RESERVED **Case No. 2414604/2018**
1809831/2018
2410163/2019

EMPLOYMENT TRIBUNALS

Claimant: Mr S Rathore

Respondent: WM Morrison Supermarkets PLC

HELD AT: Liverpool **ON:** 25, 26 & 27 September 2019

BEFORE: Employment Judge Shotter

Members: Mr G Pennie
Mr WK Partington

REPRESENTATION:

Claimant: In person
Respondent: Ms, I Ferber, counsel

JUDGMENT

The unanimous judgment of Tribunal is:

1. The claimant was not unlawfully discriminated against under section 13 of the Equality Act 2010 and his complaints of unlawful race, religious and age discrimination are dismissed.

2. The claimant did not suffer an unlawful deduction of wages and his claim for the differential of full pay and statutory sick pay for the period 8 July to 15 July 2019 is dismissed.

3. The claimant's claim of unlawful deduction of wages for the period 21st January 2019 to 24th February 2019 was brought on 15th July 2019 after the end of the period of 3 months beginning with date of the last deduction on 24th February

2019. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, the complaint was not presented within such further period as the tribunal considers reasonable, the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

REASONS

Preamble

Case number 1809831/2018

1. By a claim form case number 1809831/2018 received 14 August 2018 following ACAS Early Conciliation between 7 June 2018 and 20 July 2018 the claimant claimed he had been unlawfully discriminated against on the grounds of his age, religion or belief.

2. The claimant alleged on 16 January 2018 he had grown his beard for a Sikh religious festival and been told by Frank Billington to buy razors and shave off his beard. A second incident arose when he grew his beard again for a Sikh event on 17 April 2018 and was questioned by Mike Linegar about why he had not shaved, Mike Linegar said he would discuss possible disciplinary action with the claimant's manager.

3. The claimant relies on 3 comparators; Neil Gilmartin, Dann Cooper and Charlie Gilmartin who are Caucasian, aged younger than the claimant and had beards but nothing was said to them by the respondent.

4. Case number 2414604/2018

5. By a claim form case number 2414604/2018 received on 16 August 2018 following ACAS Early Conciliation between 7 June 2018 and 20 July 2018, the claimant who at the time he issued the first set of proceedings remained employed by the respondent as an instore butcher, brought complaints of unlawful direct race, religion and age discrimination under section 13 of the Equality Act 2010 ("the EqA") and unlawful deduction of wages. The claimant puts his case as follows:

5.1 On the 16 January 2018 Frank Billinge, manager, was informed the claimant was growing a beard for a religious event Guru Gobind Singh's birth and instructed the claimant to buy razors and shave it off and this was an act of race, religious and age discrimination.

5.2 The claimant's comparators were Neil Gilmartin and Dan Cooper, Caucasian and younger than the claimant who had "beards bigger than mine."

5.3 In April 2018 for a Sikh holy day the claimant grew his beard the week before Mike Linegar "pulled" the claimant into the administration room and with Gail Daly, the administration manger as a witness, and he threatened to take disciplinary action against the claimant if he did not shave off his beard.

<u>Case number 2410163/2018</u>

6. By a claim form case number 2410163/2018 received on 15 July 2019 the claimant remained employed by the respondent and brought a complaint of unlawful deduction of wages arising out of his suspension in 2017 and being placed on SSP. The claimant also complained he had not received any wage slips.

7. In short, the respondent disputes all of the claimant's claims, alleging that it was following the act of suspension for alleged gross misconduct the claimant raised a grievance for the first time, and it denies the allegations.

<u>Witness evidence</u>.

8. The credibility of witnesses was pivotal in this case, as there was little supporting documentary evidence. The Tribunal spent a great deal of time weighing up the oral evidence and balancing it against the background factual matrix. It has dealt in detail below the credibility issues and its conclusion in relation to the witness evidence, which it assessed on the balance of probabilities.

9. The claimant gave evidence on his own behalf, and on behalf of the respondent the Tribunal heard oral evidence from Neil David Gilmartin, meat and fish manager and one of the claimant's comparators, Gail Daly, price integrity and cash manager, Karl Oscar Andersson, store manager, Frank Billinge, trading manager, Mike Linegar, senior street market manager, Christopher John Clayton, produce manager, Andrew John Stanley, personnel manager and Karen Smith, people manager responsible for wages who dealt with the claimant's unlawful deduction of wages claim.

10. The claimant was not found to be a credible witness, and taking into account the factual matrix the Tribunal found his motivation in raising the grievance, which had no basis, was to delay disciplinary proceedings for gross misconduct.

11. In oral closing submissions the claimant attempted to give new evidence alleging Frank Billinge had bullied him on three occasions, allegations that had not been put to Frank Billinge on cross-examination. One of the allegations was that the claimant had asked Frank Billinge if he could go home early because he had no lunch and he was told to have his break and then clock off, which the claimant maintained was an act of bulling. The Tribunal struggled to see how Frank Billinge's actions amounted to bullying

and it brought into question the claimant's credibility as he was willing to draw upon any allegation whatsoever to bolster his claim, when there was no basis for it.

