EMPLOYMENT TRIBUNALS

Claimant: Mrs S Henderson

Respondent: Asda Stores Limited

Heard at: Manchester **On:** 24-28 August 2020
17-18 November 2020
19 November 2020
(in Chambers)
17 December 2020
(in Chambers)

Before: Employment Judge Ainscough
Mrs A Jarvis
Mr M Stemp

REPRESENTATION:

Claimant: Mr G Vero (Partner)
Ms J Ferrario of Counsel

Respondent: Ms J Duane of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of constructive unfair dismissal contrary to section 94 of the Employment Rights Act 1996 is successful.

2. The claim of harassment on the grounds of race contrary to section 26 of the Equality Act 2010 is successful.

3. The claim of direct discrimination on the grounds of race contrary to section 13 of the Equality Act 2010 is unsuccessful.

REASONS

Introduction

1. The claimant, who is Ukrainian, worked for the respondent, a supermarket chain, as a Sales Assistant for approximately 15 years until her resignation on 8 May 2019. The claimant commenced early conciliation proceedings on 6 June 2019 and was issued with a certificate on 6 July 2019. The claimant submitted her ET1 claim form on 5 August 2019.

2. The respondent submitted a response on 16 September 2019, and prior to the case management hearing on 25 November 2019 the claimant provided further details of her claim dated 21 November 2019. The respondent submitted an amended response on 10 February 2020.

3. The claimant sought to amend her claim to include a claim for indirect discrimination on the ground of her religion. That application was refused by Employment Judge Dunlop on 3 March 2020.

Evidence

4. The Tribunal spent the first two days of the hearing in August reading because the parties had submitted a bundle of some 511 pages, and on the second day there was no interpreter available to assist the claimant.

5. On day three the Tribunal heard an application from the respondent to strike out the claim. The Tribunal decided not to strike the claim out and went on to clarify the List of Issues with the parties. The Tribunal's reasons are set out in a separate Judgment following a request from counsel for the claimant, who did not represent the claimant at the first part of the final hearing.

6. The respondent sought to make a costs application. It was agreed this application would be dealt with at the conclusion of these proceedings.

7. On the fourth and fifth days, the claimant gave evidence. The matter resumed part-heard and the Tribunal spent the sixth day reading because the parties had been asked to attend via Cloud Video Platform and the claimant objected on the grounds that the first part of the hearing had been in person. The Tribunal decided that in order to give effect to the overriding objective, the part-heard hearing should take place in person.

8. On day seven the Tribunal heard evidence from Fozia Khan, a section leader for the respondent, and Mark Bates, another section leader for the respondent.

9. The Tribunal agreed to accept written submissions from the parties and spent days eight and nine in chambers making this decision.

Issues

10. The issues to be determined by the Tribunal are:

<u>Unfair constructive dismissal</u>

1.1 Did Asda breach the implied term of trust and confidence, that is, did it act, without reasonable cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and Mrs Henderson? The matters relied on as bring (or contributing to) breaches of the implied term are:

1.1.1 On or around 7 May 2019 Fozia Khan criticising Mrs Henderson over her footwear;

1.1.2 On or around 7 May 2019 Fozia Khan questioning Mrs Henderson in a critical manner about the timings of her breaks;

1.1.3 On or around 8 May 2019 Mark Bates having an "abusive and aggressive" conversation with Mrs Henderson in which he looked at his watch and made sarcastic comments about the length of time she had taken and made critical comments about her performance generally;

1.1.4 On 10 April 2019, 24 April 2019 and 8 May 2019, Mark Bates denying Mrs Henderson opportunities to take breaks she was entitled to and delaying the end of her shift;

1.1.5 On 6 January 2018, 28 January 2019, 18 February 2019, 10 April 2019, 15 April 2019, 7 May 2019 and 8 May 2019, Mark Bates taking Mrs Henderson aside, to criticise her performance outside the formal disciplinary process.

1.2 If so, did Mrs Henderson nevertheless affirm the contract before resigning?

1.3 If not, did she resign in response to that breach?

1.4 If Mrs Henderson was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

<u>S.13 Equality Act 2010 - direct discrimination because of race</u>

2.1 Did Asda subject Mrs Henderson to the following treatment:

2.1.1 The treatment Mrs Henderson relies upon for the purposes of the direct discrimination claim is the matters set out at 1.1.1-1.1.5 above.

2.2 Was that treatment "less favourable treatment" i.e. did the respondent treat Mrs Henderson as alleged less favourably than it treated or would have treated others ("comparators") in not materially different

circumstances? Mrs Henderson relies on the following comparators, and/or hypothetical comparators:

2.2.1 In respect of the treatment at 1.1.1 (shoes) Sue Smith (Security), Ann (Fish counter) and Elaine Martin (chilled department)
2.2.2 In respect of the other allegations, a hypothetical comparator only.

