EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Ajith Perera **v** **Sainsbury's Supermarkets Ltd**

Heard at: London Central **On: 4, 5, 6, 7, 11 and (in chambers) 26 November 2019**

Before:
Employment Judge Paul Stewart, **Mr Ian McLaughlin and Ms Tricia Breslin**

Appearances
For the Claimant: in person
For the Respondent: Mr Hamed Zovidavi of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of direct and indirect discrimination on the grounds of race and / or age, the claims of unfair dismissal and harassment and all other claims are dismissed save for breach of contract for which we award the Claimant the sum of £78.92 gross.

REASONS

1. By his ET1 presented to the Tribunal on 11 September 2018, the Claimant has claimed he was unfairly dismissed, that he was subject to age and race discrimination and that he was owed notice pay and other payments. Several Preliminary Hearings were held in this case with the most recent being that conducted by Employment Judge Mason on 8 April 2019. At that hearing, it was established that, in relation to the race discrimination claim, the Claimant identifies as "Asian-other". Further, it was established that the Claimant's age claim was based on the Claimant being within the age bracket of 46 to 55. A consequence of that hearing was that the parties were able to agree a List of Issues which is to be found, with certain relevant schedules, at pages 87 through to 107. That List has proved to be of great assistance to this Tribunal in arriving at our conclusions.

2. We have heard evidence from the Claimant. He was the only witness called in support of his case. The Claimant worked as a 4S Deputy Manager at the Respondent's London Queensway store from May 2017 until 9 June 2018. During this period, there was a Retail Management Structure Review [*RMSR*] carried out which resulted in the grade of 4S Deputy Manager being abolished and the creation of new 3S and 4S Customer and Trading Manager (*CTM*) roles.

This led to personnel occupying the position of 4S Deputy Manager being assessed for positions in the new structure. The Claimant was so assessed and when he left the London Queensway store, it was to take up a new role as a 3S CTM at the London Queensway North store.

3. We heard the following witnesses (all employees of the Respondent) called in support of the Respondent's case, namely:

   a) Ms Elizabeth Davis, a Senior Finance Analyst. She conducted an assessment of the Claimant on 4 April 2018 to see whether he could fill a vacancy in the Finance team she managed. She did not take the Claimant forward for a second interview.

   b) Mr Ahmed Kali Ali, a Store Manager currently at the Ladbroke Grove store but who previously was the Store Manager at the Respondent's London Queensway store where he managed the Claimant when he worked as a 4S Deputy Manager from May 017 until 9 June 2018;

   c) Mr Eddie Aylward, a Store Manager, who conducted an assessment of the Claimant on 11 April 2018 as part of the RMSR.

   d) Mr Ruhul Amin, a 4S Store Manager of the London Queensway store from 21 April 2017 having previously been a 4S Deputy Manager. He managed the Claimant from when the Claimant started in the 3S CTM role on 12 June 2018 until the last day of his employment on 28 July 2018.

   e) Ms Sophie Taylor, currently Head of Stores for SO4, covering Oxford and the Swindon areas. Previously, she was an Area Manager covering Central and South East London. There, she conducted interviews of 5 shortlisted candidates to fill a vacancy for a 5S Convenience Store Manager in the Respondent's Southwark store. The Claimant was interviewed on 1 May 2018 and was one of the 4 interviewees who were unsuccessful.

   f) Mr Christopher Locks, an Area Manager for the C10-1 area that covers West London and within which the Claimant worked. In that role, Mr Locks asked the Claimant around March 2018 to go temporarily to the Edgware Road store to cover staff shortages. Whilst at the Edgware Road store, the Claimant continued to be managed by Mr Ali.

   g) Ms Lorraine Pearson, currently the HR Change Manager for Food and previously the HR Area Manager for the C10-1 region working alongside Mr Locks;

   h) Mr Mark Costello, currently the Senior Talent Partner for the C10 region and actively involved in the RMSR that took place across the Respondent's business in 2018.

