EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Erguven	v	Avara (Faccenda) Foods Limited

Heard at: Cambridge **On:** 21, 22, 23 and 24 January 2020

Before: Employment Judge Ord

Members: Mr C Davie and Mr T Chinnery

Appearances:
For the Claimant: Mr A Smith, Counsel (FRU).
For the Respondent: Ms A Esmail, Solicitor.

Interpreter: Ms S Butcher, Turkish speaking interpreter.

JUDGMENT having been sent to the parties on 17 February 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant was born on 27 January 1975 and is a Turkish Muslim. He worked at the respondent's premises between May 2016 and 19 June 2018 on which date he was dismissed with a payment in lieu of notice on the stated ground of his conduct. There was a dispute over the date on which the claimant's period of continuous employment began. The respondent says he was employed by an agency until 4 September 2016, the claimant says his period of continuous employment began on 25 May 2016.

2. The claimant brings complaints in these proceedings that he was unfairly dismissed, automatically unfairly dismissed because the principal reason for his dismissal was either his assertion of his statutory right to a rest break or because he had raised health and safety issues. Further that he was the victim of direct discrimination and harassment on the grounds of his religion and the victim of direct discrimination on the grounds of his race. All of the claims are denied.

3. At a preliminary hearing on 27 March 2019 following a case management discussion held after the presentation by the claimant of an amended set of particulars of his claim which the respondent did not object to, the claims and issues for determination were identified and confirmed in writing to the parties along with case management orders. The order was sent to the parties on 14 April 2019. The claims were identified as follows:

   (i) Unfair dismissal;

   (ii) Automatically unfair dismissal because the reason (or principle reason) why the claimant was dismissed was because he asserted his statutory rights to a full rest break (including having to regularly carry out tasks which caused him to miss part or all of his daily rest break) which he says he raised at least weekly;

   (iii) Automatically unfair dismissal because the claimant was dismissed for raising concerns over health and safety regarding handling food products after working with cleaning chemicals which he again said he raised on a weekly basis;

   (iv) Direct discrimination on the ground of religion and belief. The claimant says that after it became known he was a Muslim he was treated less favourably in relation to the allocation of overtime compared to non-Muslim colleagues, was regularly given more difficult tasks than non-Muslim workers and was treated less favourably than non-Muslim colleagues in the allocation of duties which led to rest breaks being more regularly curtailed or missed;

   (v) Harassment on the ground of religion and belief in that after it became known he was a Muslim the claimant says he was continually singled out for criticism and questioning by his manager/managers in front of colleagues in a way which was intimidating, hostile, degrading and humiliating, and further that his religion was brought up by his manager in order to humiliate and degrade him.

   (vi) Direct discrimination on the ground of race because the claimant says he and other non-white colleagues would be required to undertake cleaning outside in the cold weather whilst white colleagues would clean outside in the warmer weather.

4. The issues for the Tribunal to determine were agreed as follows:

   4.1 First, what were the correct dates of employment for the claimant? Does he have sufficient qualifying service to bring a claim for unfair dismissal?

   4.2 Second, what was the reason for dismissal? The respondent relies on the claimant's conduct. The claimant asserts that his dismissal was because he had asserted his statutory rights to breaks and/or because he raised issues of health and safety.

4.3 Third, if the claimant has sufficient qualifying service to bring a claim for unfair dismissal and the reason for dismissal is established as conduct, was that dismissal fair within the meaning of s.98 of the Employment Rights Act 1996?

4.4 Fourth, was the claimant the victim of alleged discrimination on the ground of his religion as alleged? Did the incidents complained of occur, and if so, did they amount to less favourable treatment and if so, where they on the ground of religion or belief?

4.5 Fifth, was the claimant a victim of direct discrimination on the ground of his race as alleged? In other words, did the incidents occur, and if so did they amount to less favourable treatment, and if so were they on ground of race?

4.6 Sixth, was the claimant a victim of harassment on the ground of his religion or belief as alleged? Did the incidents occur, if so, was the conduct unwanted and did it relate to a relevant protected characteristic, and did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him taking into account his own perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect?

4.7 Seventh, if the claimant was unfairly dismissed, did he contribute to his dismissal by his own conduct and if so, to what extent?