2.3 If so, was this because of Mrs Henderson's nationality (Ukrainian)?

2.4 In respect of any act of discrimination found by the tribunal, was Mrs Henderson's claim presented in time having regard to the time limits set out ss. 123(1)(a)-(b) of the Equality Act 2010? Dealing with this issue may involve consideration of whether there was an act or conduct extending over a period of time, and/or a series of similar acts or failures, and/or whether time should be extended on a "just and equitable" basis.

S. 26 Equality Act 2010 – harassment related to race

3.1 Did the respondent engage in the following conduct:

3.1.1 The treatment Mrs Henderson relies upon for the purposes of the harassment claim is the matters set out at 1.1.1-1.1.5 above.

3.2 If so, was that conduct unwanted?

3.3 If so, did it relate to the protected characteristic of race?

3.4 Did the conduct have the purpose or (taking into account Mrs Henderson's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating Mrs Henderson's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

3.5 In respect of any act of harassment found by the tribunal, was the Mrs Henderson's claim presented in time having regard to the time limits set out ss. 123(1)(a)-(b) of the Equality Act 2010? Dealing with this issue may involve consideration of whether there was an act or conduct extending over a period of time, and/or a series of similar acts or failures, and/or whether time should be extended on a "just and equitable" basis.

Remedy

4.1 If Mrs Henderson is successful (in full or in part) what is the appropriate remedy?

Relevant Legal Principles

Constructive Dismissal

11. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> "**the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."**

12. The principles behind such a "constructive dismissal" were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. It was held that unreasonable conduct is not enough, there must be a breach of contract which led to the constructive dismissal. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

13. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

14. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

15. The EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT* said:

> **"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"**

16. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the "band of reasonable responses" is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

17. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

> **"12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O'Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying "damage" is "seriously". This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:**
>
> > **"… apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."**
>
> **13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.**
>
> **14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.**
>
> **15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see Hilton v Shiner Builders Merchants [2001] IRLR 727). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach."**

18. In some cases the breach of trust and confidence may be established by a succession of events culminating in the "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.**

19. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

20. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

Discrimination

21. Discrimination against an employee is prohibited by section 39(2) Equality Act 2010:

> **"An employer (A) must not discriminate against an employee of A's (B) –**
>
> **(a) as to B's terms of employment;**
>
> **(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
>
> **(c) by dismissing B;**
>
> **(d) by subjecting B to any other detriment."**

22. Harassment during employment is prohibited by section 40(1)(a).

23. The protected characteristic of race is defined by section 9(1) as including colour, nationality or ethnic origins.

Direct Discrimination

24. The definition of direct discrimination appears in section 13 and so far as material reads as follows:

> **"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".**

25. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

> **"On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case".**

26. It is well established that where the treatment of which the claimant complains is not overtly because of race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes of the individual responsible: see the decision of the Employment Appeal Tribunal in **Amnesty International v Ahmed [2009] IRLR 884** at paragraphs 31-37 and the authorities there discussed.

27. That case endorsed the approach taken by the House of Lords in **Nagarajan v London Reginal Transport (1999) IRLR 572**. In **Nagarajan** the House of Lords determined that a respondent may treat a claimant less favourably as a result of a subconscious intention and commented:

> ***"All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover we do***

not always recognise our own prejudice. Many people are unable or unwilling to admit even to themselves that actions of theirs may be (racially) motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's (race). After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not (race) was the reason why he acted as he did."

Harassment

28. The definition of harassment appears in section 26 which so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**
>
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are …race".**

Code of Practice

29. The Code of Practice on Employment issued by the Equality and Human Rights Commission on 6 April 2011, provides a detailed explanation of the legislation. The Tribunal must take into account any part of the code that is relevant to the issues in this case. In particular the Tribunal has considered:

(a) paragraphs 3.11 – 3.16 – "because of a protected characteristic".

(b) paragraphs 7.6 – 7.11 – "harassment related to a protected characteristic".

Burden of Proof

30. The burden of proof provision appears in section 136 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

31. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867** where Mummery LJ commented:

> ***"In my judgment, the correct legal position is made plain in paragraphs 28 and 29 of the judgment in Igen v Wong:***
>
> ***"28…it is for the complainant to prove facts from which…the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination*."**

32. Importantly, at paragraph 56, Mummery LJ held that the bare facts of a difference in status and a difference in treatment are not without more sufficient to amount to a prima facie case of unlawful discrimination.

