, despite the respondent's requests, or at the start of the hearing. He did bring it on day three, after the tribunal noted on day two that he was obliged to bring the original of the document.
- 5.27 We do not need to resolve whether this document came into existence in the manner described by the claimant, or whether there has been some form of manipulation of the document by the claimant. The claimant chose not to cross-examine Ms Patel, and we have no reason to doubt her evidence. It follows he did not allege that her account was untrue. Ultimately, we do not need to resolve this matter, as nothing we have to decide turns on it. However, we mention it for the sake of completeness having noted that the matter appears to be of significance to the claimant.

- 5.28 To the extent we need to find further facts we will consider them in our conclusions.

### The law

- 6.1 Direct discrimination is defined by section 13 Equality Act 2010.

#### **Section 13 - direct discrimination**

(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. ...

- 6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

...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. (para 10)

- 6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred. If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

- 6.4 Section 136 Equality Act 2010 refers to the reverse burden of proof.

#### **Section 136 - Burden of proof**

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

...

(6) A reference to the court includes a reference to--

(a) an employment tribunal;

...

- 6.5 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd** [2003] IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong** [2005] IRLR 258. We have particular regard

to the amended guidance which is set out at the Appendix of Igen. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc** [2007] IRLR 246. The approach in Igen has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**.

6.6 Wages -Section 13 ERA

(1) an employer shall not make a deduction from wages of a worker employed by him unless -

- (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract or,
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction

6.7 Victimisation - Section 27 Equality Act 2010

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith. ...

6.8 Section 146 - detriment on grounds related to union membership or activities provides, so far as is relevant:

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any de-liberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

- (a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,
- (b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, ...
- (ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or
- (c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

6.9 Section 148 - consideration of complaint Trade Union and Labour Relations (Consolidation) Act 1992 provides, so far as it is relevant:

**(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.**

## **Conclusions**

### Wages

- 7.1 We first deal with the allegation of failure to pay wages.
- 7.2 The claimant has failed to set out, in any meaningful way, what is alleged to be the unlawful deduction from wages. To the extent any case has been put at all, it proceeds on the assumption that any change from night work to day shifts was a breach of contract and resulted in his being paid less.
- 7.3 It is accepted, by the respondent, that night work attracted a 30% increase on the hourly rate. However, the claimant's contract of employment signed 21 November 2016 defined his hours of work, and specifically stated, "In order to support the needs of the business, the company reserves the right to request, with appropriate notice, that these hours be worked on any day, Sunday to Saturday." We find the claimant had no right to work the night shift. He was not employed as a night shift associate.
- 7.4 He signed a further contract on 1 February 2016 (R1/357) which recorded his hours of work as eight. The material provisions were the same as the previous contract. The rate of pay at that time was £8.34 per hour.
- 7.5 As to the work that he did undertake, he has produced no evidence to demonstrate that, for any shift that he worked, he was not paid the correct wages.
- 7.6 As regards the reference to £380. It is clear that the claimant was offered an ex-gratia payment following his grievance. This offer neither reflected any contractual right, nor did it indicate a contractual change. At the start of the hearing there was a suggestion the sum was not paid, but it was admitted in evidence that it was paid.
- 7.7 It follows the claimant never had a contractual right to work nights. He has been paid fully for all the work undertaken. He has been paid an ex-gratia sum, which is not wages.
- 7.8 It follows that his claim of unlawful deduction from wages fails.

Direct discrimination

7.9 The claimant alleges that each of the acts of direct discrimination occurred either because of sex (because he is a man) or because of religion (it is the claimant's case he was treated as he was because he is a Muslim).

7.10 We will consider each of the allegations in turn. However, in reaching our conclusions in relation to each individual allegation, we have regard to the entire evidence advanced in support of all of the allegations.

*Allegation 1: in April 2016, unlawfully deducting wages following the claimant's dispute with his supervisor.*

7.11 This allegation must fail. There was no deduction from wages at all. It follows that there was no unlawful deduction from wages. Therefore, there is no detriment. There is no treatment which could amount to discrimination. There is nothing for the respondent to explain. To the extent an explanation is necessary, it is clear that the explanation is the claimant was paid at all times in accordance with his contract.

*Allegation 2: in February 2016 by Ms Patel failing to permit the claimant to take paternity leave.*

7.12 The claimant's case is that his child was born at 05:00 on 15 February 2016. The claimant was at the hospital. He claims that he informed Ms Patel of the birth on that date, but in some manner, she insisted that he work his shift. We have preferred Ms Patel's evidence. She was not told of the pregnancy, or of the birth, at that time.