4.8 Eighth, if the claimant was unfairly dismissed as a result of a procedural error what was the prospect of a fair dismissal taking place had a proper procedure been followed?

4.9 Did the respondent act in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures, and if not, should any uplift be made to any award in favour of the claimant?

4.10 What is the appropriate award of compensation for the claimant in relation to any of his claims that succeed, and if his claims of discrimination succeed in whole or part should any recommendations be made by the Tribunal?

5. It is correct as the claimant raised, that in the list of issues the question of time limits was not specified. The issue of limitation/time limits was put in issue by the respondent in its response. At the time of the case management discussion the date or dates on which the claimant said that acts or omissions which amounted to discrimination had actually occurred were unclear. However, the issue of bringing a claim in time is a jurisdictional issue and must be considered. It has been pleaded by the Respondent.

The Hearing

6. At the hearing we heard evidence from the claimant and from Mr Septimiu Neagoe. The claimant submitted a signed witness statement from a Mr Shirwan Namik who was not called to give evidence – his statement has been read by the Tribunal and given the appropriate weight bearing in mind the witness has not been sworn to the truth of his statement, nor been available for cross examination.

7. On behalf of the respondent evidence was heard from:

   7.1 Mr Gary Lake, Hygiene Manager;

   7.2 Brian Johnson, Night Hygiene Manager;

   7.3 Dan Bentley, Production Manager and the dismissing officer;

   7.4 Clare Tarvit, Senior Production Manager who dealt with the claimant's appeal against dismissal; and

   7.5 Mr Anthony Romaine, Human Resources Manager.

8. Reference was made to a substantial bundle of documents and a supplementary bundle. Mr Romaine's statement was disclosed late as was the supplementary bundle submitted by the respondent. There was also a supplementary statement from the claimant which was disclosed late and was produced in reply to Mr Romaine's statement.

9. After hearing submissions from counsel for the claimant and the respondent's solicitor the Tribunal allowed both statements and the supplementary bundle to be submitted into evidence, neither side considered that they were thereby prejudiced. The respondent produced additional documents before the second day of the hearing which were the notes of the exit interview conducted with Mr Neagoe. The claimant did not object to these documents being placed in the bundle.

10. Based on the evidence which had been presented to us we have made the following findings of fact.

Findings of Fact

11. The claimant began working at the respondent in or about late May 2016. His evidence which we accept was that he was advised by a friend that there were jobs available at the respondent and he rang the office at Brackley speaking to a Samantha Potter who advised that there were cleaning jobs available and he should come in for an interview if interested.

12. The claimant went to the respondent's premises in Brackley on 24 May, spoke to Miss Potter, undertook some tests and then returned that evening to speak to the Night Cleaning Section Managers. When he returned he spoke to Mr Johnson and Mr Lake as well as to Mr Hancock a Team Leader. One of the cleaners showed him round the factory floor,

after which he said he was still interested in the job. The following day he spoke again to Miss Potter and he either gave her or received and signed, signed paperwork. He was told the rate of pay was £9 per hour and that after a 3 month period he would receive a permanent job and his pay would increase.

13. Miss Potter is not employed by the respondent, she is employed by an Employment Agency, Extra Personnel Limited (Extra). All the paperwork which the claimant signed to begin work carries the name of Extra and the name of the respondent only appeared on the assignment details from which it was confirmed that the client name was that of the respondent and the address of the place of work was their premises at Brackley. All of the documents were in the name of Extra.

14. The claimant says and we accept he had no further direct contact with Extra as all of his training and supervision was carried out by representatives of the respondent. His pay was paid by Extra and his payslips were sent to him electronically by them. They carry the name of Extra. After a period of time the claimant was told by Mr Johnson and Mr Lake that they wanted to keep him as a permanent employee and that he would get a contract. The claimant received a contract in the name of the respondent confirming that the start date of his employment was 4 September 2016 and that that was also his start date for the purposes of calculating any period of continuous employment.

