EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S A Akbary	**v**	**Patsnap (UK) Ltd**

Heard at: London Central
On: 6 – 14 October 2020

Before: Employment Judge Hodgson
Mr Ian McLouglin
Ms Sandra Campbell

Representation

For the Claimant: Mr S Saeed, solicitor
For the Respondent: Ms S Omeri, counsel

JUDGMENT

Withdrawn claims

1. **All claims of indirect discrimination are dismissed on withdrawal.**
2. **The following claim of direct discrimination were dismissed on withdrawal:**
   a. **that training was not given for new role (it was agreed this allegation was in claim 1 only);**
   b. **that failing to provide provision at social events for individuals who do not drink alcohol (it was agreed this allegation was in claim 1 only);**
   c. **that failure to have one to one meetings (it was agreed that this is in both claims); and**
   d. **that the claimant was not invited to management meetings (it was agreed this was in both claims).**

Claim 1

3. To the extent there is a claim of failure to pay wages it is dismissed.

Claim 2

4. The claim of unfair dismissal fails and is dismissed.
5. The claim of direct discrimination fails and is dismissed.

REASONS

Introduction

1.1 By a claim issued on 20 September 2019 (3322609/2019) the claimant brought claims of direct discrimination relying on the protected characteristics of race and religion.

1.2 By a claim issued in 5 February 2020 (2200425/2020) the claimant brought a claim of direct discrimination relying on the protected characteristics of race and religion, and a claim of unfair dismissal.

The Issues

2.1 The issues were agreed at the hearing. We have set them out as appendix 1.

Evidence

3.1 The claimant gave evidence.

3.2 The claimant filed a skeleton argument at the hearing which was later used as the basis of the claimant's submissions.

3.3 We received a bundle of documents.

3.4 The claimant served two applications to amend.

3.5 For the respondent we heard from the following: Mr Alistair Newman; Mr Alistair Newman; Ms Joanna Cassey; Mr Muhammed Sufyan; Mr William Briggs; Anja Stapleford; and Mr Jeffrey Tiong.

3.6 The respondent relied on written submissions.

3.7 The tribunal produced a written list of issues, which was given to the parties.

Concessions/Applications

4.1 On day one, the tribunal discussed the issues. It noted there were two claims. Claim one had been issued in Watford, on 20 September 2019. Claim two was issued in London Central on 5 February 2020. Applying the rule **Henderson v Henderson**,[1] it was agreed that any claims prior 20 September 2019 must be brought in claim one.

4.2 We identified the specific issues in each claim. A note of those issues (draft 1) was provided to the parties on day three.

4.3 Claim one contained allegations of direct discrimination. There also appeared to be a claim of failure to pay wages. However, the claim form failed to set out the following: the relevant contractual term; whether the contractual term was express or implied; calculation of any sums due; the dates any sums were due; the sums paid; and any alleged deduction. Whilst it was possible to infer that there was an allegation there had been a failure to pay, the description was so unclear, it could not be said that a claim had been properly brought. It was not in a form which could either be answered by the respondent, or dealt with by the tribunal.

4.4 The respondent noted that the inadequacy of the pleading had been raised in its response and then recorded by Employment Judge Burns at HIS case management discussion. The claimant had been ordered to supply particulars. The documents supplied did not address the relevant factual basis of any claim. The tribunal explained what matters must be addressed in any application to amend. The claimant indicated an application would be made.

4.5 The respondent indicated it wished to call two witnesses by video. The tribunal noted an application has been made on 24 September 2020. On 30 September 2020, Employment Judge Grewal had sent a guidance sheet to the respondent giving options, and confirming that evidence can be given electronically. We confirmed that that was not an order granting permission. The guidance note envisages an application being made to explain the nature of the evidence, the necessity for evidence by video, and the means to be used. The respondent had not yet made the necessary application. It was agreed that the application be made in writing by 10:00 the following day.

4.6 On day two, we received three separate applications as follows: an application from the claimant to amend the claim form; an application from the respondent pursuant to rule 46 to give evidence by video; and an application to amend the response.

4.7 We considered each of those applications. The claimant's application to amend also included an application to adduce further evidence. In so far as it dealt with the wages claim, it remained confused and lacking in

[1] *Henderson and Henderson* 1843 3 Hare 100, PC

particularisation. The tribunal explained, again, the matters which must be addressed in order to set out adequately a claim of failure to pay wages, or a breach of contract claim. The claimant elected to consider the application further and to present it again on day three. So far as it contained an application to adduce further evidence, we stated that the application should be made at the relevant part of the proceedings, when it was necessary to introduce the documents referred to. It would then be possible for the tribunal to understand the relevance, if any. It was not proportionate to deal with the matter in the abstract and the documents may have little or no relevance at all. In particular, a number of documents were said to be relevant to the wages claim. As there was no claim adequately set out in the claim form, and as any wages claim was subject to an application to amend, it was not possible to determine relevance.

4.8 The respondent's application pursuant to rule 46 had two parts. The first part dealt with permission and the arrangements for witnesses to give evidence by video link. The second part requested that those same witnesses be allowed to view the claimant's cross-examination via a video link established by the respondent. As to the second part of the application, we noted that was, essentially, a broadcasting of the hearing. The respondent could identify no case law which established a precedent. The tribunal noted it appeared that the request was unprecedented. Further, there was no requirement that any witness should be able to see, or hear, the evidence of any other witness. The respondent submitted that it was necessary for the witnesses to see the evidence of the claimant in order to understand the case it was to answer. The tribunal noted that the case should be understood from the pleadings. If the respondent alleged it could not understanding the case it was to meet, it should apply to strike out the claim on the basis that there could be no fair hearing. There was no guarantee that any difficulties would be clarified by any the cross-examination. The witnesses were witnesses of fact. It was not necessary for them to understand the claimant’s case to give their evidence. We refused the second part of the application, and reserved the first part to the following day.