7.13 We would note that the claimant has been inconsistent in his evidence as to when he had a conversation with Ms Patel. He has been unconvincing as to the content of that conversation. He suggested that he worked at midday, whereas the clear documentary evidence demonstrated he started at 16:59. It is clear to us that the claimant's memory of these events is defective.

7.14 Ms Patel did not allow the claimant to take paternity leave immediately after the child's birth for a number of reasons. The claimant had not informed Ms Patel of the pregnancy. He did not tell her of the birth of his child. He had not requested paternity leave at any time prior to the birth. In fact, he told her nothing about it until 11 March 2016, when she agreed to his taking leave as requested. The only reason why the leave was not classified as paternity leave (at that time) is that he failed to produce the documents requested.

7.15 We note that it is the respondent's case that he had no statutory entitlement to paternity leave. We need not resolve the issues relating to that. Whether or not he had a right did not influence Ms Patel's decision. When she learned of the request, she sought advice from HR, and she followed that advice. It is clear this respondent exercised its discretion to

allow paternity leave in principle. All the claimant had to do was complete the relevant documents, which he failed to do.

- 7.16 The claimant has not sought to state what he means by failure to permit him to take leave. The fact that he did not take paternity leave cannot in itself be seen as a failure by Ms Patel to permit the leave. Moreover, the reference to "permit" would imply that there was some form of request and some form of refusal, but there is no basis for that assertion.
- 7.17 The reason why the claimant did not take paternity leave at any time is clear. First, he did not request it prior to the birth. Second, when he did request it on 11 March 2016, he was granted paternity leave subject to one condition, being that he filed the relevant request forms. He failed to file those forms, and the time given for paternity leave was treated as holiday, subject to it being converted to paternity leave, as soon he complied with the request to file forms. There is no fact from which we could conclude any action of Ms Patel was because of a protected characteristic. The burden does not shift. In any event the explanation is a complete answer to the claim.

*Allegation 3: by the respondent failing to pay paternity pay in February 2016.*

- 7.18 This allegation expands on the previous allegation. During the two weeks which were allocated for paternity leave, the claimant was paid holiday pay. Paternity pay was never due because the relevant statutory notices were never given. To the extent the respondent agreed to treat leave as paternity leave, that was subject to a condition that he filed the relevant forms with his request. The moment he did so, the leave would be treated as paternity leave, and he would be given paternity pay. He failed to make the relevant request. It follows no paternity pay was ever due.
- 7.19 There is no fact which turns the burden. The explanation is a complete answer to the claim.

*Allegation 4: by moving the claimant from the night shift in April 2016.*

- 7.20 Ms Patel accepts that the claimant was moved to the day shift. Mr Rehman was of the same religion as the claimant. Ms Patel was a Hindu. It is possible to say that there is a difference in religion, at least between the claimant and Ms Patel. There is also difference in the protected characteristic of sex between them. However, the claimant has not established such a difference between him and Mr Khaleel Rehman, who was left on the night shift and not moved to the day shift.
- 7.21 The claimant has established a difference in treatment between himself and Mr Khaleel Rehman. But it is not enough to establish a difference in treatment, even if there were a difference in the protected characteristics relied on in relation to the only evidential comparator referred to in evidence, being Mr Khaleel Rehman; there must be something more. There is no fact from which the tribunal could conclude that any difference



in treatment was because of a protected characteristic. The burden does not shift.

- 7.22 In any event, Ms Patel has provided a clear explanation. There had been argument on the evening of 16/17 March 2016. The claimant had behaved inappropriately. The argument had become heated. She had no reason to believe that Mr Rehman would continue the argument. However, the claimant raised a grievance, and she took action. She considered it appropriate to separate them. For reasonable and legitimate managerial reasons, she did not consider it appropriate to move Mr Khaleel Rehman, she therefore moved the claimant, pending resolution of the grievance. In fact, subsequently, the claimant elected not to return to his original store, despite the fact that the respondent's managers hoped that the two could work together again. It follows that Ms Patel took action to preserve the position whilst the grievance was resolved and did so having regard to legitimate business needs. That is a complete explanation. In no sense whatsoever was the decision because of sex or religion. This allegation fails.

*Allegation 5: by Ms Patel removing union leaflets from the staffroom on some date prior to June 2016.*

- 7.23 The claimant has made it clear that this is an allegation against Ms Patel personally. He now alleges he saw her remove the leaflets. We have preferred the unchallenged evidence of Ms Patel. She did not remove the union leaflets. It follows the alleged discriminatory act did not occur. It follows there is no action to explain and this allegation fails.