15. The claimant's work at the respondent then proceeded without incident of note until December 2016. The claimant says that in early December 2016 he reported a problem with the prayer room at the respondent's premises. He described it as a room that could be used for prayer by anyone but which was "only used by Muslims because they need to pray more often". The claimant says he did not use the prayer room himself but he knew that Mr Namik would use the prayer room from time to time. The claimant says that in early December 2016 he went to the lavatory passing the prayer room and saw a cleaner changing out of dirty overalls and boots. In his words "for Muslims it is important that the place where you pray is clean and I was angry he was making it dirty". The claimant says he then spoke to Mr Lake and told him what had happened. Mr Lake allegedly replied that the cleaner in question was not a Muslim. The claimant says he replied that he knew that but the cleaner should not be changing in there, at which point he was asked by Mr Lake "Are you a Muslim?". The claimant said that he was and describes Mr Lake as being shocked. The claimant says he then spoke to Mr Namik who alleged that the same thing had happened two weeks earlier with the same person changing in the prayer room which he had reported but nothing had happened.

16. Mr Lake's evidence was that the claimant did not report this, it was another employee who reported that there had been a cleaner in prayer room wearing his boots and on investigation by him Mr Lake found the cleaner was in fact in the changing room. He says the claimant did not report the matter but was nearby when it was reported to him. He denied ever asking the claimant about his religion and was unaware of the claimant's religion. Mr. Lake's unchallenged evidence was that the

claimant had never asked for any time off or other consideration for any religious observance at any time during his work at the respondent.

17. Mr Namik's account was that in November 2017 he discovered other cleaners using the prayer room and that they were not supposed to be in the room because they were not praying. He says that he reported this to his supervisor, Aga, who allegedly reported the matter to Mr Lake but nothing changed. He also said that he last worked for the respondent in October 2017 and for the last 6 months of his employment he was absent from work through sickness. As he did not attend to give evidence and there was no suggestion that his statement required amendment we have to consider his account of this matter unreliable. He referred to an incident in November 2017 at which time he was not at work.

18. Mr Lake's evidence in this regard was clear and precise, and we accept it. We accept and find as a fact that the complaint was not made by the claimant but by someone else, either in the claimant's presence or overheard by him. We also accept and find as a fact that at no time did Mr Lake ask the claimant about his religion, he had no reason to do so.

19. We are satisfied that the claimant overheard the matter and may well have been concerned about misuse of a prayer room even though he himself did not use it, but he did not raise any complaint. The matter was brought to Mr Lake's attention and he dealt with it appropriately, but it was not brought to his attention by the claimant.

20. The claimant also says that in the same month he was ignored by Mr Lake. This one incident is recited by the claimant thus:

> "The next day (after the alleged report of misuse of the prayer room) I came into my shift and I said Hi to Gary as normal. He ignored me. Before that day he would also always say hello and be friendly towards me but after that he suddenly became unfriendly."

21. Other than that one single event in December 2016 no particulars of "unfriendliness" have been given by the claimant. The matter was not put to Mr Lake.

22. The claimant also alleges that there was a day in or about December 2016 when there was a problem with the water supply in the factory so that high pressure hoses could not be used to clean machines. Mr Lake is said to have told the cleaners to use blue towels used to wipe any spillages to clean the machines. The claimant says he was finishing his shift when he was shouted at by Mr Lake for not using water and no one had told him that water had come back on. The claimant was told to stay behind and clean the machine again using water but he refused.

23. Mr Lake said that there had never been a time during his employment with the respondent, stretching for some 16 years, when there had been a problem with the water supply and he simply denied that this event occurred. We accept Mr Lake's evidence in this regard for the following reasons:

23.1 First, if the claimant had refused to obey a lawful instruction from Mr Lake he would doubtless have been the subject of some informal or formal disciplinary action.

23.2 Second, Mr. Lake said – and this was also not challenged - that if water was not being used this would not be a matter for him but for the process leaders and he would not be involved in any such matter with the claimant, that would be the process leaders' role.

24. The third incident which occurred in December 2016 related to an occasion when some travellers had moved onto some land adjacent to the company's site. Mr Lake says that as a result of this, to avoid possible conflict, the respondent's staff were told not to use the main doors, but if they wished to smoke to use a smoking hut which was put in place for this purpose. The claimant alleges that he was happy to go outside and questioned why he and others could not with Mr Lake allegedly replying that the claimant would not be scared because he was a Muslim. The claimant says this conversation took place in front of a number of people. Mr Neagoe recalled travellers being near the respondent's site and being told by Mr Lake not to go outside for safety reasons and that the respondent kept the doors closed. He did not report any conversation of the type described by the claimant. Mr Lake again simply denied the incident ever occurred.