12. In oral evidence under cross-examination the claimant shifted his evidence. He stated Mike Linegar had told him "I'm going to consider a disciplinary over your beard." The claimant confirmed in oral evidence during the liability hearing that the threat of disciplinary was the only discriminatory act alleged against Mike Linegar. In his written statement the claimant alleged Mike Lingear stated he would speak to Neil Gilmartin about a disciplinary against him for being late and not having a shave, and yet being late did not form any part of his case. It is notable the claimant's witness statement incorrectly stated Karl Andersson and not Mike Linegar who had been involved in the April 2018 alleged incident, and this was only picked up by counsel with the result that the claimant's statement was altered.

13. Neil Gilmartin was found to be a credible witness who gave a straight-forward and coherent explanation for the respondent's attitude towards stubble/beard to the effect that when the growth became visible it became a hygiene issue and the respondent had a policy, well-known to the claimant, that stubble/beards were either shaved off or a snood was to be worn. The Tribunal accepted throughout the relevant period the claimant could have worn a snood (which he had worn before when working for the respondent) over his beard, and the claimant was unable to establish he had a prima facie case taking this evidence into account together with the Tribunal's view that the claimant was an inaccurate historian.

14. Neil Gilmartin's evidence that he never challenged the claimant directly to avoid confrontation and he had found the claimant difficult to deal with, was reinforced by the evidence of other witnesses. The Tribunal accepts as credible that when the claimant came to speak to him about Frank Billinge in 2018 allegedly telling him to shave his beard, Neil Gilmartin's response was to direct the claimant to speak with Karl Andersson and that was the full extent of the evidence he could give relating to the January 2018 alleged incident. Neil Gilmartin did not witness the actual alleged incident. Neil Gilmartin confirmed John Cheek, an older employee similarly aged to the claimant, wore a snood.

8 Gail Daly was a succinct confident witness who gave honest and credible evidence. She witnessed the meeting between Mike Linegar and the claimant in April 2019 and her evidence on what had been said was accepted by the Tribunal. She was definite the waste issue and the facial hair had been discussed, and she confirmed in oral evidence on cross-examination Mike Linegar made no reference to a disciplinary and had not told the claimant he would be speaking to Neil Gilmartin about it. Gail Daily confirmed other staff wore snoods over beards, including John Cheek on bakery, and the Tribunal

concluded the claimant had not been threatened with a disciplinary as he alleges.

9 Mike Linegar in his witness statement could not recall asking the claimant about his beard, but could recall discussing the waste stock. Having heard the evidence of Gail Daly under oath, Mike Linegar confirmed in oral evidence he had a recollection that she was right and some form of discussion about the claimant's beard had taken place, which he could not previously recall. Mike Linegar in cross-examination gave logical and coherent evidence that the claimant's allegation concerning the alleged disciplinary threat could not be correct, given the fact Neil Gilmartin was not senior enough to deal with any disciplinary issue and it would be Mike Linegar or managers above his level that had the authority to deal with disciplinary matters. This evidence was accepted by the Tribunal as credible, and it noted that it was not disputed by the claimant.

10 Mike Linegar's evidence that he had approached the claimant on other occasions regarding his facial hair growth and company policy was accepted as credible. The Tribunal accepted he had told the claimant to shave or wear a snood and was reluctant to enforce the management instruction. Mike Linegar wanted to avoid confrontation as he found the claimant difficult to deal with. The Tribunal found Mike Linegar's exhibited embarrassment during this part of the hearing in was reluctant to admit the fact it was difficult for him, as a senior manager, to act against the claimant when he was told about the company policy requiring a snood to be worn and not wearing one, and the Tribunal accepts that as a result the claimant was not threatened with a disciplinary and it is irrefutable disciplinary action was never taken against him for his beard.

11 Finally, the Tribunal accepted as credible Mike Linegar's evidence that he had not been informed by the claimant he was growing his beard for a religious festival and concluded that Mike Linegar did not possess any knowledge to the effect the claimant was Sikh, and nor did this occur to him. In response to a question put to him under cross-examination by the claimant regarding a Sikh bracelet he had worn Mike Linegar denied the conversation had taken place, confirming had it taken place as described by the claimant he would have consulted with the human resource department. It is notable that this was new evidence was not raised by the claimant prior to his cross-examination, despite counsel's objection he was allowed to ask the question and the Tribunal found Mike Linegar's response was credible.