*Allegation 6: by Ms Patel, orally inviting the claimant to a grievance meeting, it being the claimant's case that the grievance was in part about Ms Patel, in June 2016.*

- 7.24 We have considered the claimant's grievance letter. The vast majority the letter concerns his dispute with Mr Khaleel Rehman arising out of the disagreements on the shift 16/17 March 2016. Towards the end of the grievance there is reference to his being disappointed by Ms Patel's actions.
- 7.25 The claimant was invited to a grievance meeting because he raised a grievance. His complaint is that Ms Patel proposed to conduct the meeting. He raised no complaint about this following the invitation prior to the meeting itself. It is unclear why he did not raise any objection earlier. It is surprising that he should fail to do so, if he had real concerns. On a fair reading of the grievance, it is clear that the focus of the grievance is not about Ms Patel. It is not surprising that she hoped it could be resolved informally, and any concerns the claimant had could be addressed. To the extent there is any complaint about Ms Patel, it is not set out in clear terms. Therefore, we cannot find that her proposing to deal with the grievance initially was in any sense unreasonable.

- 7.26 Perhaps if Ms Patel had exercised extreme caution, she could have sought to identify with the claimant whether he proposed to include her as part of the grievance. However, given the focus of the grievance, it was entirely reasonable for her to assume that the grievance was, essentially, not about her.
- 7.27 The question of reasonableness of approach is important. It is possible to infer discrimination if the conduct of the manager is unreasonable and unexplained. In this case it is neither unreasonable nor unexplained. The explanation is simply that she did not believe that the grievance was about her; we find she was reasonable in forming that view. When the claimant and his union representative did object to her dealing with the grievance at the meeting on 17 May, she immediately made arrangements for somebody else to conduct the grievance hearing. Her ready agreement is entirely inconsistent with an individual acting inappropriately or unreasonably in relation to the grievance investigation.
- 7.28 There is no fact, whether looking at this incident in isolation, or looking at the entirety of the evidence, from which we could conclude that the action taken by Ms Patel was on the grounds of either religion or sex. Further, the explanation given by Ms Patel is clear, cogent and fully explains the action. In no sense whatsoever was her action because of sex or religion.

*Allegation 7: by Mr Cook rejecting the claimant's grievance appeal in August 2016.*

- 7.29 This allegation is puzzling. The claimant did choose to cross-examine Mr Cook. However, despite being requested to do so by the tribunal, he made no attempt to suggest to Mr Cook that Mr Cook had rejected the claimant's grievance. Nowhere — not in the claim form (where the matter is not addressed at all), in any further and better particulars, any draft of the issues, the amendments as sought before us, or in the claimant's statement — does the claimant set out, in any meaningful way, the aspects of his grievance he believes were rejected.
- 7.30 We have considered the nature of Mr Cook's findings above. It is apparent that he substantially upheld the claimant's grievance. It would be fair to say that he concluded the claimant was not entitled to additional pay. Nevertheless, he gave the claimant ex-gratia compensation, even though there was no contractual basis for his claim of unlawful deduction from wages. He did make findings in the claimant's favour. He was critical of the night management by Mr Rehman. He was critical of Ms Patel.
- 7.31 There is no factual basis on which we could conclude that Mr Cook rejected the claimant's grievance. There is no fact from which we could conclude that any of the action taken by Mr Cook in relation to the claimant's grievance was because of sex or religion. Mr Cook has given an explanation. He analysed the claimant's grievance. He took time in the grievance hearing to identify what resolution the claimant sought. He

considered the evidence carefully. He found a number of grievances made out and proposed appropriate action. In short, he dealt with the grievance thoroughly and reasonably. This is a clear cogent explanation, and it is a complete answer to the allegation of discrimination. In no sense whatsoever was his action discriminatory.

*Allegation 8: by Mr Cook leaving two grievance issues unresolved being medical records and paternity leave in the outcome to the grievance appeal August 2016.*

7.32 The claimant did not seek to cross-examine Mr Cook on these matters, despite the tribunal encouraging him to do so. It is clear that Mr Cook did identify the claimant's additional grievances in relation to the alleged theft of sick notes, which is the medical records issue, and the alleged refusal of paternity leave. He agreed to explore both matters. He did investigate. He undertook interviews and raised the matter with Ms Patel. He did all that he could reasonably be expected to do to resolve the issue. It would appear from his evidence he was not entirely satisfied with all the answers he received. The claimant may not be satisfied with the answers either. The allegation is that he did not pursue or address those additional issues; that allegation is unsustainable. It is arguable that the issues remained unresolved, in the sense that no final explanation was given and accepted. It follows that the claimant perceives the matters unresolved. However, there was nothing further that Mr Cook could have reasonably done.