4.9 We considered the respondent's application to amend. The respondent wished to plead a number of factual matters relating to alleged breaches of contract by the claimant discovered after the dismissal. It was agreed that this is primarily relevant to remedy and in particular the question of any Polkey deduction. The tribunal noted that it may be relevant to the question of credibility, but the factual allegations could be put in cross-examination, and as liability was being considered only, any answers to credibility would be final. As the application to amend was essentially concerned with any remedy, it was agreed that the application would be considered prior to any remedy hearing. The respondent was invited to set out the detail of any legal defence raised by the factual issues asserted.

4.10 On day three the claimant presented a further application to amend in substitution for the original application to amend. We considered the application at length and sought further clarification.

4.11 We determined the respondent's rule 46 application. We gave permission for evidence to be received via video on the condition that respondent undertook to use its best endeavours to prevent the link being transmitted beyond the witness, there was no recording of audio or video, and no capturing of images. We confirmed our refusal of the application to stream the claimant's evidence, as that would be an unprecedented step and constitute an unauthorised recording and broadcasting of the hearing. Further, there was no requirement that any witness must see the evidence of another witness. As previously noted, if it were the respondent's case that it could not understand the claimant's position, the appropriate application was for further information, or to strike out as a fair hearing could not be conducted.

4.12 We dealt with the claimant's amended application to amend. It proposed to expand the claim of direct discrimination in two respects – first by adding facts to an existing allegation concerning his removal from the employee forum and second, by adding an additional claim concerning his omission from a seating plan on 6 August 2019.

4.13 We refused the application insofar as it purported to add new facts to the allegation concerning his removal from the employee forum. The allegation as set out in the claim form was unclear. The additional matters raised in the application to amend did not add anything to the allegations already put. They provided no appropriate or reasonable clarification. They did not specify the nature of the employee forum. The application failed to clarify the allegation in any manner. The balance of hardship was against amendment. As to the balance of hardship, we will say more below.

4.14 We allowed the following amendment as an allegation of direct discrimination in the first claim:

> **[O]n 6th August 2019 the respondent removed and/or omitted the Claimant's name from the office seating plan. It is not know[n] who removed/omitted the claimant's name but the email setting out the seating plan was sent by Lucy Woodhouse. The claimant submits that his name was removed/omitted from the seating plan because of his race and/or religion.**

4.15 The remainder of the application to amend was concerned with first, the failure to pay commission, and second the failure to pay a referral fee. The application itself was unclear, confusing, and lacked detail. During the hearing, Mr Saeed sought to amplify, explain, and at times vary the actual application made. It is not possible to set out, precisely, the claims sought to be advanced, as they are inadequately recorded in the application. We have regard to the document, and the submissions, it is possible to identify the following basic assertions. It is alleged that, in

addition to the standard company scheme, for which he received all commission, there were three separate personal agreements concerning commission. He puts it as follows:

> **8. …On 26th June 2018, the Claimant and his then manager, Joseph Smith verbally and expressly agreed that the Claimant would earn commission on 2 separate schemes for the months July 2018 to December 2018. The first scheme was the company standard scheme and the other was a bespoke scheme. The Claimant was paid on the standard company scheme but not on the bespoke scheme. The bespoke scheme was agreed between the Claimant and Mr Smith on 26th June 2018 as follows: the Claimant would be set a target between 1st July 2018 and 31st December 2018 to on board between 5 to 10 clients on the API product, and upon achieving that target the Claimant would be paid an average of his commission earnings from 2017, ie. £100,340.18 (the Claimant's commission earnings for 2017 were £200,680.35 over 12 months so the average per month was £16,723.35. Over the 6 months from July to December 2018 this works out to be £100,340.18). The Claimant was never paid this sum, which was due on 26th April 2019, and submits that this is an unlawful deduction of wages pursuant to s13 of the Employment Rights Act 1996. In addition, on 20th September 2018, the Claimant and Joseph Smith verbally and expressly agreed that on the Bio and Discovery products the Claimant would be paid 10% commission on sales up to $100,000, 7.5% commission on sales between $100,001 and $250,000 and 5% commission on sales above $250,001. Between July and December 2018 the Claimant achieved sales to the value of $260,322.89 on the Bio product and $557,900.85 on the Discovery product. On the agreed commission scheme, this amounts to $58,411 in commission (in Pound Sterling using the exchange rate at the time it comes to £48,109.34). The calculations for Bio are: ($100,000 x 10% = $10,000) + ($149,999 x 7.5% = $11,250) + ($307,900 x 5% = $15,395). The calculations for Discovery are: ($100,000 x 10% = $10,000) + ($149,999 x 7.5% = $11,250) + ($10,322.89 x 5% = $516). The Claimant was never paid the sum of £48,109.34, which was due on 26th April 2019, and submits that this is an unlawful deduction of wages pursuant to s13 of the Employment Rights Act 1996.**
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> **9. … In March 2019, at a meeting attended by the Claimant, Al Newman, Tim Woods, Ray Chohan, Joseph Smith and Laurence Painall, it was verbally and expressly agreed by Al Newman that for Q2 the Claimant's target would be changed to 10 early adopters instead of a sales target of $600,000. The Claimant met his target of 10 early adopters for Q2 but was not paid £27,500 in commission. This commission ought to have been paid after 30th June 2019. The Claimant submits that this is an unlawful deduction of wages pursuant to s13 of the Employment Rights Act 1996.**

4.16 The first refers to a meeting between the claimant and Mr Smith on 26 June 2018. The second refers to a meeting on 20 September 2018 when it is alleged Mr Smith agreed that on the bio and discovery products the claimant would receive 10% commission on sales of up to £100,000. The third is an allegation that in March 2019 at a meeting attended by a number of individuals including Mr Newman it was expressly agreed the claimant target would be changed to 10 early adopters instead of sales target of £600,000.