12 Frank Billinge could not recall the incident that allegedly took place on some date mid-January 2018, however he did recall raising the issue of facial hair growth with the claimant on numerous occasions and referring him the respondent's policy. The Tribunal accepted Frank Billinge had approached numerous employees about facial hair and he had treated all the same

whether their race, religion or age, by drawing their attention to the respondent's policy that required them to be clean shaven or to wear a snood when dealing with certain types of food. The Tribunal accepted Frank Billinge's evidence that he was unaware the claimant was a Sikh and the claimant had made no mention of growing his beard for a Sikh festival. It would not be an issue for Frank Billinge or the respondent as the claimant could have worn a snood in the run up to religious events. The claimant was aware of the respondent's policies and procedures, he had worn a snood when he worked for the respondent in the manufacturing plant and was aware of the strict rule on this.

13 Karl Andersson, gave straight-forward and credible evidence. In January 2018 he was aware the claimant was not shaving for religious grounds, and it is not disputed that when the claimant went to see Karl Andersson in January 2018 it was made clear that the claimant either had to shave or wear a snood. Karl Andersson's evidence that the claimant had reported to him Frank Billinge had told him to shave or wear a snood was credible, there was no reference to the claimant being instructed to purchase razors on the shop floor, which the claimant maintains was said by Frank Billinge. The Tribunal found on the balance of probabilities that Frank Billinge did not tell the claimant to purchase razors. It is not disputed the claimant did not purchase any razors, and did not shave off his beard immediately and there was no adverse consequence for the claimant.

14 Karl Andersson corroborated the evidence given by other witnesses, namely, John Cheek on bakery and Richard Welsh on oven bake, both wore snoods over their beards as required when handing fresh food.

15 Chris Clayton (who found the claimant hostile to deal within the workplace) gave undisputed evidence. He confirmed John Cheek wore a snood and was aged in his late forties early fifties. Chris Clayton described how he met with the claimant seeking an explanation for something that had not been done on the meat counter and when asked for an explanation the claimant would be "very hostile." The Tribunal found this was relevant to the claimant's argument that the respondent should have made the adjustment referred to by his GP which provided for no stressful meetings. From a practical point of view normal interaction between staff and management can be stressful, is part of normal working life and Chris Clayton's evidence emphasised how unreasonable the adjustment being sought by the claimant was.

16 Andrew Stanley's evidence was unchallenged, and he confirmed the regional people manager had emphasised at senior management level that they should ensure individuals with facial hair or long hair wore protective clothing, and that there was "a grey area around enforcement in some stores." From the evidence before the Tribunal, whilst it accepts the claimant was told he would either have to wear a snood or shave off his beard, when he did not no

action was taken. The evidence on what steps were taken by the claimant was unsatisfactory due to issues with recollection, it appears the claimant did following the January 2018 instruction shave for the next day shift in the knowledge that he could have worn a snood.

17 Karen Smith dealt with the unlawful deduction of wages, and the chronology of deductions set out in the ET3 was agreed by her and the claimant which left the Tribunal with two periods to consider; 21 January to 24 February 2019 (35 days) and 8 to 15 July 2019 (8 days) when the claimant was in receipt of SSP. The claimant was more concerned about whether Karen Smith had responded to his communications regarding his suspension and disciplinary matters, both allegations that had not been included in the claimant's claim, which were irrelevant to the agreed issues as explained to the claimant by the Tribunal. The Tribunal accepted as credible Karen Smith's evidence that the claimant was paid SSP in those two periods totalling 43 days because he was not well enough to work and take part in meetings, including a return to work meetings as the claimant had been off for a while, and he could not return to work pending a disciplinary hearing for alleged theft which required resolution before a return to work was possible for any employee.

Agreed issues

18 The agreed issues between the parties are as follows:

Direct Discrimination

18.1 Was the Claimant told to shave off his beard on around 16th January 2018? Or was he told either to shave it off or wear a snood?

18.2 Was the Claimant told "How come you haven't had a shave?" and "I will speak to your manager about a potential disciplinary" on around 17th April 2018? Or was he told about the policy of either being clean shaven or wearing a snood, if coming into contact with fresh food?

18.3 Were Dan Cooper, Charlie Gilmartin and/or Neil Gilmartin treated differently from the Claimant, in that they were not told to shave off their beards?

18.4 If there was a difference in treatment, was it on the ground of the Claimant's race, religion and/or age?

Unlawful Deduction from Wages

18.5 Was the Respondent entitled to pay the Claimant SSP (as a matter of contract) from 1st July 2019 to the date of lodging the ET1 on 15th July 2019,

or should the Claimant have been on full suspension pay? In particular, was the Respondent entitled to pay the Claimant SSP:

(a) In circumstances where the Claimant was declared fit to work by his GP except for being unfit in respect of attending disciplinary meetings, and the Claimant was required to attend a disciplinary meeting?

(b) In circumstances where company sick pay was not contractually payable where the sick leave began during either investigations or formal disciplinary processes (6th bullet point on page 205)?

18.6 If the Claimant makes a similar claim in respect of the period from 21st January 2019 (or any earlier period) to 24th February 2019, is such a claim out of time?

18.7 If not, was the Respondent entitled to pay the Claimant SSP for that earlier period, or should the Claimant have been on full suspension pay?