The Facts

4. The Claimant started his employment with the Respondent on 3 January 2006. He worked as a 4S Deputy Manager and he appears to have had good relationships with his workmates and most of his line managers. But his managers did not assess him purely on the basis of good relationships. The Respondent relied on Performance Potential Matrix ('PPM') documents to make an assessment as to the suitability of its employees for promotion. The Matrix

records on a graph (1) how well the employee performs in his or her current role or (2) in a broader role, (3) in a role 1 level up from the current role and (4) in a role 2 levels up from the current role. In the two PPMs that we saw – one compiled in 2017 and the other in 2018, it would appear that the Claimant's managers regarded him as performing reasonably well in his current role but did not see him as having the potential for performing in a broader role or in a higher grade.

5. In January 2018, the Respondent commenced the RMSR which resulted, among other things, in the grade of 4S Deputy Manager being abolished and the creation of new 3S and 4S Customer and Trading Manager (*CTM*) roles. The impact of this Review was considerable because it meant that within the C10-1 area in which the Claimant worked, there were some ten 4S Deputy Managers and a further 60 or 70 supervisors whose positions were proposed to be removed from the new retail management structure.

6. A detailed store team briefing was delivered to the affected employees in the London Queensway store where the Claimant worked on 23 January 2018. It provided details of the RMSR. The Claimant attended this briefing. A total of three group consultation meetings followed on 31 January, 12 February and 20 February 2018. This permitted further details of the proposed re-structure to be discussed with employee (or, as is the preferred terminology of the Respondent, colleague) representatives. The details discussed included:

   a) Details of the roles that affected colleagues could apply for – and for managers like the Claimant in 4S Deputy Manager roles, these included the new 3S and 4S CTM roles;

   b) The proposed selection process for the 3S and 4S CTM roles. There was to be a single interview for all CTM roles with a pass mark being established for each grade;

   c) The proposed new salary bandings for 3S, 4S and 5S manager roles; and

   d) Details of the proposed changes to the management contract.

7. Following the conclusion of group consultation, Mr Ali wrote to the Claimant on 10 March 2018 to invite him to an individual consultation on 20 March 2018 to discuss how the RMSR would impact on his role. At the meeting, the Claimant indicated he was aware that group consultation had taken place and he had had the opportunity of reviewing minutes and Frequently Asked Questions [*FAQs*] arising from that consultation. He confirmed that of the three roles that he could apply for, namely 3S CTM, 4S CTM and Trainee Manager, he would be applying for a 3S CTM role in Convenience (as opposed to Supermarket) stores.

8. At that meeting, Mr Ali provided the Claimant with a provisional redundancy calculation that was based on the Claimant being unable or unwilling to secure an alternative role within the business, with notice of redundancy being given on 13 May 2018 and a leaving date of 9 June 2018.

9. Colleagues who were applying for the new roles available were asked to complete preference forms in advance to indicate which of the roles they would prefer to get. The Claimant listed 3S CTM as being the role he preferred.

10. Following the initial consultation meeting, Mr Ali wrote to the Claimant to confirm their discussion and reminded him that he could apply for other available vacancies within other teams in the business making use of the internal recruitment portal.

11. The Claimant attended the single interview for the 3S and 4S CTM roles on 11 April 2018. This interview was conducted by Mr Aylward, who was the Store Manager in Alberton and who had not worked with the Claimant in the past, nor had met him. Prior to conducting this series of interviews of which that of the Claimant formed part, Mr Aylward attended a refresher course of previous interview training he had received as a store manager. Prior to the interviews being conducted, a pass mark of 27 was set for the 4S CTM role, 24 for the 3S Trainee Manager role and 21 for the 3S CTM role.

12. Mr Aylward received in advance of his interview of the Claimant the preference form that the Claimant had filled in indicating that the Claimant's preferences for the roles were in the following order: (1) the 3S CTM role (2) the 4S CTM role and (3) the 3S Trainee Manager role. Mr Aylward in the course of the interview discussed the Claimant's preferences as disclosed on the preference form.

13. After the interview, Mr Aylward completed his evaluation and scoring of the Claimant. The evaluation and scoring, which has not been challenged, resulted in the Claimant receiving a score of 25, good enough for him to be offered either a 3S CTM role or a 3S Trainee Manager role but not a 4S CTM role.

14. Erroneously, it appears that the invitation issued to the Claimant to attend this interview suggested that the interview was for the 4S CTM role only. However, Mr Aylward established with the Claimant that he understood the interview was a single interview for all three roles.