25. We again accept Mr Lake's evidence in this matter which was clear and consistent. Although the claimant alleged that others were present when this conversation took place no one has given evidence in that regard. On the balance of probabilities, we find as a fact that no such conversation took place, the claimant has not established on the balance of probabilities that it did.

26. In January 2017 the claimant had an accident at work resulting in a knee injury. He was absent from work for 2 days. He says that thereafter he was required to push a trolley containing heavy containers full of chicken. He said that he raised a complaint about this and that nothing was done. There is no contemporaneous evidence of any such complaint, the claimant did not put anything in writing to complain to the Human Resources Team or to any other person. The first time he raised any complaint about the incident in question was when he raised a grievance on 31 May 2018. The grievance related to the alleged false completion of accident paperwork by Mr Lake and contained these words, "I just want to be compensated as my knee will never be right again and action to be taken against Gary".

27. Nowhere in that grievance does he alleged that he was deliberately given or not excused heavy work as a result of his religion or belief following his suffering an injury, rather it suggests that Mr Lake and the respondent generally had covered matters up. That was said to take place with the assistance or connivance of the claimant's then solicitors Slater and Gordon who the claimant said "Work with (the respondent) who try to cover …. wrongdoing". This is the only allegation made by the claimant about being given regularly more difficult tasks compared to non-Muslim workers.

28. Mr Lake said he did not know that the claimant had any ongoing injury problem at the time. The claimant had been absent from work for 2 days and then returned to work. He had not submitted any documents or made any report to the respondent to suggest that he required lighter duties at the relevant time. We accept and find that Mr Lake was unaware of any ongoing injury or difficulty at that time.

29. The claimant says that he also reported this to Mr Johnson. Mr Johnson denied any such discussion and we accept his evidence also. There is no contemporaneous note, written complaint or other information about this. Had the claimant been struggling to carry out certain aspects of his work as a result of his injury we would expect him to have produced some medical note to his employer so that they could be aware of the problem. Medical advice regarding carrying out light duties could also have been provided to the respondent. No such action was taken. We are satisfied that in early 2017 the respondent reasonably believed that the claimant had no ongoing difficulties following an accident at work which had required him to be away from work for only 2 days.

30. The claimant says that in December 2017 he complained to Mr Lake that he was not getting enough time for his break. Mr Lake denied this. We have been shown lengthy documents in relation to clocking in and clocking out with some analysis prepared by the claimant's counsel relating to the claimant's clocking in and out times, and other lengthy documents, unanalyzed, showing shift patterns. The claimant says that the clocking in and out times show the number of occasions he did not take his full break and that he did not do so because he was detained beyond the start time for his break due to the unfair allocation of tasks. However, whilst the documents in question show that on a number of occasions the time between the clocking out and clocking back in was less than 30 minutes, Mr Lake and Mr Johnson both confirmed (and this was not challenged by the claimant) that this was not determinative of the length of the break because part or all of a break could be taken in the canteen or in another part of premises which would not involve clocking out or back in.

31. The staff rota which was produced by the respondent and ran to some 57 pages was in part unreadable and gave no indication whatsoever of the specific tasks which an individual was carrying out at any time. Other than his complaint about pushing a heavy container the claimant did not indicate any tasks which he was given that were particularly difficult or more difficult than the tasks regularly given to non-Muslim workers.

32. Mr Neagoe's evidence was that **he** was assigned to clean in the "kill rooms" on every single shift apart from on a handful of occasions when he would clean the scalder. Cleaning the scalder was a task which was normally given to another cleaner who was said to be friendly with Mr Johnson and Mr Lake, and "just did what he was told so he got an easy time". Mr Neagoe attributes this uneven allocation of tasks to be "because I stood up for myself more than some of the others" and referred to raising complaints about blocked drains, chicken heads on the floor and the fact that he had to clean the hardest machines. He does not say or suggest that the claimant was at this time being given an unfair allocation of work, nor does he attribute in any way his allocation of work to his religion and

belief or his race.