15. During closing submissions, the claimant was more concerned with dealing with his recent dismissal, appeal and indicated his intention to lodge Employment Tribunal proceedings, rather than deal with the case before the Tribunal and the agreed issues. The Tribunal suggested the claimant's submissions should include all of the agreed issues, and taking into account his status as a litigant in person it was agreed counsel would present her oral submissions first following which the hearing was adjourned and the claimant given approximately 1.5 hours to finalise his oral submissions, the parties having been given notice at the end of the first day of hearing that preparations should start. Despite an invite from the Tribunal the claimant refused to deal with counsel's submissions on the claimant's motivation in raising allegations of discrimination to deflect from his suspension and serious disciplinary matters he was facing.

16. The Tribunal was referred to an agreed bundle of documents together with the claimant's bundle, and having considered the oral and written evidence and oral and written submissions presented by the parties (the Tribunal does not intend to repeat all of the oral submissions, but has attempted to incorporate the points made by the parties within the body of this judgment with reasons), it has made the following findings of the relevant facts.

Facts

18. The respondent is a national supermarket with stores across the UK including Chester. The claimant was first employed on 3 February 2015 at the manufacturing plant in Winsford in a general operations role. In oral evidence the claimant explained the strict food hygiene requirement of snoods being worn if an employee was not clean shaven, and the claimant had worn a snood over his beard.

19. The claimant was issued with a statement of terms and conditions of employment and had access to various policies and procedures including Attendance Management last updated 17 August 2017 that provided "colleagues will receive statutory sick pay if they meet the government criteria…A colleague who cannot attend work for a medical reason, for example sickness…will receive company sick pay (subject to complying with policy rules) the amount is based on their length of service. It is not disputed during the relevant period the claimant received his entitlement to 5-weeks company sick pay.

20. The respondent was entitled to withhold company sick pay in certain circumstances including when an employee begins a "period of sick leave during investigations or formal processes, for example…disciplinary." The Policy included a requirement to consider reasonable adjustments if an employee was disabled.

21. On the 13 March 2015 the claimant signed a "Responsibility Form" for Morrison's Manufacturing Winsford that required the claimant and other employees "in the course of their employment" to act diligently and with due care for health and safety, wear or use protective clothing and "Follow all procedures required by health and safety Policy of the Group, site or any location which they are vising." The claimant was aware he was required to wear a snood if he was not clean shaven.

22. The claimant was transferred to the Chester store in or around May 2016 where he worked as a butcher on the meat counter working with fresh meat. Employees working with fresh produce were required to either been clean shaven or wear a snood, and the claimant was aware of this although he considered the Chester store to be "lackadaisical" in its attitude to snoods.

<u>Dress Standard Retail Policy</u>

23. The respondent issued a Dress Standards Retail policy last updated 17 August 2017 which the claimant did not dispute he was aware of. The "Key points "of the Policy are as follows:

    a. We have a diverse workforce and respect that colleagues may choose to wear items of clothing for religious or cultural reasons; we need to make sure these are in keeping with our safety and hygiene requirements…please maintain a high standard of personal hygiene and appearance…"

    b. "If you've got a beard or moustache, please keep it neatly groomed and you'll need to cover it with a snood if you work on open food areas."

24. The Tribunal concluded the claimant was aware of the Policy that snoods should be worn and his evidence that he was instructed to shave off a beard with no reference to the alternative of a snood was not credible. The claimant was aware at all relevant times the claimant could have worn a snood as an alternative to shaving his beard off, and it did not accept his evidence that the actual comparators relied upon had beards and did not wear a snood when handling fresh food.

<u>First alleged incident mid-January 2018</u>

25. At the liability hearing the claimant produced an email sent 3 September 219 to the Sikh Council and the response that practicing Sikhs support uncut hair on head and beard around certain religious events. The claimant relied upon two religious events; the Smagram in London for the celebration of Guru Gobind Singh and Baisakhi. The Tribunal were not provided with the dates of either festival.

26. On an unknown date in mid-January 2018 the claimant exhibited a growth of facial hair whilst working on the open meet counter, and he was approached by Frank Billinge who challenged him about his appearance instructing the claimant to shave or wear a snood. The Tribunal finds the claimant was not instructed to purchase razors and shave his beard off immediately, and nor did he make the purchase and shave off his beard immediately. After the discussion the claimant went to see the general manager Karl Andersson and he was told in no uncertain terms he either had to shave off his beard or wear a snood. The claimant did not wear the snood and chose to shave at home prior to working his next shift.

27. The claimant raised no complaint about his alleged treatment by Frank Billinge until the day after he had been suspended on full pay for gross misconduct alleged theft.