15. Once Mr Aylward had completed the evaluation and scoring of the Claimant and had conducted and scored the interviews with other colleagues, he returned all his papers to the HR Talent Partner, Mr Costello.

16. The score that the Claimant had received in the interview with Mr Aylward led to the Claimant being offered a post in the Queensway North convenience store. In June 2018, the Claimant commenced a trial period in the new 3S CTM role at that store.

17. Mr Amin was the Store Manager of the London Queensway North local store where the Claimant was offered, and accepted, the position of a 3S CTM on a trial basis. The trial period was specified as four weeks. Early in the trial period, the Claimant indicated to Mr Amin that he was not happy with the contract for the 3S CTM post and had not signed it. Mr Amin advised him to raise his concerns with Mr Locks, the Area Manager. Mr Locks initially attempted to get the Claimant to raise his concerns with Ms Racquel Rodrigues who was operationally in charge of the area in which the Claimant was based but it appeared that Ms Rodrigues was unable to address the Claimant's concerns. In consequence, Mr Locks, together with the Senior Talent Partner, Mr Costello, visited the Claimant in the store on 29 June 2018. Mr Costello in his evidence recalled the Claimant expressing concern that the 3S CTM role was a step down from the 4S Deputy Manager role he had previously occupied and which, of course, had been removed in the restructuring exercise. The Claimant also expressed concern that the salary was too low.

18. Mr Locks confirmed to the Tribunal the concerns that the Claimant expressed during that visit. Prior to that visit, Mr Locks knew the Claimant had concerns about his salary level but he also knew that the new salary structure for the 3S CTM role had a maximum of £27,000 and that the Claimant earned in excess of that maximum. The salary that the Claimant had received as a 4S Deputy Store Manager had been preserved notwithstanding he had moved to a lower salaried position. The Claimant had suggested in an email to Mr Locks that he should have been an exception to the band maximum [as, indeed, he was] but that he should receive a higher salary.

19. To Mr Locks, the meeting with the Claimant was not very successful. The Claimant was very emotional during the discussion and it appeared that he was unhappy with the changes that the RMSR had brought about and no amount of re-assurance and clarification would satisfy him.

20. On 2 July 2018, the Claimant sent an email to Mr Locks and Mr Costello requesting that he be allowed to take redundancy as he could not continue to work “with that frustration and unhappiness”.

21. On 9 July 2018, Mr Amin met with the Claimant to complete his trial period one to one record. In that document, the Claimant noted that he was not happy with the contract terms, the pay was too low, he was being scheduled to do extra hours over and above the 39 hours stated to be his normal working hours per week which meant he was being scheduled for hours for which he would not be paid. In addition, he was unsure of his future prospects.

22. Because of the Claimant’s objections to the contract terms, his trial period was determined as unsuccessful. As a result, Mr Amin re-opened the Claimant’s redundancy consultation process and arranged for a final 121 consultation meeting on 11 July. At that meeting, Mr Amin informed the Claimant that his contract entitled him to receive 12 weeks’ notice of termination but that, should he elect to work out his notice period and then decide, during the notice period, to leave before the end of the notice period, he would forfeit the right to payment in lieu of notice. Given that the trial period in the new 3S CTM post had started on 12 June 2018, that meant that, should the Claimant leave on 28 July (which Mr Amin ascertained from the Claimant was when he would like to leave) then there would be no payment in lieu for the remainder of the 12 week notice period taken to have started on 12 June. Subsequent to this meeting on 11 July, the Claimant submitted a doctor’s certificate indicating he was unfit to work which took him up to the 28 July 2018 with that date being marked as his final day of employment. Mr Amin’s evidence to the Tribunal, which we accepted, indicated that at the meeting on 11 July 2018, he - Mr Amin - had specifically alerted the Claimant to the consequence of terminating his contract within the notice period, specifically, that he would not receive money in lieu for the remaining notice period.