4.17 The application was refused. In refusing the application, we considered the balance of hardship. In the first claim, there is reference to commission, but, as was agreed by the claimant, it is not possible to

ascertain what is said to be contractual term, what sum is said to be due, or when the deduction was made. The difficulty was raised initially by the respondent its first response. The failure to set out the claim adequately at all was identified by EJ Burns in HIS case management hearing. The claimant was ordered to provide particulars. The claimant provided extensive particulars, but those particulars failed to deal with the essential elements of the commission claim or claims. They failed to identify the relevant contractual term or state whether it was either express or implied. They failed to specify the method of calculation or the sum said to be unlawfully deducted.

4.18 The claimant became represented in July of this year. There was no attempt thereafter to address the difficulties or provide clarification. The continuing failure was noted at the start of the hearing. The tribunal spent time carefully explaining the information which must be provided in order to bring the claim. The first application to amend failed to deal with the relevant clarification. We have considered the second application to amend and have reached the conclusion that it still fails to set out the claims adequately or at all.

4.19 In relation to the first claim for commission, the application itself envisages the claimant would be set a target. This fails to address the fundamental point, which is what was the contractual term. Moreover, it fails to give the detail of how that target was set and what further agreement was reached. The respondent pointed to documentation which would indicate the claimant accepted that in fact there was no further agreement. Mr Saeed sought to answer the respondent's criticisms by saying that the reference to target being set in the future was some form of error. This added to the confusion and demonstrated the lack of clarity in the particulars of the amendment. The second allegation of failure to pay commission does little more than assert that there was some form of express verbal agreement. It fails to set out the specific contractual terms. It is agreed by the claimant that it is not supported by any written documentation of confirmation from the respondent. It is not possible to ascertain what is alleged to be the relevant contractual term. There are similar difficulties for the third commission claim concerning the meeting in March 2019. Whilst there is an assertion that agreement was reached. The nature of that agreement is not set out adequately or at all. It is not supported by any specific documentation from the respondent

4.20 The final part of the application to amend concerned failure to pay the alleged referral fee.

4.21 At paragraph 12 the application states that on the first day of the claimant's employment (1 September 2015) during his induction carried out by Anjali Jha, he was told there was a companywide programme which would reward introductions of new employees with £1500 on engagement in £1500 after completion of probation. The respondent expressed concern that this appeared to be a new allegation not raised before and may have resulted from instructions taken after the claimant

had started to give sworn evidence. Mr Saaed agreed this was an entirely new allegation. It had not been raised in any grievance, correspondence, claim, further particulars, or witness statement. He stated that he received instructions concerning it on the day before, during lunch, and before the claimant was sworn. It is clear, therefore, that this is an allegation which had never previously been raised.

4.22 It follows that all the allegations were unclear. The factual basis of at least the referral fee claim had not been raised at all until the second application to amend. At least one of the other allegations was said to be materially wrong and in itself in need of amendment. The respondent took the view that these allegations were unclear and were evolving in a way which made them difficult to understand or to meet.

4.23 We considered the manner and timing of the application. This application was not finally made until the claimant had already started to give evidence. We received a witness statement which suggested that the claimant had been suffering from anxiety when the claim was originally lodged and that this had caused difficulties. However, he had been represented since 6 July 2020. Moreover, the inadequacies and difficulties been raised by the respondents, and by the tribunal during case management. This tribunal had spent significant time explaining the difficulties and explaining what was needed to provide clarification. Those difficulties were not addressed even by the second day with the second application.

4.24 All of these applications were now significantly out of time. On the claimant's case, the first two commission claims fell to be paid on 26 April 2019 the third on 30 June 2019. The referral claims appear to date back to 2017. It was noted that referral claim was brought as a breach of contract claim within the second claim and therefore, arguably, time would not start to run until the date of termination, albeit it is possible that the referral claim could have been brought as a wages claim earlier.

4.25 As regards time, it cannot now be assumed that the doctrine of reference back applies. In any event, we are entitled to consider time as part of our discretion and to take into account that at the date of the application, the claims were significantly out of time. In relation to the referral claims they are months out of time. The test for extension of time in all these matters is whether it was not reasonalbly practicable to bring the claims. We have found that it would have been practicable to bring the claims. Moreover, even it was not practicable, the period of delay is not reasonable.

4.26 We reach the conclusion that we should not allow amendment of claim one to include the commission claims or amendment of the second claim to include the breach of contract claims. Whilst there is reference to those claims in the first claim form, the way in which they are put fundamentally makes them new claims. The amendment is not a clarification of existing claim. For there to be an existing claim, there must be some basis on

which the fundamental factual basis is set out. A vague assertion the claimant is not enough.

4.27 There is immense potential of hardship to the responent. If we allowed the referral claim to proceed, it would inevitably require an adjournment, as the relevant evidence would have to be obtained. There is no good reason for the failure to present any of the applications to amend. Waiting until the final hearing has led to a serious disruption of the filed final hearing and an unnecessary curtailment of the time available, which in itself has contributed to the need to extend the length of the hearing. There may be hardship to the claimant on not being allowed to pursue a claim which has value; however, any hardship has been caused by his own action in first, failing to set out his claim adequately, or at all despite clear warnings and second, by delaying for no good reason. The balance is against allowing the amendment. We find it was practicable to present the various claims in time. To the extent it was not practicable, they have not been presented in such further time as was reasonable. Taking all those factors into account it is appropriate to refuse the application to amend.