33. In the case of **Qureshi v Victoria University of Manchester and another (2001) ICR 863** the Employment Appeals Tribunal warned against a Tribunal looking at a claim in a piecemeal fashion and commented:

> ***"It was not however necessary for the Tribunal to ask itself in relation to each incident or item whether it was itself explicable on racial grounds' or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on 'racial grounds."***

Time Limits

34. Finally, the time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable …**
>
> **(2) …**
>
> **(3) For the purposes of this section –**

> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

35. In considering whether conduct extended over a period we had regard to the decision of the Court of Appeal in **Hendricks v Metropolitan Police Commissioner [2003] IRLR 96**.

Relevant Findings of Fact

36. On 28 September 2003 the claimant joined the respondent as a Sales Assistant in the Blackburn store. On 20 November 2013 the claimant moved to the Accrington store and was assigned to the date code team. From May 2017 onwards, Mark Bates was the section leader for that team and the claimant's first line manager.

37. The claimant's normal shift was 6.00am until 10.00am. During that shift she was entitled to a 15 minute break. Often, the shift would be changed from 6.00am to 12.00pm. During that shift, the claimant was entitled to a 20 minute break.

38. The claimant's role on the date code team involved checking the dates of products to ensure that there were no out of date products on the shelves. The claimant's role on the chilled team involved taking chilled products and putting them in the fridges first thing in the morning after the night-time delivery.

39. In May 2017 the claimant moved to the chilled team and Mark Bates remained her line manager.

40. In May 2018 the claimant raised complaints of bullying with her second line manager, Fiona Barrington. Fiona Barrington spoke to Mark Bates about the allegations and no further action was taken.

41. On 28 January 2019 Mark Bates helped the claimant put products onto the shelves. On this date the claimant informed Mark Bates that she was Ukrainian. Mark Bates then asked the claimant to complete the replenishment of the cottage cheese.

42. On 18 February 2019, the claimant replenished the fresh meat section and then worked in the chiller back up.

43. On 10 April 2019 the claimant was rostered to work on the replenishment team from 6am until 12pm. On 15 April 2019, the claimant was rostered to work on the replenishment team from 6am until 12pm.

44. On 24 April 2019 the claimant was rostered to work on the replenishment team from 6.00am to 12.00pm. The claimant finished her shift at 12.21pm.

45. On 7 May 2019 the claimant was wearing black trainers with a pink sole. As of this date, the respondent had a policy which required employees to wear "dark, clean, full shoes/boots".

46. On that date the claimant was working from 6.00am to 12.00pm. The claimant was entitled to a 20 minute break. The claimant took her break at approximately 10.00am. Fozia Khan challenged the claimant about the duration of her break.

47. On 8 May 2019, the claimant was working in the chilled department with Mark Bates and Elaine Martin. At some point during this shift, Mark Bates said to the claimant, "what time do you call this?". The claimant took a cage of products to fill the shelves. On the claimant's return to the chilled area, Mark Bates and the claimant had a discussion about the duration of time it had taken her to empty the cage.

48. Following the conversation between the claimant and Mark Bates, the claimant became upset and went to the toilet. On return to the chilled area the claimant put down her scanning gun and left the respondent's store. The claimant went out to her car and wrote out her resignation and handed it in.

49. The claimant's resignation note detailed that she wished to cease her employment with the respondent with immediate effect, that despite having worked for the respondent for over 15 years she was unhappy with the recent change in management and the style of communication, and that she was unable and unwilling to continue with her employment. On 21 May 2019 the claimant was informed that a senior director for people would investigate her complaints.

50. On 29 May 2019 Lisa Fullalove, the manager of people, acknowledged that the claimant had raised some of the issues during her employment but that investigations had not been completed prior to her leaving her employment. The claimant was offered a meeting with the Deputy Store Manager to discuss the issues further.

51. Following the claimant's resignation, she was contacted by the HR department and asked if she wanted to reconsider her decision.

52. On 15 May 2019 the claimant responded, and detailed how she had suffered pain under the management of Mark Bates and Fozia Khan. In that email the claimant made reference to the last straw doctrine, the shoe incident, nasty comments by Mark Bates, workloads that were impossible to complete, prevented from going on breaks and being subject to unlawful treatment.

Submissions

Respondent's Submissions

53. It is the respondent's submission that the claimant has confirmed in evidence that her complaints were resolved to her satisfaction. It is the respondent's case that the incident on 6 January 2018, if a repudiatory breach, was affirmed, and further that the claimant's evidence lacks credibility and cogence. The respondent contends that after each incident the claimant was content to continue working for the respondent.