23. During the period that followed RMSR, the Claimant applied for other vacancies that had become available. We heard evidence from Ms Sophie Taylor as to why, after interviewing the Claimant on 1 May 2018, she did not take his application for a 5S convenience store manager’s position forward. It seemed to us her reasons were perfectly rational. To her, the Claimant had appeared to be very laid back, a description she used because he was slumped in his chair and visibly unenthusiastic throughout the interview. He made a joke about one of Ms

Taylor's colleagues in her area which Ms Taylor thought unprofessional. The Claimant appeared to be unprepared and deficiencies were noted across all the required areas including communication, motivation and technical competence. As a result, Ms Taylor and her co-interviewer Mr Adam Ralph decided to mark his interview at 17 out of 24. The interviewee who received the highest mark was a 47 year old man of Asian Indian origin who was, at the time of his interview, working as a 5S Deputy Manager and formally "at risk" of redundancy (as the Claimant was).

24. Ms Taylor rejected the claims made by the Claimant that his application was not taken forward despite him having the requisite experience, qualifications and having performed well at interview. We accepted her account of the interview.

25. The Claimant also applied, and was interviewed by Ms Elizabeth Davis on 4 April 2018, for a post in the finance team she managed. The Claimant had previous experience of having worked as a finance officer prior to his employment with the Respondent. Ms Davis explained that, while in the interview, he ticked certain boxes of attributes she was looking for (including demonstrating strong retail knowledge), he did not fully answer a number of questions and did not perform well in a test on the use of the Excel spreadsheet program. We accepted her evidence.

Discussion

26. We discussed the list of issues and arrived at the following conclusions.

Jurisdiction

1. We considered acts 1, 6, 7, 8, 9, 10, 11 and 12 on the Claimant's Schedule of direct discrimination claims (on Schedules 1a and 1b) to have been presented out of time. All these acts were alleged to have taken place between October 2009 and 29 March 2018. The normal limitation date consequent on an act occurring on 29 March 2018 is 28 June 2018. Early conciliation occupied ACAS from 6 August to 5 September 2018 and the Claimant's ET1 was presented on 11 September 2018.

2. The evidence of the Claimant did not satisfy us that the 12 acts of discrimination contained in Schedules 1a and 1b amounted to conduct extending over a period ending with 29 March 2018.

3. The Claimant has claimed a total of 12 acts of harassment alleged to have occurred between September 2017 and March 2018. All of these alleged acts - not recorded in the Facts above but which should be taken to be so recorded - are out of time.

4. The Claimant has presented no evidence upon which we could determine it to be just and equitable to consider the claims he advances at 1 and 3 above. In that regard, we are guided by the observations of Auld LJ in **Robertson v Bexley Community Centre** [2003] IRLR 434 (CA):

> 25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the

> exercise of discretion is the exception rather than the rule. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

Unfair Dismissal

5. The Respondent had satisfied us that the principal reason for dismissal was redundancy which is a potentially fair reason under section 98(2) of the Employment Rights Act 1996.

6. We considered the decision to dismiss was within the range of reasonable responses open to the Respondent.

7. We considered the Respondent to have followed a fair procedure in reaching its decision to dismiss the Claimant.

8. The Respondent complied with the requirements of the ACAS Code of Practice unlike the Claimant who did not appeal the decision to dismiss.

9. We did not receive evidence on remedy. We recognise, however, that if our determination on the claims is considered wrong in law, a fair procedure might have resulted in the completion of the trial period. Of course, for that to happen, the Claimant would have to have been prepared to complete the trial period. Given that he was not prepared to complete the trial period, we do not think any compensation that would fall to be awarded to the Claimant (contrary to our findings) should be reduced in accordance with Polkey v AE Dayton Services.

Direct Race and Age Discrimination

10. We were not satisfied that the Respondent excluded the Claimant from promotion:

    a) To the post of 5S Duty Manager in Training Role in October 2009 [the position being that this was so long ago that the Respondent was unable to supply sensible evidence to contradict the bare allegation made by the Claimant];

    b) To the post of 5S convenience store manager in training role in November 2009, October 2013, May 2015 and October 2016. In this regard, we note that the Claimant in his annual performance reviews never obtained an “exceeding” categorisation of his performance or, post 2014, in the PPMs never obtained an indication that he was considered capable of performing either in a broader role than his current one or in a role at a higher level;

    c) To either of two 4S store manager vacancies in the area the Claimant worked in in May 2017. The comments concerning the PPMs made in b) above apply equally here.