4.28 For the reasons already given, we take the view that there is no extant claim of failure to pay wages in the original claim form, as the factual basis for that is not set out the assertion the claimant is not sufficient.

4.29 On day four, the claimant sought to rely on a transcript of a recording. He alleged the recording had been undertaken by accident. He had disclosed two short clips of the recording itself. His initial representation was that the recording had been lost. The following day it was clarified that it had not been lost, but it could not be downloaded from the phone. There was also reference to a second recording. We do not need to record the full details. What is clear is the claimant was seeking to rely on transcripts of a recording which he had failed to disclose, and he had not adequately explained to the respondent either the existence of recordings, or any difficulties in providing them, and this despite specific requests from the respondent. The claimant elected to withdraw his application to rely upon the documentation.

4.30 We noted that the position was unsatisfactory. These were relevant documents. It appeared the claimant had failed to disclose them and had not given any adequate explanation for that failure. It appeared he had failed to engage with the respondent's requests, and instead had sought to rely on an extract which clearly had been taken from a longer conversation. It follows the claimant appeared to be in breach of his duty of disclosure.

The Facts

5.1 The respondent is a developer of electronic research and development platforms designed to combine millions of data points from patents,

licensing, litigation, and company information with non-patented literature. The platform enables other business to analyse technology trends, assess new opportunities, conduct competitor intelligence, and maximise returns on IP assets. The respondent's UK office is located in Chiswick, central London. The wider organisation has offices in China, Japan, Los Angeles, Singapore, and Toronto.

5.2 The claimant joined the respondent in 2015, first as a senior account executive (SAE) and then from 2018 as head of new product sales. He was dismissed, allegedly by reason of redundancy, on 15 October 2019.

5.3 His claim was presented on 20 September 2019. A further claim was presented after his dismissal.

5.4 The claimant describes himself as a Muslim of Asian ethnicity. He contends he has never drunk alcohol, albeit this was not accepted by the respondent.

5.5 The SAE role is, essentially, a sales role. Some of the executors have individual sales targets, in addition to sales management duties. Others act as sales managers, but have no individual sales target.

5.6 It is common ground that the claimant performed well in sales. In one year 2018, he was the highest performer. On 1 April 2017, the claimant was promoted to the role of selling sales manager. His salary at that time was £98,000 per annum. On 16 July 2018 he was promoted to head of new product sales. His salary at that time was £108,000.

5.7 The respondent had a number of products. One of those products was known as Discovery. Other than to record it is one of the products which the respondent sold, and that it was a product that was being developed and established, we do not need to give further details.

5.8 The respondent has described the claimant's position as an "overlay" role. The role was to support the sales that would be effected by others. It was envisaged the claimant would be brought in towards the end of a deal to provide information and support which would lead to a deal being closed. The claimant had no individual sales target. He did not act as a direct salesman. He was not managing any sales team. Whilst at one point the claimant had an individual reporting to him, he had no reports after December 2018. To the extent the claimant had a target, it revolved around the total quotas for his product lines that were then distributed across the sales people who had individual targets. The claimant has suggested, at times, that there were other people who were, in some sense, comparable. We find that the claimant's role was unique. He was not a salesman. He was not a sales manager. He was providing support for a particular products at a high level. This is what the respondent has called an overlay position, and it was unique in the company.

5.9 On 4 February 2019, Mr Newman commenced employment as the respondent's vice president of sales. He became the claimant's line manager. Mr Newman reported to the chief executive officer, Mr Tiong.

5.10 Mr Newman's role was to review the business to ensure it was a profitable and sustainable commercial operation. There was a senior leadership team. There has been some dispute before us as to the exact make-up of that team, we do not need to resolve the dispute. It is not relevant.

5.11 Part of Mr Newman's brief was to review the company, including income and expenditure, and to make proposals designed to secure the long-term stability of the company. The potential proposals embraced the possibility of reducing staff costs. He was to provided recommendations to Mr Tiong. We have not seen any documents setting out his brief. We are satisfied that there were discussions. We are also satisfied that he did take a strategic look at the business. He considered relevant documents, including all relevant sales figures. He reached various conclusions.

5.12 Mr Newman reviewed the respondent's performance and considered the business metrics. He observed these metrics were not at the level predicted and were not sufficient to sustain the respondent's business costs. Performance was behind budget. He concluded action was needed. He considered the proposals he wished to put forward. The key accounts team should be reduced. Roles in Los Angeles, Toronto, and Britain would be made redundant. Ultimately, four roles across Los Angeles and Toronto were made redundant one employee was white British, one white American, one was a black Canadian, and one employee was Asian.

5.13 Mr Newman considered the claimant's role. He reached a number of conclusions and in particular the following: the claimant's role was unique; the claimant had no specific sales target; the claimant's salary was high; the role was not necessary to continue securing sales; and deleting the role would not prevent continuing sales of the product. He decided the role should be considered for redundancy.

5.14 On 14 May 2020, he sent an email to Ms Florence Carter of HR. The email stated, "…we will make Sami redundant." Before us there has been significant argument as to whether this indicated that the decision to dismiss had been taken by Mr Newman at that stage. It is the respondent's case that Mr Tiong had the final decision which was taken in October 2019, and whatever the language used, the effect was to put the claimant at risk of redundancy. We will consider this further in our conclusions.

5.15 On 24 May 2019, Mr Newman, together with Ms Carter, informed the claimant, verbally, that his role was at risk of redundancy. He was given a letter on the same day. Formal redundancy consultation was scheduled for 3 June 2019.