<u>Second alleged incident April 2018</u>

28. In or around early/mid-April 2018 Mike Lenegar approached the claimant initially concerning food wastage, and when doing so noticed his personal appearance due to fact that the claimant was working with fresh meat unshaven. The claimant was invited to a meeting. Mike Linegar asked Gail Daly attend and witness the meeting he had arranged with the claimant. Gail Daly's understanding was that the meeting was to discuss missed waste reductions. During the meeting the claimant was shown pictures of missed weight reductions and he refused to engage with the questions asked of him. The claimant was then asked to explain why he had not shaved, and he responded that he had "only shaved in certain places because he wanted to grow a beard" and pointed to his face. The claimant did not refer to the reasons why he wanted to grow a beard, and did not inform Mike Linegar that it was for a religious festival. Gail Daly's undisputed evidence was that the

claimant was hostile throughout the meeting, had raised his voice and was verbally aggressive towards Mike Linegar. The Tribunal finds the claimant was not threatened with a disciplinary over his beard as alleged, and the matter was left that he would either shave or wear a snood.

<u>Suspension pending investigation</u>

29. On the 20 April 2018 Frank Billoinge suspended the claimant on full pay pending investigation into alleged theft. The suspension was confirmed in a letter dated 23 April 2018. An investigation commenced into an allegation of theft and the claimant attended an investigation on 28 April 2018 at which his suspension was continued.

<u>The grievance</u>

30. The next day, 21 April 2018, the claimant sent a number of emails complaining about his suspension, the alleged theft and Frank Billinge. The email sent at 06.08 read “I would like to raise a grievance against his bullish intimidating attitude towards me on a regular basis he has bullied me in favour different ways as follow: making me take dinner an hour and 10 before my leave time, questioning the integrity of my gp, always snooping around me, grown my beard for religious events.” This was the first time the claimant had raised these specific allegations.

31. A second grievance was emailed at 6.31 regarding “automatic half hour pay taken out for lunches…”

32. A third grievance was put in at 9.49 on 23 April 2018 “for 3 years working for Morrisons I have had the threat of dismissal and bullying and harassment I am now raising a formal grievance on every attempt being made to dismiss me from the company am now under dr for mental health which has been bought [brought] upon due to the consistent attempt to dismiss me…”

33. A fourth grievance was submitted on 3 May 2018 at 21.38 “logging further incidents and further information about the incident the beard. There is 2 colleagues Dan and Neil whom I work with who have beards. Who have beards since I’ve known them. In January Frank questioned me about the growth of my beard…Frank said to me go in the back buy some razors and shave it OFF. When I asked him why he said it is not company policy, later I went to Karl Andersson…to tell him I’m not shaving it he put his hand up and said am not saying anything...” The claimant set out information relating to allegations concerning a break in February 2018 and a code to reduced stock in March 2018.

34. It is notable that the most recent alleged incident that occurred in April 2018 was not referred to, despite the fact on the claimant’s account he was threatened with a disciplinary and Tribunal concluded this was further

evidence that the alleged incident had not taken place and the claimant had fabricated the January 2018 allegation regarding the razors to deflect a possible dismissal at a disciplinary hearing arranged for 17 May 2018. The Tribunal's view was supported the claimant's last sentence in the 3 May 2018 email "kindly email me back when the grievances are going to be heard as I have a disciplinary hearing 17 May for dismissal and you confirmed that hearing will be suspended until the grievances are heard." It appears from the claimant's own communication he believed dismissal would follow, which is not surprising given the allegation was a serious one, namely theft in the retail store.

<u>Unlawful deduction</u>

35. The claimant accepted the payment dates set out within the respondent's Grounds of Resistance to the unlawful deduction claim dated 10 September 2019. The relevant dates are as follows:

    a. The claimant received basic pay during his suspension until 7 January 2019 when pay was suspended as a result of the claimant failing to follow the scheduled disciplinary hearing or contact the respondent and he was qualified as absent without leave. The non-payment is not part of the claimant's claim for unlawful deduction of wages as confirmed by the claimant during the liability hearing. The claimant did not dispute Karen Smith's evidence that he had not followed procedure and the company policy was absence without leave resulted in non-payment of salary with no back pay.

    b. The claimant provided a MED3 following his assessment on the 17 January 2019 on 21 January 2019 that confirmed "stress at work" not mental health or depression, and the claimant "may be fit considering…patient feels that avoiding stressful meetings at work could benefit his mental health." The claimant informed the Tribunal he had a mental health impairment for a period of 12-months before this, however, there was no other evidence to this effect in the documents or in the claimant's statement and claim form.

    c. The claimant was placed on SSP for 35-days from 21 January to 24 February 2019 the respondent having taken a view that the claimant was not fit for work.

    d. Between the 25 February to 7 July 2019 the claimant received other types of pay including paternity leave 25 February to 10 March and 25 March to 11 April 2019. The claimant's daughter was born on 26 February 2019. Between 11 March and 24 March 2019, the claimant had a period of bereavement leave for the death of the claimant's father on 7 March and aunty on 14 March 2019.

e. The claimant took annual leave 8 April to 15 May, provided a Med 3 16 May to 12 June 2019 and the respondent exercised its discretion and paid him full salary by way of company sick pay. Company sick pay reflected continuity of service and at the respondent's discretion the claimant could be paid up to 5-weeks, which was the amount he received the fifth week on full pay being the 1 to 7 July 2019.

f. The claimant's second period of annual leave was 14 June to the 30 June 2019 when full pay was received.