7.33 There is no fact from which we could conclude that action taken by, or failure to act by Mr Cook was because of religion or sex. It follows the burden does not shift. In any event, Mr Cook has produced cogent evidence to demonstrate his understanding of the grievance, the way in which he investigated it, and the actions taken. That provides an explanation which in no sense whatsoever is because of sex or religion. This allegation fails.

### Victimisation

7.34 It is the claimant's case that he was victimised because he undertook a protected act being his grievance of 30 April 2016. This is, in fact, the grievance which reached Ms Patel on 30 April 2016, albeit it was drafted, as we understand it, on 25 April 2016. We have read the document carefully. It contains no allegation of discrimination. It does nothing for the purposes of, or in connection with, the Equality Act 2010.<sup>6</sup> The claimant was asked about the grievance during cross-examination. He accepted that in no sense whatsoever was it claiming any form of discrimination.

7.35 The claimant relies on no other basis pursuant to 27(2) Equality Act 2010 for the being a protected act. Moreover, he does not allege the respondent believed he may undertake a protected act. The claim of victimisation is pursued on the basis of his grievance being a protected act

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<sup>6</sup> It follows that the question of whether it was false information given in bad faith does not arise.

on no other basis. It follows that the claim of victimisation must fail, as it is brought in relation to an alleged protected act, but the act was not protected.

- 7.36 In any event, the explanations provided, for the three allegations (allegations six, seven, eight are relied on), would equally constitute defences to the claim of victimisation, as they do to the claim of direct discrimination.

Trade union activities

- 7.37 The claimant relies on allegation five. This is an allegation against Ms Patel that she removed the membership forms. She did not remove the membership forms and, therefore, the alleged detrimental treatment did not occur. As she did not remove the forms, it cannot be argued that she made any attempt to prevent him or deter him from taking part in the activities an independent trade union, or penalising him for doing so.
- 7.38 The claimant has not sought, at any stage in these proceedings, to specify how he alleges the detrimental treatment in any manner at all occurred because of his membership of, or activities in relation to an independent trade union. We do not need to explore this further. The reality is that Ms Patel did not act in the way he said she did. It follows there is no detrimental treatment at all which could call for an explanation.
- 7.39 It is for the respondent, on a complaint under section 146 Trade Union and Labour Relations (Consolidation) Act 1992 to show the sole or main purpose for the act or the failure to act. However, when the act relied on did not occur at all, as in this case, there is nothing to explain

*Allegation 9: by Ms Patel in May 2006 insisting the claimant produce his staff card for discount shopping, rather than the staff number.*

- 7.40 We have explored the circumstances relating to this allegation above. It was agreed that the claimant is referring to an incident after the adjourned grievance hearing on 17 May 2016.
- 7.41 Even taking the claimant case at its height, how he says section 146 is engaged remains unclear. It would appear to be his case that the alleged treatment had the sole or main purpose, in some manner, of deterring him from taking part in the activities of an independent union or deterring him from making use of the trade union services. However, this interpretation is more an attempt by the tribunal to give a rational basis to a claim which in reality lacks any rationality at all.
- 7.42 He was allowed to have his union representative at all relevant meetings. This is not consistent with the respondent then seeking to deter him, in any way, from exercising his rights. Moreover, it is difficult to see how he was being penalised.

- 7.43 The reality is this: his trade union representative wanted to buy some clothes. We have found the claimant was not buying the clothes as a gift on the basis she was a friend. The trade union representative was not entitled to a discount. The claimant was not entitled to use his card to facilitate the discount, as that would have breached the terms on which the card was given to him. He was refused the right to use the discount card. Ms Patel confirmed that refusal. It had nothing at all to do with union activity.
- 7.44 Moreover, the act was not detrimental. It was not a detriment because he had no right to use the discount card in way which breached the agreed terms of use. All Ms Patel did was apply her understanding of the contractual arrangements to the clear situation with which she had to deal. The suggestion before us that it was the claimant who initiated the purchase as he wanted to give the trade union representative a gift as a friend is a disingenuous invention, and not an argument employed at the time.
- 7.45 The employer has shown, pursuant to section 148, the sole or main purpose for the act complained of. It follows that the claims pursuant to section 146 Trade Union and Labour Relations (Consolidation) Act 1992 fail.
- 7.46 All claims have failed, and the tribunal dismisses them.

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Employment Judge Hodgson

Dated: 19<sup>th</sup> July 2019

Sent to the parties on:

25<sup>th</sup> July 2019

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For the Tribunal Office