5.16 The claimant became ill with anxiety. He was signed off work, initially from 30 May 2019 to 13 June 2019. He never returned to work.

5.17 On 3 June 2019, the respondent decided to pay the claimant enhanced sick pay was consistent with the respondent's new contracts, and represented an improvement on his contract.

5.18 At this time, the claimant had raised no allegations of discrimination. On 9 July 2019, for the first time, the claimant referred in writing to racial discrimination. One minute later, he sent a further email to Ms Carter requesting to discuss matters "before it goes down the legal route."

5.19 He contacted ACAS on 22 July 2019.

5.20 On 30 July, (R1/450) he referred to the previous informal chat and made a specific complaint concerning the behaviour of Mr Newman. He alleged that that he had turned down an alcoholic drink and was told by Mr Newman "Your religion is backwards and ancient" and that he should enjoy himself.

5.21 The respondent commenced a formal investigation on 3 August 2019. The claimant was asked to provide further information.

5.22 On 8 August 2009, the claimant raised a formal grievance concerning pay and commission. On 11 August 2019, the claimant provided some detail of his discrimination complaint. He referred to feeling he had been discriminated against in the following ways: not having meetings with Mr Newman; being prevented from attending Friday prayers; being removed from the employee forum, in particular by his pictures being taken away; not being given a seating area since the last two moves, and his name not appearing on the latest plan; and by not being invited to attend the Lapland trip. He stated that all incentives seemed to be focused around drinking, and claimed no other options were given. He did not set out the detail of any of these matters. He did not state how he had been prevented from attending Friday prayers, or specify any relevant date.

5.23 Mr Newman had left the business on 14 June 2019. On 15 August 2019, the claimant was invited to attend a redundancy consultation with Mr Briggs this was eventually rescheduled to 23 August 2019, when it took place via telephone. Mr Briggs sought to discuss alternative roles with the claimant. The claimant had expressed an interest in the SAE role. Ms Carter attended from HR. She told the claimant there would be a drop in salary for the SAE role. The claimant stated a drop in his salary was not suitable and did not make sense. He was concerned to ascertain what this would mean financially. He was told the respondent wished to make a decision in the following week. The claimant confirmed he would let her know by the following Wednesday whether he was interested in any roles.

5.24 On 20 August 2019, Ms Carter gave the outcome of the grievance investigation. She asked for clarification of a number of the allegations.

5.25 On 27 August 2019, there was a further telephone consultation with Ms Carter. The claimant could not remember it. Ms Casey was told the meeting had taken place. On the balance of probability we find this meeting occurred.

5.26 There was an interview on 4 October 2019 with the respondent's recruitment partner, Mr Evelyn. Mr Evelyn terminated the interview, as he believed the claimant had become confrontational. It was rescheduled. There was a further telephone consultation with Ms Stapelfeld on 8 October 2019. This resulted in a rescheduled telephone interview for the role of SAE, this time with Ms Stapelfeld. That interview occurred on 10 October 2019. T

5.27 The SAE role had a basic salary of £45,000 (compared to the claimant's of £110,000). The commission was capped at 150% of 30% of the salary. On a £45,000 salary this is a commission of £19,750 and therefore the total potential earning was in the region of £65,000. The claimant expressed the view that he did not see why his salary needed to change. Ms Stapelfeld sought to explain the nature of the commission arrangements, but was not satisfied the claimant understood them. The claimant stated that he would overperform and that therefore the lower basic salary was not an issue. Ms Stapelfeld sought to explain that the commission was capped. The claimant deals with this interview at paragraph 46 of his statement. He states that Ms Stapelfeld mentioned the large salary drop and he alleges he said "I am happy with that." We do not accept the claimant's evidence. His evidence is inconsistent with his position at the 23 August consultation. Ms Stapelfeld gave clear evidence that there was a lengthy discussion concerning commission. The claimant fails to mention commission in his evidence. It is unlikely that he would not have sought to understand the commission structure. At best, it appears the claimant's evidence is incomplete. To the extent he suggested he was happy with any salary drop, that was contingent on an incorrect assumption that he would, in some manner, overperform and gain earnings through commission earned. To put this in context, in his best year the claimant's total earnings were in the region of £250,000.

5.28 On 15 October, there was a further telephone call and Ms Stapelfeld refer to the claimant being overqualified. She confirmed that he would not be offered a new job. She confirmed that his position was being removed and he would be made redundant. The reference to being overqualified refers to a number of concepts which Ms Stapelfeld had in mind. He had not performed the SAE role for several years. He had moved through two promotions and was now a senior employee. Taking the SAE role would have been a backward step in his career. The salary was significantly lower. Ms Stapelfeld and other senior managers perceived difficulty with the culture. Employees were not being compliant and they were altering contracts without reference to legal advice. There was a lack of cooperation and the respondent wished to foster a more collaborative approach. It was perceived there was a high turnover of employees and

they wanted individuals who would stay for a longer period. Returning a senior employee to a junior position may have had an adverse effect on morale and undermined the respondent's ability to achieve the culture it wished to foster.

5.29 At no time did the claimant address the potential effect on the team of his being demoted. He gave no indication that he was committed to the job long-term. Instead, he disputed the need to change his salary and asserted that he would earn a similar amount anyway, although he failed to accept, or recognise, the operation of the commission arrangements.

5.30 On 15 October 2019, the claimant's redundancy was confirmed by letter.

5.31 The claimant sent a formal appeal on 21 October 2019. He stated he had been not been considered for the renewal role and did not understand why he was overqualified for SAE. He alleged he had been refused commission. There was no mention of discrimination.