54. The respondent also contends that the claimant did not complain about the incidents on 10 April 2019 and 24 April 2019. It is the respondent's case that the claimant accepted if she was not adhering to a policy she could be challenged, and

the claimant accepted that she was wearing inappropriate footwear. It is the respondent's case that the claimant's colleagues were spoken to in a similar manner by section leaders and that in fact, Fozia Khan was unaware of the claimant's nationality.

55. The respondent submits that the claimant took longer breaks than to which she was entitled and that it was conceded that it was right for the respondent to discuss this matter with her. It is contended that there has been no evidence that either manager dealt with the claimant in the way that they did because of her nationality, and that any acts of the managers were so trivial that they could not be said to indicate that the respondent no longer meant to be bound by the contract of employment.

56. The respondent asserts that the claimant has only brought this claim to gain compensation because she failed to address her grievances with the respondent post resignation. It is the respondent's case that the claimant has affirmed any breach, and that any treatment by her line managers was as a result of the claimant's failure to adhere to policy, taking excessive breaks, substandard performance and the failure to carry out her duties in a timely manner.

57. It is the respondent's case that the claimant has not shifted the burden of proof because she has not proven facts from which the Tribunal could conclude that the respondent committed an unlawful act of discrimination. Equally, says the respondent, there is no evidence that the treatment was inherently discriminatory. The respondent contends that the claimant has been unable to prove any single comment or act which could amount to harassment, and in any event the claimant's claim is out of time.

Claimant's Submissions

58. The claimant contends that the Tribunal should infer from the facts found that she has been subject to race discrimination and/or harassment. It is the claimant's case that the Tribunal should follow the case of **Qureshi** and look at the totality of facts in order to see whether it is legitimate to infer that the acts complained of were on racial grounds. The claimant submits that the hypothetical comparator is a team member in the same team who was born in Britain. It is the claimant's case that if any of her claim is found out of time it would be just and equitable to extend time given that she has only recently received professional advice.

59. It is the claimant's case that the treatment by Mark Bates on 8 May 2019 was the final straw. It is the claimant's case that when she tried to raise the issues about Mark Bates' treatment, it was not taken seriously by the respondent and no formal proceedings were ever initiated.

60. The claimant relies on the fact that she was the only non British national working in the team. The claimant states that she was treated differently because English was not her first language and because she was a foreigner with a different work ethic and attitude to management.

61. The claimant contends that the evidence given by Mark Bates was based on his belief that the claimant was a good worker if "she largely did as she was told". It is the claimant's case that he spoke to her in a demeaning and disrespectful manner

because of her cultural work ethic and subservient attitude towards management, but did not treat other British colleagues, with different ethics and attitudes, in the same way.

62. The claimant submits that the evidence of Fozia Khan should be given little weight because it was inconsistent. The claimant submits that her evidence should be accepted over that of Mark Bates because he cannot remember most incidents.

63. The claimant relies on the case of **Nagarajan** in which the House of Lords identified the crucial question as why the complainant received less favourable treatment, and further that a Tribunal could draw proper inferences from evidence even if the employer did not realise that the reason for the treatment was race.

64. The claimant submits that she resigned as a result of all of this treatment and the lack of support shown by senior management.

65. It is the claimant's case that there should be an extension of time for any part of her claim that is out of time on the grounds that it would be just and equitable to do so.

Discussion and Conclusions

A: Disputed Facts

Asda Policies and Procedure

66. It is clear from the bundle that the respondent is a paper driven and procedure led employer. There were numerous pieces of evidence in the bundle that show that each time an employee was spoken to by a line manager, it was recorded in a file note, no matter how small the issue.

67. It is submitted on behalf of the respondent that any challenge to the claimant by her line managers was as a result of poor performance. There is no documentary evidence, which the Tribunal would expect to see in such an organisation, that there were issues with the claimant's performance. This leads the Employment Tribunal to determine that, on the balance of probabilities, the claimant's managers did not have genuine concerns about her performance. The respondent has failed to provide an adequate explanation for the claimant's treatment.

Management style of Mark Bates

68. Mark Bates admitted in cross examination that he would tell people what to do in order to get the job done and admitted he had no problem with the claimant provided she did as she was told. The respondent did not provide any evidence that he treated all members of the team in this way. The Tribunal finds that Mark Bates felt comfortable challenging the claimant because he knew English was not her first language and she was unable to adequately respond. Mark Bates knew that the claimant was Ukrainian and that her cultural work ethic made her subservient to her managers.