33. The claimant says that in about March 2017 he reported to Mr Lake, Mr Johnson, Aga and someone called Robert his concerns about handling food after the use of chemicals for cleaning and an absence of training on the cutting machine. The claimant's evidence was that he was told "If you don't like it go home". Mr Johnson denied that this ever occurred. He agreed that some clothing worn whilst using cleaning chemicals would also be worn in the food preparation area but these were not top layer garments and items such as hats and gloves would be changed. He denied ever suggesting to anyone that they could simply "go home".

34. In March 2017 the claimant received a first written warning as a result of his regular absences from work. Nothing further occurred until August 2017 when the claimant was absent for 14 days as a result of problems with his knee.

35. The claimant says that in November 2017 he was pressurised by Mr Lake into signing training documents for the packing area, but he did not allege that this was in anyway connected to his religion or race.

36. The claimant says that he had a meeting in late November 2017 with Mr Lake and Mr Johnson when he complained about breaks, moving large containers containing chicken and contamination of chicken with chemicals. Neither Mr Lake nor Mr Johnson could recall any such conversation, and Mr Johnson says that he would have been on holiday around the time the claimant suggested this meeting took place. We find as a fact there was no such meeting. There was no evidence to support it having occurred.

37. The claimant was absent from work as a result of his knee problems between 5 and 28 December.

38. On 14 March 2018 the claimant, as he admitted, took a break of more than 30 minutes and was found smoking in a colleague's vehicle rather than in the designated smoking area. He was then absent from 16-18 March.

39. On 2 April he was called to a disciplinary hearing in respect of the unauthorised length of his break. On the same day, 2 April he used his swipe card to allow another employee access through the secure turnstile.

40. On 3 April 2018 Mr Johnson issued an advisory note to the claimant in respect of the use of the swipe card.

41. On 5 April 2018 the claimant attended the disciplinary hearing regarding the unauthorised break. The meeting was held by Mr Andrew Davies, Section Manager. The claimant was issued with a final written warning as a result of his taking an unauthorised break. He was advised that the final written warning would remain on his file for 6 months and that any further misconduct in that period would be likely to result in further disciplinary action which could lead to dismissal. He was afforded the right of appeal which he did not pursue.

42. The claimant was then called to a disciplinary hearing regarding his use of the swipe card and that was heard by Mr Bentley. That took place on 19 June and the claimant was told that in the light of the final written warning he would be dismissed for the offence which he admitted, although he said he did not know it was an offence to swipe someone other than himself into a secure area with his own swipe card.

43. The claimant was dismissed and paid in lieu of notice.

44. The claimant appealed against this decision and complained that he could not understand why his grievance was not dealt with before his disciplinary action, could not understand why the witness statement regarding the swipe card incident was produced after the incident and not on the day of the incident, said that he had been told he could not be dismissed for the swipe card incident because it happened before the disciplinary meeting when he received his final written warning and could not understand why the person who reported the use of the swipe card had allowed him to do it and did not stop it. He also raised an issue about pension contributions.

45. The appeal was heard by Miss Tarbit. She confirmed the claimant had asked that the grievance should not be pursued at the disciplinary hearing and as there had been 16 months between the accident which was the subject of the grievance and the date of the grievance. Had he raised it promptly it could have been dealt with. Further at the end of the disciplinary hearing the claimant had said he did not wish to have the grievance heard. She did not see any issue regarding the creation of the statement a few days after an incident rather than on the day of the incident, considered that it was appropriate to invite the claimant to a disciplinary hearing even though Mr Johnson had said no further action would be taken and confirmed that the claimant had opted out of the auto enrollment pension scheme in December 2016. She dismissed the appeal.

46. Mr Romaine’s evidence was that because of the importance of security people would normally be disciplined for allowing someone else access with their pass and that justified the subsequent formal action being taken against the claimant notwithstanding the issue of the informal advisory note by Mr Johnson and this was said to be on the grounds of consistency.

47. The respondent produced letters to indicate that others had also been in receipt of warnings for the same swipe card offence or similar swipe card offences. Against that background the claimant brings his complaints.

The Law

48. The Law relevant to this matter is as follows; first of all, under s.94 of the Employment Rights Act 1996 each employee has the right not to be unfairly dismissed.

49. Under s.108 of that Act, s.94 does not apply to the dismissal of an employee unless they have been continuously employed for a period of not less than 2 years ending with the effective date of termination.