5.32 Throughout this process, the claimant referred to commission and alleged he had been underpaid. The consideration of this was extensive. We do not need to consider the detail. We note the claimant did not accept, at any time, that he had received all commission owed.

5.33 On 22 October, the claimant sent a further email with appeal points. He alleged the redundancy process had not been fair and there had been no real attempts to minimise redundancy. He did not allege discrimination.

5.34 The appeal hearing was conducted by Ms Joanna Casey, and she sought guidance before conducting the interview. During that interview, the claimant alleged that he felt discriminated against. She enquired why he would want to do another role. He stated he wished to stay at the company. She considered whether roles other than the SAE were available. She explored his allegations of discrimination. She also considered his complaints relating to commission.

5.35 Ms Cassey's appeal outcome letter was sent on 11 November 2019. She recorded the redundancy selection process and the various meetings and she explained the nature of the business unit reorganisation. In her conclusion she recorded his employment history and the nature of the reorganisation. She concluded that the more junior SAE role was not commensurate with his current level of pay and that it would not meet his career aspirations. She had in mind the difficulty of integrating the claimant into a role which was a more junior position.

5.36 She considered commission for 2018, quarters one and two. She noted a target £500,000 had been set for each quarter. She concluded that this had been appropriate, but there was some ambiguity, and was prepared to lower the target for Q1 which resulted in the claimant being paid more commission. She reviewed all his salary changes. The claimant had alleged he was due a referral fee for introducing an employee. She

considered that argument, and rejected it. As there was a lack of documentation, she did not authorise payment of any referral fee.

5.37 She considered the allegation of marginalisation. She noted the lack of documentary evidence and reviewed the role of Ms Carter. She found no evidence of marginalisation because of discrimination.

5.38 In summary, she upheld the decision to dismiss, but adjusted the commission as noted.

5.39 The company's chief executive officer is Mr Jeffrey Tiong. He notes that the respondent has, currently, 92 employees in its UK office and 790 employees globally. He agrees the claimant was one of the top performing salespeople, historically. Of the UK workforce, approximately 53.26% were white British. Others were British Asian, European, British middle eastern, black British, and South American. Around 17.39% were British Asian. It is estimated 26% of the respondent UK workforce were Muslim, including one who is part of the UK senior leadership team. He accepts that he discssed Mr Newman's review before the claimant's role was put at risk of redundancy in May 2019. We accept his evidence that in October 2019 he made the final decision that there was no alternative appropriate role for the claimant, and that the redundancy should proceed. We accept the matter was discussed with him and that he agreed the decision. We accept that the final decision was his. We also accept his evidence that the annual contract value of the Discovery product was dropping in 2019. In quarter one the value was $391,030, quarter two $232,450, quarter three $90,535, quarter four $35,710. The discovery product is no longer a single product solution and instead forms part of respondent's new sales strategy; it is advanced for sale with various other products.

The law

6.1 In **Safeway Stores Plc v Burrell [1997] ICR 523** the EAT set out a simple three stage test in alleged redundancy dimsissals: (1) was the employee dismissed; (2) if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish; and (3) if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

6.2 There were no grounds for importing into the statutory wording a requirement that there must be a diminishing need for employees to do the kind of work for which the claimant was employed. The only question to be asked when determining stage 2 of the new test is whether there was diminution in the employer's requirements for employees (rather than the individual claimant) to carry out work of a particular kind. It is irrelevant at this stage to consider the terms of the claimant's contract. The terms of the contract are only relevant at stage 3 when determining,

as a matter of causation, whether the redundancy situation was the operative reason for the employee's dismissal. The test set out in **Burrell** was subsequently endorsed by the House of Lords in **Murray & Another v Foyle Meats Ltd [1999] ICR 827**.

> **Lord Irvine LC (with whom Lords Jauncey, Slynn and Hoffmann agreed) said this:**
> **"My Lords, the language of paragraph (*b*) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly they found that that state of affairs had led to the appellants being dismissed. That, in my opinion, is the end of the matter."**
> **The main significance of *Murray v Foyle Meats* was that it rejected the heresy that the expression, 'work of a particular kind', in s 139 meant *the work for which the employee was employed*: that is, the work as defined by his contract of employment. The heretical interpretation can be traced back to the case of *Haden Ltd v Cowen [1982] IRLR 314*, *[1983] ICR 1, CA*. The actual judgments in that case were enigmatic, but the case was taken to have decided that the relevant 'work' was the employee's work as defined by his contract (*Pink v White [1985] IRLR 489, EAT*). This novel 'contract test' became the rule for over a decade until it was (controversially) rejected by another division of the EAT in *Safeway Stores v Burrell [1997] IRLR 200, EAT*, and then condemned by the House of Lords in *Murray v Foyle Meats*.**

6.3 In considering the fairness of the dismissal the tribunal must apply section 98(4) Employment Rights Act 1996, applying that section we must consider the reasonableness of the employer's conduct not whether the Tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. There may be, although not in all cases, a band of reasonable responses where one employer might reasonably take one view and another quite reasonably take another view. The function of the Tribunal as an industrial jury is to determine whether in a particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might adopt.

6.4 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **Section 13 - Direct discrimination**
>
> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

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

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)**

6.6 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

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

Section 136 - Burden of proof

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
> **(5) This section does not apply to proceedings for an offence under this Act.**
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.8 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.9 The submissions have referred to various case that are said to be illustrative, but do not establish any specific principles. We do not need to set them out.