69. The Tribunal does not accept the evidence that as a line manager Mark Bates sought to integrate the claimant into the team. Mark Bates admitted that every morning there would be a "huddle" but does not recall the claimant attending and

only asserts he would have attempted to include her. He assures the Tribunal that she would have attended. However, it is the claimant's case that she never attended a "huddle" and was not invited to do so.

70. Similarly, Mark Bates was responsible for inviting team members to social events outside of work, and insists the claimant would have been invited. Again, the claimant contends that she was never invited and never attended. The Tribunal prefers the evidence of the claimant.

71. Mark Bates tried to justify the lack of file notes recording the issues he had with the claimant's performance. It was his view that the issues were so minor they were not worth recording. The Tribunal does not accept this. Mark Bates' evidence is that there were repeated failures by the claimant to perform that justified his treatment of her. If Mark Bates had genuine concerns, he would have recorded them in file notes. The Tribunal infers that there was a failure to record because there was no performance issue that would stand the scrutiny of senior managers.

Complaints to second line manager

72. It was the claimant's evidence that she complained every 2-3 weeks to her second line manager, Fiona Barrington, but that no action was taken against Mark Bates.

73. In accordance with the Tribunal's finding that this was a paper driven and procedure led organisation, there is no documentary evidence to record the claimant's complaints, albeit that the Tribunal accept that they were made. The Tribunal infers that there is no such record because Fiona Barrington did not take the complaints seriously. Fiona Barrington may have initially assured the claimant she would investigate, but it cannot be said that the matter was dealt with satisfactorily.

74. It was Mark Bates' evidence that he offered to mediate with the claimant when she complained in May 2018. The Tribunal finds that Mark Bates had no previous experience of mediation and it is unlikely to have made this offer.

6 January 2018

75. The claimant asserts that whilst filling milk she was challenged by Mark Bates as to why she was filling the milk and not the yoghurts. The claimant complains that Mark Bates stared at her and accused her of not listening to him. The claimant complains that as she walked away he muttered "go on and do whatever you are doing".

76. The claimant then complains that Mark Bates followed her and watched what she was doing, and all this took place in the chiller back-up area when no other colleague was present, during an "off the record chat". The Tribunal finds that the claimant would be unlikely to use the phrase "off the record" because English is not her first language and instead this was suggested to her by Mark Bates.

77. Mark Bates does not deny that there was a conversation but denies that this conversation took place in the way described by the claimant.

78. The Tribunal prefers the claimant's evidence, as there was an acceptance from Mark Bates during evidence that conversations could take place in the chiller

back-up area. If the claimant was filling either milk or yoghurts, it is likely she would have been in this area collecting chilled products. There is no record of this interaction in a file note and therefore, the Tribunal is of the view that Mark Bates targeted the claimant without a substantive reason.

28 January 2019

79. It was the claimant's case that by the time she was asked to fill the cottage cheese shelves, she had been working from 6.00am until 11.25am and needed a break. The claimant says that Mark Bates challenged her about going on a break before she had finished the cottage cheese. It is the claimant's position that there was a lot of product and she felt weak and needed to go on her break. The claimant again complains that this challenge took place in the chiller back-up area when she was alone, and on this occasion, Mark Bates invaded her private space.

80. Mark Bates states he only has a vague recollection of this event, but also provides specific detail in his witness statement. The Tribunal finds that the claimant was asked to complete a task before she went on her break despite the period of time she had been working. The Tribunal also finds that knowing the claimant wanted to take a break, Mark Bates gave her an additional task to do which he knew would delay her further as a way of targeting the claimant.

81. Mark Bates accepts that he did challenge the claimant after the break in the chiller area. He also admits he would have raised his voice but says this is because of the fans in that area. The Tribunal accepts the evidence of the claimant because she had been challenged by Mark Bates previously in a similar way on 6 January 2018. There is no file note to record this issue and the Tribunal does not accept that Mark Bates had a genuine concern about the claimant's performance. The Tribunal heard evidence that colleagues only visited this area infrequently to collect stock.

82. The claimant says that she complained to Fiona Barrington but no further action was taken. There is no evidence that any further action was taken.

Line Management of the claimant

83. The Tribunal does not accept that Mark Bates ceased to be the claimant's line manager in February 2019. The evidence the Tribunal has seen and heard is that, whilst Fozia Khan was due to take over in February 2019 when Mark Bates stepped down, she in fact did not do so because she had had an operation on her hand. This was confirmed by Fiona Barrington in a file note at page 490, that Mark Bates stayed on as section leader for a few months in light of "Fozia's hand". It is the Tribunal's finding that Fozia Khan did not return to take over the role of section leader until the beginning of May 2019.