    d) We were not satisfied that the Respondent failed to provide the Claimant with a £3,000 pay increase that was afforded to other deputy

managers on 26 June 2018. We were satisfied that the Claimant's allegation sprang from a perception that some deputy managers who were appointed to new posts had been on salaries that were below the new minimum salary for the grade. In consequence, they received an increase to the minimum for the grade. The Claimant, in contrast, had enjoyed a salary higher than the maximum for the new grade. He was therefore could not be given a salary increase to bring him up to the new minimum for the grade and, indeed, had his salary ring-fenced despite it being higher than the maximum for that grade.

e) We were satisfied that the Respondent had not failed to help the Claimant find alternative roles before his redundancy. The Respondent had supported him to apply for a job in finance for which he was short-listed and a 5S convenience store manager's post, both being posts for which the Claimant was interviewed. Further, the Respondent had supported the Claimant into obtaining his preferred role in the new structure. Thereafter, the Claimant had expressly indicated he did not want to finish a trial period in a 3S CTM role and that he wanted to be made redundant. We could not see that the Claimant left the Respondent much option but to comply with his wishes.

f) We were satisfied that the Claimant was under no misapprehension that the interview he undertook on 11 April 2018 was an interview for the 4S CTM job alone. We are satisfied he understood that interview to be a single interview for the posts of 4S CTM, 3S CTM and 3S Trainee Manager. The Claimant had expressed a preference to be appointed, out of those 3 roles, to the 3S CTM role, a preference which his performance at interviewed allowed the Respondent to facilitate.

g) Having heard the evidence of Ms Davis and of the Claimant, we were satisfied that the Claimant did not perform well enough at interview to justify his application for a post in the finance team being taken further.

h) We were not satisfied that the request made of the Claimant by Mr Locks that he should help out in the Edgware Road store contravened any policy in respect of redundancy. The Claimant was required under his contract to comply with any reasonable request to work in another store and this was a reasonable request.

i) We were satisfied on the evidence of Ms Taylor that the Claimant's presentation for the post of 5S CTM role wholly justified her decision not to progress his application further. In the context of the Claimant's identification of his race and his age bracket at the Preliminary Hearing, the success of a 47 year old man of Asian Indian origin is significant.

j) The allegation that the Claimant's 4S Manager sign-off in September 2008 was withheld despite him being ready and qualifying for it is one we could not form any sensible conclusion upon principally because the passage of time without the Claimant having raised a contemporaneous complaint about it meant, as Mr Locks outlined in paragraph 32 of this statement, that the Respondent was unable to find within their records any indication that the three comparators named by the Claimant had been employed by the Respondent.

11. We were clear that any acts or omissions which, contrary to our findings, we had jurisdiction to hear and, contrary to our findings, were committed by the Respondent were not so committed or omitted because of the Claimant's age and / or his race. During the hearing, the Claimant became more refined in the categorisation of his race that he afforded himself. From a starting point expressed during the Preliminary hearing that he was "Asian-other", that became refined to being Sri Lankan when confronted with evidence that people of Indian origin occupied positions of authority within the Respondent's organisation that he claimed were denied to him on racial grounds. And, when challenged that he had once reported to Mr Ram, a manager of Sri Lankan origin holding a position within the Respondent's organisation that the Claimant asserted he was denied on racial grounds, the Claimant changed the definition of his racial identity to assert that he was from one of the two ethnic groups recently engaged in the civil war, the Tamils and the Singhalese, and Mr Ram was from the other.

    a) We were not satisfied that the Claimant had provided evidence of primary facts from which we could properly and fairly conclude that the difference in treatment that the Claimant received (contrary to our findings) was because of either his age or of his race.

    b) It is unnecessary for us to have to make a finding in respect of the next question asked in the List of Issues – "If so, has the Respondent provided non-discriminatory reason for any proven treatment?" – because not only has less favourable treatment not been proved but, even if it had been, the Claimant has not established primary facts from which we could properly and fairly conclude the difference in treatment to be because of either age or race. However, we consider that, if we are wrong on both those counts, the Respondent has provided evidence of non-discriminatory reasons for such treatment.