36. The second MED3 dated 29 January 2019 was for a 5-weeks for "stress at work" the advice being the claimant "may be fit for work considering the following advice patient feels that avoiding stressful meetings at work would benefit his mental health."

37. The third MED3 dated 21 May 2019 referred to "stress" and that the claimant may be fit for work with amended duties suggested and "please arrange for less stressful work – no meetings for the next 6-weeks from 15 May 2019." The claimant clarified in oral evidence that the reasonable adjustment he required was no stressful meetings, specifically his disciplinary hearing and there was no requirement of less stressful work on the shop floor. For the avoidance of doubt there is no claim under section 20-21 of the Equality Act 2010 that the respondent was in breach of its duty to make reasonable adjustments.

38. The fourth MED3 referred to "stress at work" only, and the claimant may be fit to work with "amended duties…patient requests no stressful meetings."

39. The fifth and last MED3 confirmed the claimant was not fit for work with strass at work from 9 to 10 August and "patient informs he felt able to return to work from 29 July 2019."

40. The Tribunal concluded the MED3's referred to stress at work only, and there was no suggestion the claimant had depression or mental health impairments as suggested by the claimant at the liability hearing. The claimant never returned to work although he did attend the disciplinary investigation meeting held on 28 April 2018 following which he was invited to a disciplinary hearing on 27 June 2018 which did not take place and was reconvened a number of times into 2019 before the claimant was dismissed.

Law

Direct Discrimination (s.13 of the Equality Act 2010 ("EqA"))

41. S.13(1) of the Equality Act 2010 (EqA) provides that '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'.

42. S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be '**no material difference between the circumstances relating to each case'** [the Tribunal's emphasis]. In the well-known case of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL (a sex discrimination case), Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class'.

43. The EHRC Employment Code states that the circumstances of the claimant and the comparator need not be identical in every way. Rather, 'what matters is that the circumstances which are relevant to the [claimant's treatment] are *the same or nearly the same* for the [claimant] and the comparator'— para 3.23

Burden of proof

44. Section 136 of the EqA provides: (1) this section applies to any proceedings relating to the 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 provisions concerned, the court must hold that the contravention occurred. (3) Subsection (2) does not apply if A shows that A did not contravene the provisions. (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."

45. In determining whether the respondent discriminated the guidelines set out in Barton v Investec Henderson Crossthwaite Securities Limited [2003] IRLR 332 and Igen Limited and others v Wong [2005] IRLR 258 apply. The claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in Igen. With reference to the respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn

the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case disability], failing which the claim succeeds.

Unlawful deduction of wages

46. Under part II of the Employment Rights Act 1996 (ERA) the general prohibition on deductions is set out. S.13(1) ERA states that: ‘An employer shall not make a deduction from wages of a worker employed by him.’ This prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction — S.13(1)(a) and (b).

47. The claimant, who remains employed, cannot bring a contractual claim under S.3 ETA as this can only be brought if it arises or is outstanding on the termination of employment.

48. Section 13(3) provides that where the total amount of wages paid on any occasion by the employer to the worker is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purpose of this Part as a deduction made by the employer from the worker’s wages on that occasion.

49. The determination of what is ‘properly payable’ is relevant in this case. The approach Tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — Greg May (Carpet Fitters and Contractors) Ltd v Dring [1990] ICR 188, EAT. It must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion and this requires consideration of all the relevant terms of the contract, including any implied terms (including the implied term of mutual trust and confidence) — Camden Primary Care Trust v Atchoe [2007] EWCA Civ 714, CA.

Conclusion: applying the law to the facts

Direct Discrimination on the grounds of disability (s.13 of the Equality Act 2010 (“EqA”))

50. With reference to the first issue, namely, did the respondent treat the claimant less favourably than it treats or would treat others contrary to section 13(1) of the EqA, the Tribunal found it did not. On around 16th January 2018 the claimant was told either to shave off his beard or wear a snood. As stated earlier the Tribunal was not provided with a date for the religious festival and it took on face value the claimant’s evidence that the festival took place in January after the alleged incident. The incident as described by the claimant

did not take place on the balance of probabilities, the claimant was aware of the respondent's policy applicable to all employees (including his actual comparators) that a beard or moustache should be covered by a snood when working in open food areas.

51. The claimant has not satisfied the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and the burden of proof has not shifted to the respondent.