18 February 2019

84. On this date the claimant was working alone in the chiller back-up area for over five hours. She contends that Mark Bates knew this but did not check on her or tell her that she could leave that area. In evidence, Mark Bates said that he could not recall the incident but questioned the claimant's account of the incident.

85. Mark Bates did admit that people would be asked to work in that area. Mark Bates describes a pick of products at 11.00am after the morning fill. The claimant's

shift started at 6.00am on that date and therefore it is perfectly plausible that she would have been in the fridge for a period of five hours by the time Mark Bates came to pick products at 11.00am.

86. Mark Bates admitted that any leftover delivery returned to the chiller back-up area, would normally take up to two hours to deal with if it was being dealt with by more than one person. Mark Bates is clear he would have sent colleagues in to assist the claimant. The Tribunal does not accept this evidence, nor does the Tribunal accept his evidence that had he seen the claimant in the fridge during this period he would have asked her to leave and go and warm up.

87. The claimant raised the issue with Fiona Barrington but no further action was taken.

10 April 2019

88. The claimant complains that at 10.00am she had still not had her break, despite starting work at 6am and was instructed by Mark Bates to finish the promo ends before she went on her break. Mark Bates does not recall this incident but again seeks to comment upon it. Mark Bates was the section leader on this date. The claimant recalls her colleague, Elaine Martin, went on her break at 10.00am and Mark Bates had had his break at 9.00am. The claimant states it got to 10.40am and she was starving and felt weak and needed to go on a break.

89. The claimant was challenged by Mark Bates when she returned from her break about not completing the promo ends. Mark Bates said to the claimant that it was not good enough and she did not obey his orders. Mark Bates threatened the claimant by saying he would take it to the office next time. The Tribunal finds that Mark Bates did not attempt to stop Elaine Martin from taking her break.

90. The claimant was then ordered by Mark Bates to fill up the milk. The claimant complains that Mark Bates asked to have a friendly chat with her and took her into the chiller back-up area when she was collecting the milk. The claimant complains that Mark Bates invaded her space and stared into her eyes. The claimant states that she was then challenged again about not finishing the promo ends and she asked him to leave her alone. The claimant says she feared that she would be assaulted. The claimant said Mark Bates threatened her again and said next time would be far more serious. Mark Bates did not complete a file note about this matter and the Tribunal finds this was because he did not have a genuine concern over the claimant's performance.

91. The Tribunal accepts the claimant's evidence, particularly given that Mark Bates cannot recall the incident.

15 April 2019

92. Whilst still the section leader, the claimant alleges Mark Bates questioned her about out of date chicken casserole. The claimant accepted that this would be a serious problem for the respondent and accepted that no further action was taken. Despite the respondent asserting that this was a serious issue there is no file note recording the conversation with the claimant. In light of previous dealings with Mark Bates, the claimant felt he was singling her out without any evidence. She had no knowledge of him speaking to other colleagues.

93. Mark Bates does not remember this incident and says he would have questioned everybody. The Tribunal finds that Mark Bates questioned the claimant about this issue without any substantive reason to do so.

24 April 2019

94. The claimant states that she was asked to stay after her shift finished at midday to tidy up the area. The shift record records that she did not finish her shift until 12.21pm. Mark Bates cannot remember this but accepted that he could on occasion ask people to stay behind and tidy up. Mark Bates would still have been the claimant's section leader and is likely to have asked her to do this.

7 May 2019 – shoe incident

95. It is the claimant's case that Fozia Khan shouted at her in a direct manner and talked to her sternly and did not question Anne on the fish counter about her non-compliant footwear. Fozia Khan admits the conversation but says it was not on 7 May, but does not provide any alternative evidence as to the date that it could have taken place. It is accepted by this date that Fozia Khan was the section leader.

96. The claimant had given up complaining to Fiona Barrington because she had not taken any action and the claimant had lost faith. The claimant has provided evidence that others were wearing different shoes but only she was challenged. Fozia Khan admits that she knew that English was not the claimant's first language but did not know that she was Ukrainian. Fozia Khan's position is that she was always polite even if she had to be assertive. When Fozia Khan was asked about speaking to Anne on the fish counter, she firstly said it would not be her responsibility because she was not the section leader, and then said she did not do it because the section leader was not in. Her evidence on this point was inconsistent.

97. The Tribunal prefers the claimant's evidence to that of Fozia Khan. It is likely that Fozia Khan was assertive and upset the claimant. Fozia Khan did not produce a file note about this issue despite asserting that the claimant was in breach of the respondent's policy. The Tribunal did not find the evidence of Fozia Khan credible.