12. It is difficult to say whether all the actual comparators listed in Schedules 1a and 1b are appropriate comparators for the purposes of the Claimant's claims of age and race discrimination: certainly, it is the case that the Claimant has failed to establish that the circumstances of each individual he has identified in connection with each alleged act or omission were not materially different to those of the Claimant save in respect of their age or race.

13. We make no finding on the sum that should be awarded to the Claimant for injury to feelings or loss of earnings were his claim for age and / or race discrimination to have been upheld. Had we upheld his claim, we consider the injury to feelings award would be in the lower band of such awards per **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102 CA** which the 25 March 2019 Second Addendum to the Presidential Guidance originally issued on 5 September 2017 suggests should be in the range of £900 to £8,800 and the point in that range we would have thought appropriate would be £2,000.

Indirect Age Discrimination

14. The Claimant identified in two schedules (Schedule 2a and Schedule 2b) a series of five acts – in Schedule 2b, the Claimant uses the term "events"

- said to be capable of amounting to a provision, criterion or practice. We will deal with each such act (or event) in turn.

a) The first such act is said to be the issue of a new contract for a 3S manager role which have provisions that were not in the existing 4S contract. We agree with the submission made on behalf of the Respondent that the existence of contractual terms cannot amount to a PCP. But, in any event, the particular provisions in the new 3S CTM manager contract that were cited by the Claimant were:

   i) A term requiring the 3S CTM manager to take full accountability for the store;

   ii) A term requiring the 3S CTM manager to work at pace and making use of technology;

   iii) A term requiring the location of the 3S CTM manager as being the whole area as opposed to an individual store.

   We could not see that the inclusion of these provisions put people who shared, with the Claimant, the protected characteristic of being in the age bracket of 46 to 55, at a particular disadvantage when compared with persons outside of that age bracket. The Claimant argues that there is a group disadvantage in that former 4S managers given 3S roles are more likely to perform the store manager's role in the store than other 3S managers who came to the role from band 3 or 2. However, he produced no evidence to show that former 4S managers fell within the age bracket of 46 to 55 or that other 3S managers who came to the role from band 3 or 2 fell without it. His assertion that former 4S managers were "not physically robust to work at pace or learn new technology at the near end of our careers" may be right but he provided no evidence for that proposition and no evidence that other 3S managers who came to the role from band 3 or 2 were different.

b) The Claimant asserted that the job profile for the new 3S CTM manager's role was not implemented in the London Queensway North store in which he tried out the new role. This meant, he said, "that I am no longer doing managerial tasks such as coaching, team building, performance checks in my store but to work as a normal colleague in the store." In his oral evidence, the Claimant suggested that 95% of his time was spent working as a normal colleague (employee) but this assertion was denied by Mr Amin who was the store manager in the London Queensway North store. On balance, we preferred the evidence of Mr Amin in this regard. But, in any event, it was difficult to obtain from the Claimant any sense of how this allegation of unfair treatment translated into a PCP which put people in the 46 to 55 age bracket at a disadvantage comparted to those outside that bracket.

c) The Claimant asserted that the redundancy proposal stemming from the elimination of the 4S Deputy Manager role affected 163 managers in the company. He said: "All the other managerial grades affected by this proposal has the ability to apply for their old role unlike in our 4S role." The group disadvantage he cited was the:

> Limit the chance of applying new role especially removing chance to apply for the old DM role and it is possible for other affected grade managers to apply for their old grade. As experience managers we will not be able to get a job match our service and experience. Our next grade is 5S and it highly unlikely to get job on that calibre. As experienced and high service group will have age disadvantage in progression as we have to settle for 3S role."

We could not see that the removal of a layer of management constituted a PCP. We simply did not understand why the Claimant should regard a process that permitted the present holders of 4S Deputy Manager posts to apply for 3S or 4S CTM roles as leading irrevocably to them having to settle for 3S CTM role. In any event, Mr Costello provided us with evidence that, out of 180 (not 163) employees holding 4S Deputy Manager posts, only 23 were in the Claimant's specified age bracket of 46 to 55. It is therefore difficult to see any sufficient link between the alleged PCP and the Claimant's age. But, as Mr Costello pointed out, there was nothing stopping an appointee to a 3S position subsequently applying for, and being appointed to, a 4S position.