50. Under s.98 in a claim for unfair dismissal it is for the employer to show that the reason or if more than one the principal reason for the dismissal and that it is a reason falling within sub-section 2. Under sub-section 2(b) a reason falls within that sub-section if it relates to the conduct of the employee. Under s.98(4) where an employer has demonstrated that the reason was a potentially fair reason the determination of whether the dismissal is fair or unfair having regard to that reason depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case. The question of reasonable action applies throughout the procedure and relates to both procedural and substantive elements of a dismissal as per Iceland Frozen Foods Ltd v Jones.

51. Under s.100 an employee who was dismissed shall be regarded as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that he was an employee at a place where there was no Health and Safety Representative or Committee or it was not reasonably practicable for him to raise the matter by those means and brought to his employer's attention by reasonable means in circumstances connected with his work which he reasonably believed were harmful or potentially to his health or safety.

52. Under s.104 an employee who is dismissed is regarded for the purposes of the Act as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that the employee alleged that the employer had infringed a right of his which was a relevant statutory right is immaterial for that purpose whether or not the employee had the right or whether or not the right had been infringed, but for the sub-section to apply the claim to the right must be made in good faith.

53. Under the Equality Act 2010, s.4 race and religion or belief are protected characteristics.

54. Under s.13 a person discriminates against another if because of a protected characteristic they treat that person less favourably than they treat or would treat others.

55. Under s.26 a person harasses another if they engage in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating that person's dignity or creating an intimidating, hostile or offensive environment for them. In deciding whether the conduct has that effect, a Tribunal must take into account the perception of the person allegedly harassed, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

56. Under s.136 of the Equality Act if there are facts from which the court could decide that in the absence of any other explanation that a person has contravened the Act the court must hold that the contravention has occurred unless the person who has alleged to have contravened the Act can show that they did not do so, the so called shifting burden of proof.

57. Under s.123 of the Equality Act a complaint must be presented to the Tribunal before the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable.

58. In James v Greenwich London Borough Council the Court of Appeal approved the approach of the Employment Appeal Tribunal in the same case in determining whether there was an implied employment contract between an agency worker and an end user. Such a contract may be implied in circumstances where it is necessary to do so to give business efficacy to the situation. No such necessity exists where agency arrangements are genuine and accurately reflect the relationship between the parties. The fact that an agency worker works for the same client for a considerable period of time does not justify the implication of the contract and the Court of Appeal firmly said that the Tribunal may only apply a contract between the agency worker and the end user where it is necessary.

59. We reminded ourselves in the case of Department of Constitutional Affairs v Jones the Court of Appeal emphasised that in considering whether it is just and equitable to extend time in a case of discrimination the guidelines in s.33(3) of the Limitation Act 1980 are to be treated as a valuable reminder of what might be taken into account but are not a checklist.

60. Further that in Caterham School v Rose UKEAT/0149/19 the EAT confirmed that in the absence of evidence as to whether or not it is just and equitable to extend time in a particular case, the Tribunal may not determine that it is, it must hear evidence on the matter.

61. Applying the facts found to the relevant Law we have unanimously reached the following conclusions.

Conclusions

62. In the period 24 May 2016 to 4 September 2016 the claimant was employed by Extra and not by the respondent. The respondent used Extra to find agency staff. It is not uncommon for those staff to subsequently be engaged on a permanent basis by the end user, and we have come to the conclusion in this case that Extra was being used by the respondent as means of finding staff who were then tested to ensure that they met the required standard of performance before being offered direct employment by the respondent itself. All of the documents which the claimant signed in May 2016 bore the name of Extra and their logo, they did not refer to the respondent at all except to indicate the location of the assignment.

63. If the claimant did not understand any of the documents we have not heard evidence that he asked for an explanation and whilst he might have believed or might have assumed that he was employed by the respondent that does not alter the legal position. The legal position is clear, he entered into a contract with Extra and for a period of time until employed by the respondent he was employed by Extra and worked as an agency user in the respondent’s premises.

64. There was absolutely no requirement whatsoever to imply a contract between the claimant and the respondent for that period of time because the arrangement whereby the claimant was engaged as an agency worker working at the respondent's premises adequately, accurately and properly reflected the arrangement between the three parties. The claimant received payslips from Extra, he received them electronically and that changed when he became an employee of the respondent, he thereafter received payslips bearing the respondent's name. He received a P45 from Extra indicating the end of his employment. He was paid for accrued holiday which he had accrued but not taken whilst employed by Extra. Everything at that time pointed to the end of one employment and the beginning of another with a new contract being signed bearing the respondent's name and increasing the rate of pay, and the delivery to the claimant of handbooks and other documents in the name of the respondent.