7 May 2019 – duration of break incident

98. It is the claimant's evidence that she was on a break with her colleagues, Tony and Elaine, but only she was questioned about the duration of their break. Fozia Khan admitted there was a conversation and stated that the claimant was on a break for 45 minutes rather than 15 minutes.

99. The canteen is upstairs at the back of the store and Fozia Khan conceded that it would take a number of minutes to get to the canteen. It was also conceded that if the claimant was working from 6.00am to 12.00pm and that she would be entitled to a 20 minute break. There was some discussion about being stopped in the store by customers, and the Tribunal accepts at the very least the claimant would have been away from her area of work for 30 minutes.

100. The claimant was the only member of staff to return to the chiller to relieve Fozia Khan. Fozia Khan gave inconsistent evidence about whether she in fact challenged the claimant's colleagues. Her first answer was that she did challenge them, and then her second answer is that she did not. The Tribunal finds that Fozia

Khan avoided answering direct questions about this incident. Fozia Khan did not produce a file note to evidence any genuine concern she had about the claimant's behaviour.

8 May 2019

101. It is the claimant's case that at the outset of the shift Mark Bates challenged the claimant about her whereabouts. Mark Bates admitted that he could be sarcastic but denies being aggressive or abusive.

102. The claimant also complained that Mark Bates challenged her over the length of time it had taken her to complete her tasks and complained that he and a colleague had completed everything else. Mark Bates does not deny this challenge took place and contends that this was the third week in a row that the claimant had done something similar.

103. It is the claimant's case that it took her longer to do her task because she had a mix of products on the cage that needed taking to different parts of the store.

104. The Tribunal finds that given previous incidents, it is likely that Mark Bates did speak to the claimant in a condescending and critical manner.

105. Whilst the Tribunal notes Mark Bates' explanation for his frustration with the claimant, there is no evidence of this within the bundle. There are numerous file notes in the bundle but none deal with this period of time to suggest that the claimant was underperforming. The claimant in her own evidence denied that there had been problems over the previous three weeks.

106. The Tribunal finds that it is likely, whether Mark Bates wore a watch or not, that he would have pointed to his wrist when he was asking about where the claimant had been.

107. There is no evidence of the claimant's alleged underperformance. The Tribunal finds that Mark Bates is likely to have been aggressive, as on previous occasions he had invaded the claimant's body space, raised his voice and singled the claimant out.

B: Application of the law

Unfair Constructive Dismissal

108. The claimant relies upon a breach of the term of implied trust and confidence. It was the claimant's case that there was a culmination of events that led to the last straw event on 8 May 2019 after which she resigned. The Tribunal is aware that if we find there was such a breach of that term, it will also amount to a fundamental breach.

109. The Tribunal finds that there is no evidence that the claimant's second line manager was doing anything about the complaints the claimant was making about the treatment.

110. The claimant had worked for the respondent for over 15 years before she chose to resign, and the Tribunal does not accept that this was done to collect a windfall.

111. The incidents between January 2019 to May 2019 are cumulative and lead to the claimant's resignation. It is the Tribunal's finding that the claimant complained every 2-3 weeks, and whilst at the time Fiona Barrington reacted in a seemingly satisfactorily manner, she did not deal with the matter satisfactorily. The claimant trusted that her second line manager would deal with her complaints.

112. The Tribunal finds that the respondent was acting in a way that was not in accordance with the continuation of the contract. Mark Bates and Fozia Khan did not follow performance procedures in a way which would be expected at this organisation. The respondent relies heavily on a paper driven process. The majority of file notes we have seen are historical, either from the claimant's employment at another store or about other employees. It is clear that when there is an issue, everything is recorded. The absence of such details about the claimant draws the Tribunal to conclude that there were no genuine concerns about the claimant's performance but rather that the claimant was targeted and singled out in a covert way.

113. The Tribunal finds that there was constant badgering of the claimant without substance and without reason, and this ground the claimant down such that she lost trust and confidence, particularly when her complaints were not acted upon.

114. The Tribunal finds that there was no change in behaviour despite the claimant complaining and by May 2019 she had been challenged by two managers. The claimant gave up complaining because she had lost trust and confidence.

115. The claimant could see other colleagues being treated more favourably and that she was singled out.

116. The manner in which the claimant was spoken to, the invasion of her private space and the location of such conversations contributed to the lack of trust and confidence in the respondent.

117. The Tribunal finds that there was no affirmation between January to May 2019, the incidents were cumulative and the claimant resigned on 8 May 2019 in response to the breach.

118. The reason for the claimant's dismissal was breach of contract and it was unfair.

Harassment

119. The Tribunal has found that the conduct about which the claimant complains as detailed in the list of issues at 1.11 – 1.15, did occur.