52. With reference to the second issue, namely, was the claimant told "How come you haven't had a shave?" and "I will speak to your manager about a potential disciplinary" on around 17th April 2018, the Tribunal is only concerned with the second allegation relating to the alleged threat of disciplary as clarified by the claimant at the liability hearing. It found the claimant was told about the policy of either being clean shaven or wearing a snood when handling fresh food and there was no reference to speaking to Neil Gilmartin about a potential disciplinary for the reasons set out above.

53. The claimant has not satisfied the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and the burden of proof has not shifted to the respondent.

54. With reference to the issue were Dan Cooper, Charlie Gilmartin and/or Neil Gilmartin treated differently from the Claimant, in that they were not told to shave off their beards, the Tribunal found they were not treated differently and they were also expected to wear snoods if they had facial hair as an alternative to shaving. The evidence before the Tribunal, specifically that of Neil Gilmartin, confirmed Dan Cooper who worked on the meat and fish counter had long hair, half way down his back and was clean shaven, but puts his hair up in a net. The Tribunal found he was not a valid comparator as there was a material difference between the circumstances relating him and the claimant, namely, he was clean shaven. However, the fact Dan Cooper wore a hair net was an indication that all employees were required to follow the respondent's health and safety policy.

55. Charlie Gilmartin was "generally" clean shaven but his stubble never got to the point where it became obviously visible. The evidence given on behalf of the respondent was that numerous employees were told to shave or wear a snood, and as they did not like to wear a snood they shaved, except for John Cheek (bakery) who wore a snood all the time. Neil Gilmartin gave evidence that he was generally clean shaven, on occasions attended work with a small amount of stubble or a days' worth of growth on his face, but unlike the claimant he was not a butcher or working on fresh foods. Neil Gilmartin's role was supervision, and he was not always serving on the counter. On the balance of probabilities, the Tribunal found neither were valid comparators as there was a material difference between the circumstances relating to them

and the claimant, namely, Charlie Gilmartin's stubble never got to the point where it became obviously visible, unlike the claimant's beard, and Neil Gilmartin was not working on fresh food when he attended work with visible stubble on his face.

56. The Tribunal found there was no difference in treatment between the claimant and his named comparators, all employees whatever their race, religion or age were subject to the respondent's food hygiene policy, namely facial growth should be shaved off or contained in a snood. The burden of proof has not shifted. The Tribunal accepts the submission put forward by Ms Ferber that the claimant's motivation in bringing fabricated allegations was to avoid the disciplinary hearing and his possible dismissal, the Tribunal on the facts of this case agreed and the claimant refused to deal with this submission at closing stage despite an invitation repeated by it more than once.

Unlawful Deduction from Wages

57. The general prohibition on deductions is set out in S.13(1) ERA,: 'An employer shall not make a deduction from wages of a worker employed by him.'

58. Section 27(1) ERA defines 'wages' as 'any sums payable to the worker in connection with his employment'. This includes 'any fee, bonus, commission, holiday pay or other emolument referable to the employment' — S.27(1)(a). These may be payable under the contract 'or otherwise'. According to the Court of Appeal in New Century Cleaning Co Ltd v Church [2000] *IRLR 27, CA*, the term 'or otherwise' does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement. In addition to sums covered by S.27(1)(a), statutory sick pay (SSP) — S.27(1)(b) is also counted as wages under S.27:

59. With reference to the first issue, was the Respondent entitled to pay the Claimant SSP (as a matter of contract) from 8 July 2019 to the date of lodging the ET1 on 15th July 2019, or should the Claimant have been on full suspension pay, the Tribunal found the Respondent was entitled to pay the Claimant SSP from the 8 July 2019. Prior to that date the claimant had been in receipt of full pay the respondent having used its discretion under the company sick pay scheme in his favour.

60. The claimant submitted that in circumstances where he was declared fit to work by his GP except for being unfit in respect of attending disciplinary meetings, he should have returned to work and not been required to attend a disciplinary meeting as a condition for his return. The claimant's argument was based on the misconceived premises that the GP had signed him fit for work with the exception of being well enough to attend a disciplinary hearing.

The MED3's does not state this; the MED3 dated 29 January 2019 was for a 5-weeks for "stress at work" the advice being the claimant "may be fit for work considering the following advice patient feels that avoiding stressful meetings at work would benefit his mental health." The MED3 dated 21 May 2019 referred to "stress," that the claimant may be fit for work with amended duties and suggested "please arrange for less stressful work – no meetings for the next 6-weeks from 15 May 2019." The fourth MED3 referred to "stress at work" only, and the claimant may be fit to work with "amended duties…patient requests no stressful meetings."

61. The claimant confirmed in oral evidence the reasonable adjustment he required was no stressful meetings, specifically his disciplinary hearing. On the evidence before it the Tribunal did not objectively find the adjustment sought by the claimant to be a reasonable one, and the respondent was not in breach of any express or implied duty to allow the claimant back into work on the basis that there would be no stressful meetings, or in the alternative, suspend the claimant on full pay.