6.10 Consultation with individuals generally arises once they have been provisionally selected, and will often be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments. The EAT summarised the case law in **Mugford v Midland Bank** [1997] IRLR 208 as follows:

> **(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the [employment] tribunal finds that a reasonable employer would**

> **have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.**
> **(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.**
> **(3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.**

6.11 There are no invariable rules as to what consultation involved, Glidewell LJ gave guidance in **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** [1994] IRLR 72, at [24]:

> **24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p 19, when he said:**
> **'Fair consultation means:**
> **(a) consultation when the proposals are still at a formative stage;**
> **(b) adequate information on which to respond;**
> **(c) adequate time in which to respond;**
> **(d) conscientious consideration by an authority of the response to consultation.**

6.12 These words were quoted with approval, in the context of stipulating what was involved in consulting a trade union, by the Inner House of the Court of Session in **King v Eaton Ltd** [1996] IRLR 199.

Conclusions

7.1 It is for the respondent to show the reason or principal reason for dismissal and that it is a potentially fair reason. Redundancy is a potentially fair reason.

7.2 We have regard to **Murray**. There are essentially two questions of fact. The first concerns whether various states of economic affairs exist, as envisaged by section 139 Employment Rights Act 1996. The second is whether the dismissal is wholly or mainly attributable to that state of economic affairs.

7.3 The claimant alleges that there is no redundancy. The respondent alleges that there is a diminished requirement for employees to carry out work of a particular kind. This led to a business reorganisation.

7.4 It is not for this tribunal to substitute its business view for that of the respondent. The background to this case is underperformance against targets. A review was undertaken by Mr Newman. He noted the constraints on revenue. One part of the product was Discovery. He

wished to maintain an income stream from that product and protect growth. He considered the options. He noted that the claimant was not directly involved in sales or sales management, but provided support for sales through an overlay role. He considered that role could be removed without preventing sales, and thus hindering the income stream, and without preventing the potential for growth. The claimant was an expensive employee and removing his role would lead to a significant saving in expenditure.

7.5 There may have been many other ways in which the respondent could have organized its business or sought to save costs. However, the specific business proposal is rational and understandable. We accept that the requirements for the business to carry out work of a particular kind had diminished. The state of economic affairs existed. We have concluded that the claimant's dismissal was wholly attributable to that state of affairs. We do not find that it amounted to discrimination. We will set out further details of our reasons below, when we consider the reasonableness of the decision and whether it amounted to direct discrimination. However, the respondent has established that the sole or principal reason for dismissal was redundancy.

7.6 There has been some suggestion before us that the claimant's position was not unique. That has not been developed adequately, or at all, during cross examination, or in submissions. The claimant was not a salesman. He was not a sales manager. He had no direct reports. The position he occupied was an overlay role and it was unique. It was concerned with providing support for Discovery sales. Mr Newman did apply his mind to whether the role should be compared to any others. He was satisfied that it was a unique role, and therefore the claimant's role was in a pool of one. At no time during the consultation did the claimant set out any rational argument that the position was not unique. He did not challenge, in any meaningful way, the respondent's clear conclusion that he was in a pool of one.

7.7 There is reference in the claimant's skeleton argument to subordinate employees being brought into a pool. There are also various references to bumping. The claimant’s case has not proceeded on the basis that he should have replaced some other employee who, in turn, should have been made redundant. It would have been open to him during the consultation to suggest that he should take someone else's job in a senior position, but this was not advanced. Nor has it been advanced with any employee in cross examination.

7.8 Whilst there is a theoretical possibility that a pool may be widened to incorporate subordinate employees, the claimant has not pursued his claim on that basis. It would be relevant to consider whether there were vacancies, how different any jobs were, the difference in remuneration, and the relative length of service for employee. But the claimant has not sought to give any evidence or advance any argument concerning the need to widen the pool of employees. Whilst the theoretical possibility

exists, there is no factual basis advanced by the claimant on which we could undertake such an analysis. He did not pursue that argument during the consultation, and he has not pursued it since. We can identify no role, which should have been given to the claimant by way of bumping.

7.9 In any event, the relevant vacancies were identified, and the claimant had an opportunity to consider them. The only one that he actively engaged with or pursued was the SAE role, for which he was interviewed on 10 October.

7.10 We do not accept that this is a case where the respondent should have identified the potential for bumping other individuals. The claimant skill set revolved around sales, albeit he was now in a senior support capacity. The jobs most relevant to his skill set were in sales, and were at a lower level of pay, as explored above. As one was available, and the claimant applied for it, not considering the matter further, in the context of bumping, was within the band of reasonable responses of a reasonable employer.

7.11 Much of the claimant's case has been advanced on the basis that Mr Newman made the decision to dismiss no later than 14 May 2019 when he sent an email to Ms Carter saying "we will make Sami redundant." It is the claimant's case that the apparent consultation which occurred thereafter, and the specific interview for the SAE role, were disingenuous as the individuals involved had knowledge of the original decision and were complicit in the deception. It is not the claimant's case that the individuals had no knowledge, acted genuinely, but would have been, in some manner, overruled had they, for example, offered the claimant alternative employment.

7.12 We accept that the wording of the email of 14 May suggests a final decision. However, that does not necessarily mean that the decision is not also the start of a process of consultation. Further, when a senior manager makes a recommendation, particularly in a case of this nature where there is an expensive employee whose role is no longer adding significant value because of a diminished need for the underlying products, that manager may expect that the redundancy will eventually occur. That does not mean that the possibility of reversing the decision does not exist, it is a simple recognition of the economic reality, and the limitation of choice.

7.13 It is necessary to consider what happened thereafter, and to consider whether or not there appears to be in a genuine consultation. It is also appropriate to consider to what extent, if at all, the underlying business decision, or its rationale, was challenged.