d) The Claimant cited the provision setting a band maximum of £27,000 for the new 3S CTM role from 10 June 2018. It is difficult to see, without more, how the setting of a band maximum can be a discriminatory PCP. In any event, we heard evidence that the Claimant's salary prior to his trial of the new 3S CTM role was higher than the maximum but that the higher salary was preserved. So, we agree with counsel for the Respondent that this must be a misconceived complaint and must be dismissed.

e) The Claimant asserted that he was required to sign and accept the offer of the 3S CTM role before the start of the trial period. In his case, he was asked to sign the contract on 23 May 2018 ahead of the trial period start on 10 June 2018. As it was, the Claimant undertook the trial period of the role without signing a contract at all and, indeed, brought the trial to an end because he did not wish to sign the contract. The Respondent denied there to be any PCP requiring the signing of the contract before the start of the role – and the Claimant's personal history appears to confirm that to be the case. And the Claimant did not link the existence of such a PCP to age. Therefore, we reject this complaint.

15. Thus, we find none of the acts set out in Schedules 2a and 2b to be PCPs. However, lest we be wrong in that finding, we have to ask whether any of those acts or events said to be PCPs were discriminatory acts in relation to the Claimant. Specifically, the Respondent applied such acts equally to all age groups and not just to the age bracket within which the Claimant placed himself. We do not find that any of those acts placed those within that age bracket (46 to 55) at a substantial disadvantage in comparison with employees younger than 46. And we could not see that any alleged PCP placed the Claimant at a disadvantage. In consequence, it becomes unnecessary for us to consider whether the Respondent has been able to show that any particular PCP was a proportionate means of achieving a legitimate aim. However, lest we be wrong in our findings to that point, we

do say that the Respondent has shown that any particular PCP was a proportionate means of achieving a legitimate aim.

16. Had we upheld the claim, we do not consider that such finding would have increased the injury to feelings award for direct discrimination set out in paragraph 26(13) above. In our view, the injury to feelings resulting from either direct or indirect discrimination would have been the same and, had we determined both discriminations in the Claimant's favour, we would not have regarded the injury to feelings award as greater than such award for one discrimination finding.

Harassment

17. We were not satisfied on the evidence we heard that Mr Ahmed Ali committed the acts that were alleged by the Claimant and set out in his Schedule 3 save for two acts which Mr Ali admitted, those being:

    a) That Mr Ali suggested, but did not force, the Claimant join the WhatsApp group of which Mr Ali was not a member; and

    b) That Mr Ali did reduce the number of chairs in the office from two to one in October 2017, an action he attributed to the need to create space in the office.

    We were not satisfied that either of these two acts could be regarded as harassment.

    c) We noted that, in respect of the allegation that Mr Ali scheduled the Claimant for "only one late shift" in the two month period of October and November 2017 (by which we understood the Claimant to be asserting that Mr Ali placed the Claimant only on late shift over that two month period), the documentary evidence in the form of the schedules for November 2017 did not bear out the Claimant's allegation.

    d) In respect of the allegation that Mr Ali attempted to prove the Claimant was a holiday cheat in the period January – February 2018, we noted that, far from attempting to prove the Claimant to be a holiday cheat, Mr Ali actually approved the Claimant carrying over a week's holiday from one year to the next.

    e) The allegation that Mr Ali selected the Claimant for transfer to another store is an allegation that should not have been made against Mr Ali in that the decision to invite the Claimant to move to another store was one made by Mr Locks.

    f) The Claimant never raised any contemporaneous complaint or grievance about Mr Ali which contributed to our doubts as to the veracity of his allegations now.

    g) And we cannot leave the topic of harassment without mentioning, and adopting, the point made by counsel for the Respondent that after the alleged acts of harassment had occurred, the Claimant expressed a preference to work at the Queensway store with Mr Ali as his manager. In our view, the unlikelihood of the Claimant expressing such a preference if Mr Ali had harassed the Claimant in the manner

described or at all reinforces our finding that the acts of harassment did not occur.