62. Karen Smith's evidence to the effect that as the claimant had been absent from the workplace from April 2018, some 15-months, and it was unrealistic to expect he could return without the need for meetings, for example return to work meeting, training issues, and so on, was credible and in accordance with the Tribunal's industrial knowledge. It is not realistic to expect the respondent to have allowed the claimant to return to shop floor without any meetings. The Tribunal is aware that meetings can take a stressful turn within the workplace, for example the claimant met with his manager and asked to leave work early, which was refused and this led to an allegation of bullying. The claimant appears to characterise meetings with management that did not go his way as stressful. In short, the adjustment suggested would result in the claimant being totally unmanageable. The Tribunal assisted by the industrial experience of the panel, recognise that stressful meetings, including disciplinaries for serious matters such as alleged theft in the workplace, need to be overcome before an employee can return to work and managed within the workplace encompassing the normal day to day working relationship between employees and the managers.

63. Turning to the alleged disability relied upon by the claimant, namely depression and mental health, the Tribunal had no satisfactory evidence of this and were reluctant to come to a definitive view. The MED3's refers exclusively to stress at work, which is unlikely to fall under section 6 of the EqA. It is noted that the Med3's quote the claimant's view that he cannot take part in stressful meetings and without looking behind the MED3 and taking into account the Tribunal are not medical experts, it appears that any employee would be stressed at the prospect of a disciplary hearing with a potential gross misconduct dismissal and the answer for that particular stress at work is to have the hearing. It is notable the disciplinary hearing at which

the claimant was dismissed for alleged theft took place some 2-weeks before the liability hearing, some 17-months following suspension and the logical conclusion of the claimant's argument was that the reasonable adjustment was to pay him in full on suspension until he was well enough to attend the disciplinary hearing. The Tribunal concluded the claimant's substantive motivation was to ensure that he remained suspended on full pay, and this motivation also lay behind the fabricated discriminatory allegations brought against the respondent.

64. With reference to the next issue, namely, if the Claimant makes a similar claim in respect of the period from 21st January 2019 (or any earlier period) to 24th February 2019, is such a claim out of time, the Tribunal found that it was. Reference was made by Ms Ferber to bullet six of the Attendance Management Policy including "if a colleague begins a period of sick leave during investigations or formal processes for example, performance improvement, disciplinary etc..." the respondent may decide not to pay company sick pay. Despite the claimant beginning his period of sickness soon after his suspension when he was facing a disciplinary investigation followed by disciplinary charges, he was paid his 5-week entitlement of company sick pay and the Tribunal did not find Ms Ferber's submission relevant to the unlawful deduction of wages issue.

65. The claimant was invited to give an explanation as to why it was not reasonably practicable for him to file a claim for unlawful deduction of wages for the period 21 January to 24 February 2019. The claimant's explanation was that a series of events got in the way, the birth of his daughter and death of his father and aunty, and as an afterthought his mental health and undergoing CBT for which the Tribunal had no evidence apart from the claimant's say so. There was no medical evidence that the claimant was unable to issue proceedings within the limitation period as a result of a disability, and the Tribunal does not accept the claimant's evidence to this effect given he was well enough to deal with a number of matters that arose during this period, such as the grievance and holiday entitlement.

66. The Tribunal accepts the claimant's explanation that it was not reasonably practicable for him to have issued proceedings until after the family deaths, the last bereavement taking place on 14 March 2019. On 5 April 2019 and in June 2019 the claimant emailed the respondent concerning holiday entitlement. The claimant responded promptly to Karen Smith's email sent 5 April 2019 at 11.17.46. He replied within 45 mins when he wrote coherently about holiday entitlement owed going back to 2018 and his entitlement in 2019. The Tribunal found it was reasonably practicable for the claimant to have issued proceedings for the alleged unlawful deduction of wages for the period 21 January to 24 February 2019 by 23 May 2019 and he failed to do so having first consulted with ACAS on 15 July 2019 well after the expiry of

the primary limitation period, accordingly, the complaint was submitted out of time and the Tribunal does not have the jurisdiction to hear it.

67. In conclusion, the claimant was not unlawfully discriminated against under section 13 of the Equality Act 2010 and his complaints of unlawful race, religious and age discrimination are dismissed. The claimant did not suffer an unlawful deduction of wages and his claim for the differential of full pay and statutory sick pay for the period 8 July to 15 July 2019 is dismissed. The claimant's claim of unlawful deduction of wages for the period 21st January 2019 to 24th February 2019 was brought on 15th July 2019 after the end of the period of 3 months beginning with date of the last deduction on 24th February 2019. The Tribunal is satisfied that it was reasonably practicable for a complaint to be presented before the end of that period of 3 months, the complaint was not presented within such further period as the tribunal considers reasonable, the Tribunal does not have the jurisdiction to consider the complaint which is dismissed.

29.10.19

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Employment Judge Shotter

RESERVED JUDGEMENT & REASONS SENT TO THE PARTIES ON

4 November 2019

FOR THE TRIBUNAL OFFICE