65. It is completely irrelevant that whilst the claimant was working as an agency worker he was trained, supervised and managed on a day-to-day basis by the respondent's staff because we would not expect an employment agency to have people with the skills, knowledge and expertise let alone the standing within the respondent's undertaking to deal with that on behalf of an end user client. It is inevitable agency workers operate under the day-to-day management of the end user but that does not make them their employees.

66. Accordingly, the claimant was employed by the respondent from 4 September 2016 onwards, he did not have sufficient qualifying service to bring a claim for unfair dismissal under s.94 of the Employment Rights Act 1996 as he was continuously employed for a period of less than 2 years ending with the effective date of termination which was 19 June 2018.

67. We should go on to say that the respondent has established to our satisfaction that the reason for the claimant's dismissal was his conduct. If he did have sufficient qualifying service to bring a claim for unfair dismissal we would have found that to be the reason for dismissal. He had received written warnings and a final written warning and was subsequently dismissed for an admitted act of misconduct. If the matter was proceeding as a claim for unfair dismissal that part of the test would have been established.

68. In this case however it is for the claimant to show that the reason or if more than one the principal reason was either because he had raised health and safety concerns or because he had asserted his right to a statutory break. The claimant has not satisfied the burden of proof in this case. We say that for these reasons:

    68.1 First, we have not found that he made any such complaints.

    68.2 Second, there is no evidence that the people to whom he says he complained, Mr Lake and Mr Johnson were involved in any of the steps leading to dismissal of the claimant. Indeed, the matter for which he was finally dismissed for the swipe card offence had come to the attention of Mr Johnson who decided not to pursue

disciplinary action. It was the decision of the Human Resources department and in particular Ms Cox, supported by Mr Romaine, that disciplinary action should be taken notwithstanding Mr Johnson having dealt with the matter unofficially.

69. There is simply no evidence to support the contention that the real reason why the claimant was dismissed was because he had raised complaints about health and safety or asserted his right to a statutory break. Accordingly, the claim to have been automatically unfairly dismissed fails, he has not established the reason or if more than one the principal reason for his dismissal was either of those alleged reasons.

70. We are also bound to say however, that had the claimant been able to establish a right to pursue a claim for unfair dismissal the decision by the respondent to pursue a matter where he had already received unofficial or informal sanction amounted to a second bite of the cherry and that would have given us considerable cause for concern. It was not only contrary to the respondent's own policies and procedures, but contrary to the normal rules of natural justice. The respondent had issued an informal sanction and there the matter should have rested. If the manager had dealt with the matter inconsistently with previous offences involving others that was a matter to take up with the manager not with the employee. The employee was entitled to assume that the matter was closed.

71. Secondly, the respondent took into account a final warning which was not active at the time of the conduct complained of and under their own written policies that is not permitted. A written warning must be in place at the time the conduct occurs under the respondent's policy and here it was not. For those reasons had we been considering a claim of unfair dismissal under s.94 the outcome might have been somewhat different.

72. In relation to the complaints of direct discrimination on the grounds of religion or belief, the claimant relies on incidents the latest in time of which occurred before his last day of actual work which was the 19 April 2018. From that day on he was permanently absent from work through sickness until dismissal. The claimant began early conciliation on 4 September 2018 and his early conciliation certificate was issued on the same date. Under s.123 the complaint must be lodged with the Tribunal within the period of 3 months starting with the date of the act to which the complaint relates. Even allowing for the stop the clock provisions of the early conciliation process the claimant must have commenced early conciliation by 19 July 2018, he did not do so. He had been in receipt of legal advice at an earlier stage as he himself confirmed.

73. The respondent in its response and in its closing submissions raised the issue of the limitation on discrimination claims. We have heard no evidence or submissions explaining why it is just and equitable to allow the claims to proceed. No explanation for the delay has been offered, indeed the claimant has not addressed the issue at all. At the time of the case management hearing the precise chronology and timescale of events on which the claimant was relying was not entirely clear, but from his evidence and the agreed chronology produced for the purpose of this hearing the claimant's complaints for his discrimination claims relate only

to matters which occurred whilst he was carrying out work which places them no later than 19 April 2018.