120. It is clear from the evidence given by the claimant that the conduct was unwanted. The claimant could not fathom why she was being singled out and why she was spoken to in such a way. The claimant was distressed and felt vulnerable. The conduct created an intimidating, hostile, degrading, humiliating and offensive environment for the claimant.

1.13 – 1.15 – 6 January 2018 – 8 May 2019

121. If there was a genuine concern over the claimant's performance, the Tribunal finds that Mark Bates would have recorded his concerns by way of a file note. This organisation is paper driven and there is no such evidence.

122. As a result of English not being the claimant's first language and her cultural work ethic, she did not argue with Mark Bates despite his unacceptable behaviour. Mark Bates knew the claimant was Ukrainian and that English was not her first language. This knowledge made the claimant an easy target unlike her English colleagues who would be capable of resisting any unsubstantiated challenges or physical intimidation.

123. The Tribunal has found that the majority of challenges took place in the chilled back area away from colleagues on the shop floor. The Tribunal infers from this finding that Mark Bates wanted to challenge the claimant without witnesses as he knew his behaviour was unacceptable.

124. Mark Bates gave evidence that he cannot recall the claimant being part of the morning “huddle” or attending social events. The claimant gave evidence that she was never part of the morning “huddle” and was never invited to social events. The Tribunal does not accept Mark Bates made any attempt to include the claimant in either event. The Tribunal does not accept Mark Bates’ explanation of his treatment of the claimant.

125. The Tribunal finds that the reason Mark Bates targeted the claimant between January 2018 – May 2019 was related to her nationality.

1.11 - 7 May 2019 – shoe incident

126. The Tribunal has found that Fozia Khan challenged the claimant over her shoes. Fozia Khan gave evidence that she spoke to Elaine Martin about her shoes but did not provide evidence of when this challenge took place. There was no denial from the respondent that Anne Pilkington who worked on the fish counter was wearing incorrect footwear.

127. Fozia Khan was evasive over whether she spoke to Anne Pilkington’s supervisor, and it was her primary position that Anne Pilkington was on a different counter so she could not speak to her. The Tribunal does not accept Fozia Khan’s explanation of why she did not speak to Anne Pilkington. The Tribunal finds it highly unlikely that a supervisor would ignore a breach of the dress code simply because the colleague worked on a different department.

1.12 – 7 May 2019 – duration of break incident

128. Fozia Khan was inconsistent in her evidence about challenging the claimant over the length of her break on 7 May 2019. Firstly, Fozia Khan stated that she did speak to the claimant's colleagues on her break, but then later changed her evidence to admit that she only spoke to the claimant because it was only the claimant that came back into the chilled area to relieve Fozia Khan from her duties. The Tribunal did not accept Fozia Khan’s explanation of the challenge to the claimant or why she did not speak to the claimant’s colleagues.

129. Fozia Khan admitted she knew that the claimant was not English and that English was not her first language. She said she did not know the claimant was Ukrainian. Fozia Khan gave evidence that it would be normal practice for Mark Bates and Fozia Khan to speak about the team during a handover of the management of the team.

130. In her witness statement Fozia Khan describes the claimant as a quiet individual. The claimant admitted in evidence that her cultural work ethic is such that a manager is someone that must be obeyed and not challenged. The Tribunal finds that Fozia Khan knew that the claimant was not English and that English was not her first language. The Tribunal also finds that Fozia Khan would know from a handover conversation with Mark Bates that the claimant was subservient to management. For these reasons the Tribunal finds that Fozia Khan found it easier to challenge the claimant over the colour of her shoes and the length of break rather than her English colleagues who were likely to resist any such challenge.

131. The Tribunal determines that the burden of proof has shifted. Fozia Khan has not provided an adequate explanation of the claimant's treatment and we can infer from facts proven by the claimant, that the reason she was treated in this way was related to her nationality.

Direct Race Discrimination

132. The Tribunal has found that the claimant was subject to harassment contrary to section 26 of the Equality Act 2010.

133. Section 212 of the Equality Act 2010 provides that "detriment" for the purposes of a section 13 direct discrimination claim does not include conduct which amounts to harassment.

134. Therefore, as a result of the Tribunal's findings of harassment, the claim for direct race discrimination contrary to section 13 of the Equality Act 2010 is unsuccessful.

Time Point

135. The claimant was subject to a continuing act of discrimination from 6 January 2018 until 8 May 2019 such that all acts complained of are in time and there is no need for the Tribunal to exercise its discretion to extend time.

Employment Judge Ainscough
Date 8 March 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

11 March 2021

FOR THE TRIBUNAL OFFICE

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