18. We did not regard any of the acts set out in Schedule 3 that were alleged to have been committed by Mr Ali to be harassment as defined in section 26(1) of the Equality Act 2010. Specifically, we did not regard any of the acts to be "unwanted conduct" and nor did we regard any of the acts to have been related to the Claimant's age or his race. Further, we did not regard either the purpose or the effect of that conduct to have been the violation of the Claimant's dignity, or the creation of an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

19. We make no finding in respect of the assertion that the Respondent took all reasonable steps to prevent Mr Ali from doing the acts alleged to be harassment.

20. And if we are wrong as regards our findings on harassment, we consider the injury to feelings award that is justified is that which we set out in paragraph 26(13) above with no increase should our findings in respect of either direct or indirect discrimination or both be changed on appeal.

Breach of contract / Unlawful deduction from wages

21. We were satisfied that Mr Amin explained to the Claimant the contractual position should he decide to work out his notice instead of taking money in lieu of notice and chose not to work out his notice. Further, we find that, having had that explained to him, the Claimant then decided to work out his notice only to change his mind part-way through the notice period. As had been explained to him, such a change of mind did not revive any entitlement to a payment in lieu of notice (PILON). His belief, if it was that, that he was entitled to PILON was mistaken and persisted in, notwith-standing the clear contradictory evidence of Mr Amin.

22. On the question of whether the Respondent breached the Claimant's contract of employment and / or make unlawful deductions from his wages by failing to pay him overtime and interview time, we note that his contract specified:

    a) His hours of work to be 39 hours per week with no entitlement to overtime payments. As the Respondent's Colleague Handbook put it: t "*If you are a manager … we'll expect you to work a reasonable number of extra hours every now and again when the business and our customers demand it. We take this into account in your salary, so there is no extra payments for it*." However, in the trial period for his new 3S CTM post, the Claimant was scheduled for more than 39 hours and thus worked an extra 3 hours per week in the weeks commencing 1 and 8 July 2018 before then becoming absent through sickness to the end of his employment. We consider there to be a difference between being scheduled to work 42 hours when the contract requires only 39 hours and being scheduled to work 39 hours in line with the contract and working such occasional hours as are required by the demands of the business and / or customers. In our view, there was a breach of contract on the part of the Respondent scheduling the Claimant for 42 hours per week when his set hours were 39. By way of damages for

such breach, we consider the Claimant was entitled to payment for such extra hours and we accept the calculation of the Respondent's counsel that 6 hours' pay at the Claimant's weekly rate of pay would be £78.92 gross.

b) The Claimant was entitled to paid time off to attend internal and external interviews provided the time off was agreed in advance with his line manager. Mr Amin gave evidence, which we accepted, that the Claimant did not make him aware of his attendance for an interview on 4 April 2018 for a finance analyst role or for his interview on 1 May 2018 for a 5S store manager position in Southwark and thus the Claimant did not satisfy the condition necessary for him to receive paid time off.

23. We do not consider there to be any outstanding sums contractually due and owing to the Claimant in respect of awarded pay increases. We recognise that the Claimant saw an increase being awarded to other London 4S Deputy Managers but only those who were being paid less than the new £25,000 band minimum. The Claimant earned more than £25,000. Furthermore, the Claimant earned more than the band maximum for those in the 3S CTM role during the period he trialled the role starting in June 2018 and would not have been entitled to be considered for any increase until at least the following March / April.

Additional Factual Issues

24. We were satisfied that, in the redundancy process, the Respondent offered the Claimant sufficient support including the opportunity to apply for suitable alternative roles in the business.

25. We were further satisfied that, in respect of the application and selection process for 3S and 4S CTM roles, the Respondent carried out a single interview to determine suitability for both roles and the Claimant failed to meet the pass mark for the 4S CTM role.

26. The Respondent's decision to temporarily transfer the Claimant to the Edgware Road store during the redundancy consultation process did not breach the Respondent's policies and procedures and did not have any impact or bearing on the conduct or outcome of the redundancy process in respect of the Claimant.

27. For all the reasons outlined above, we dismiss the claims of direct and indirect discrimination on the grounds of race and / or age as against the Respondent (and specifically as against the witnesses from whom we heard) and we dismiss the claims of unfair dismissal and harassment and all other claims save for breach of contract for which we award the Claimant the sum of £78.92 gross.

13 January 2020

Employment Judge Paul Stewart

Sent to the parties on:

16 Jan. 20

For the Tribunal:

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