74. There is no presumption in favour of a claimant that the discretion to extend time should be extended in his favour. The claimant must establish that the discretion should be exercised in his favour and that it is just and equitable to extend time. No evidence at all has been advanced on his part in this regard and on that basis his complaints that he was the victim of direct discrimination on the ground of race, direct discrimination on the ground of religion or belief and harassment on the ground of religion or belief are dismissed because they are out of time. The Tribunal has no jurisdiction to hear them. The claimant has failed to establish that it is just and equitable to extend time in his favour.

75. Had the claims proceeded however, it is right for us to set out what our findings would have been. In relation to the complaint of direct discrimination on the ground of religion or belief the claimant has not established that the relevant individuals within the respondent's undertaking, Mr Lake and Mr Johnson, knew that he was a Muslim or that any adverse action they took (none being established) related to religion. Even if they did he has not established that he was treated less favourably in relation to the allocation of overtime nor led to any evidence from which we could find facts that any such difference was on the basis of his religion or belief.

76. In relation to the allegation that he was regularly given more difficult tasks than non-Muslim workers, the claimant has also not established any relevant facts. He has not set out the tasks which he was given which were more difficult than others, when he was given them or why he says they were because of his religion. He relies on the assertion "it became known that I was a Muslim" and that he was thereafter regularly given "more difficult tasks". He has not established that either Mr Lake or Mr Johnson knew or believed that he was a Muslim, he has not explained how their knowledge resulted in production managers allocating the claimant's tasks which were more difficult than those given to non-Muslim workers on the basis of his religion. Mr Neagoe gives a wholly different reason why he believes he was given more difficult tasks and does not say at any stage that the claimant was also suffering.

77. The claimant has not established that his rest breaks were more regularly curtailed or missed when compared to non-Muslim workers. He has not established to our satisfaction that his breaks were regularly curtailed. He relies on a clocking out process which is not determinative of the length of his break, because breaks can be taken and we heard are regularly taken in whole or in part by employees in parts of the building which did not require them to clock out or back in. There is no evidence which we have heard which would lead us to find facts from which we could conclude the claimant had been the victim of discrimination.

78. In relation to the allegation that the claimant would be required to undertake cleaning outside in the cold weather whilst white colleagues would clean outside in warmer weather, this allegation was supported by Mr Neagoe who said that he would also be given outside cleaning jobs

three times a week or so and much more often in the winter or when it was raining. He would regularly work with the claimant and with some Indian colleagues. He said he only saw one other British worker out there a few times and that British workers would more often get jobs cleaning the offices, hoovering and emptying the bins outside – those were easier jobs than the tray wash which the claimant did not say he did or having to clean outside. That evidence was unchallenged.

79. The claimant's complaint that he was the victim of harassment on the ground of religion and belief is also out of time. The Tribunal has no jurisdiction to hear it. Had we been required to do so we would have concluded that the claims were not made out. The single incident of criticism and questioning related to the alleged use of towels and not water for cleaning a machine. We have found that the claimant has failed to establish on the balance of probabilities that that incident occurred. It was said that when it became known he was a Muslim the claimant's religion was brought up by his manager in order to humiliate and degrade him. The single incident in that part of the allegation related to a suggestion that he was told by Mr Lake that he would not be scared to go outside when the travellers were parked adjacent to the respondent's premises because of his faith. The claimant has again failed to satisfy on the balance of probabilities that this incident occurred and therefore that complaint would also have failed in its merits.

80. Accordingly and in conclusion, the claimant does not have sufficient qualifying service to bring a claim for unfair dismissal, the claimant has failed to establish that his dismissal was for either the reasons (or the principal reason) of his either having made health and safety complaints (none being made in any event) or asserted a statutory right (none having been asserted). His discrimination complaints are out of time and the Tribunal has no jurisdiction to hear them. There is no basis upon which it can be said to be just and equitable to extend time to allow them to proceed, had they proceeded they would in any event have failed.

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Employment Judge Ord

Date: 27 April 2020

Judgment sent to the parties on

.04/06/2020

..J Marlowe
For the Tribunal office