7.14 The letter putting the claimant at risk of redundancy outlines the business reason. It does not set out the entire thought process of Mr Newman, or set out the underlying economic factors or business structure. It was not necessary for it to do so. The claimant was a senior employee. He had

access to the relevant figures. He should have understood the difficulties facing the Discovery product. He should have understood that it was not a final product and that there were difficulties in securing customers. His focus was to secure an early uptake and that was proving difficult. He understood the structure of the business. He knew that he was not a salesman or a sales manager. He understood that his position was unique. In those circumstances, and when there is one individual involved, it is not necessary to spell out, in minute detail, the totality of the reasons for reaching a proposal. It would have been open to the claimant to put forward proposals for a different business structure or to make suggestions for the way the business could be reorganised to produce a saving. At no stage did he attempt to do so. At no stage did he engage with, or challenge, the respondent's underlying business rationale or decision. This reflects the reality of the situation and explains why all, including the claimant, believed that the role would be made redundant.

7.15 We have regard to Williams v Compare Maxam Ltd 1982 IRLR 83. This case is particularly important when there are multiple redundancies and an independent trade union is involved. The general principles incorporate the following: the employer will seek to give as much warning as possible to enable the union and employees to take early steps to inform themselves, so that they may consider their response and potentially seek further employment. Consultation will take place to achieve the desired management result. This is not in itself consultation about the business decision. It is for the respondent to decide its business objectives. The selection criteria will be considered, and if possible agreement should be reached. Selection should be undertaken fairly. Alternative employment should be explored.

7.16 In the case of individual employees, the basic principles apply but each case must be taken on its facts and the principles modified as appropriate.

7.17 In this case, the business review not only demonstrated the need for savings, but immediately suggested the appropriate course of action, being the saving made by making the claimant's position redundant. We are satisfied that the claimant was given as much warning as was practicable. As there was a pool of one, the question of selection criteria did not arise. It follows that the focus of the consultation revolved around establishing whether there were any other jobs which were either appropriate, or which were desired. For the reasons we have given, it was not appropriate, or necessary, for the respondent to actively consider bumping another individual out of his or her role. The roles potentially suitable roles were sales roles, and the claimant was able to consider those. Other posts were identified. The claimant suggested he should have, at some point, been offered Mr Newman's role. However, there is no basis on which we can find that he would have been suitable for that role. He was also considered for the account manager’s role. This is a part-time post with a low salary. He did not pursue that option. The claimant was aware of all the relevant roles which existed. The only one he chose to pursue was the SAE. The respondent did all it needed to

ensure the claimant understood what roles were available and it was entitled to accept the claimant's position that the only role he was interested in was the SAE role. The final part of the consultation concentrated on whether the claimant should be offered the junior position.

7.18 We must consider whether the respondent acted fairly in refusing to offer the claimant the SAE role. It is common ground that the claimant had acted in sales, and whilst he had not been in that role for a number of years, it could not reasonably be argued that he lacked the qualifications. He was an experienced salesman, who had achieved high sales. In that sense, he was qualified for the position.

7.19 We must consider whether the failure to offer the claimant a less senior post, for which he was undoubtedly qualified, was unfair. In considering that, we must not substitute our own view. We must ask whether the respondent's action was within the band of reasonable responses.

7.20 In principle, we do not accept that an employer is obliged to offer a more junior role to a senior member of staff in all circumstances, simply because the individual has said he would accept that job. The respondent is entitled to consider the overall functioning of, and viability, of its own business. In that context, it is entitled to ask whether the individual will perform the job in a way which is consistent with the business needs of the employer. The respondent is entitled to take into account a wide range of factors. One factor must be whether the individual has suitable experience or qualifications to perform the role adequately. It is also entitled to consider the effect of the appointment of that individual on the team and the operation of that team generally. It can look to appoint employees who are committed for a period of time; it is entitled to ask whether the individual will be committed to the post and will contribute positively to the overall team.

7.21 The primary decision was taken by Ms Stapelfeld and she had ample grounds for having serious concerns. The position was junior with a salary of less than half that of the claimant's and a cap on commission. That was the job that was on offer. The claimant was a senior employee. He should have understood how his appointment to a junior team could have potentially undermined that team and caused conflict. At no time did he engage with those issues. Instead, the claimant took issue with the salary. Rather than embrace the salary on offer, he questioned why he could not continue on his current salary. To the extent that he said the salary was of no concern, he did so by saying he would overachieve and hence, he would continue to earn at the same level. The commission structure made it impossible for the claimant to continue to earn at the same level, and he failed to acknowledge this. Essentially, the claimant was not accepting the job on offer. Instead he was proposing that the job on offer should be modified significantly to ensure that there was no financial adverse consequence to him. Ms Stapelfeld was entitled to be concerned that appointing the claimant may cause difficulty for the team.

She did not explore the finer detail with the claimant, and that is understandable. He did not engage with the clear problems, and the conversation became stilted and stuck on his unrealistic perception of his potential for earnings.

7.22 We do not accept that the claimant, at any time, made it clear that he was willing to accept the new role with the reduction in salary. Taken as a whole, his position is the opposite. In those circumstances, we cannot say that refusing to offer him that junior position was unfair. It was within the band of reasonable responses of a reasonable employer.

7.23 We have considered the appeal. We are satisfied that Ms Casey had the authority to overturn the decision. She carefully considered the points of appeal. She considered the claimant's suitability for appointment to the more junior role. She considered him unsuitable, and she rejected him for essentially the same reasons as Ms Stapelfeld. She considered carefully whether there was any discrimination, and there was no evidence before her on which she could reasonably have found the claimant had been discriminated against. The appeal was reasonably conducted and was one which was open to a reasonable employer.

7.24 For the reasons we have given, we cannot find that the respondent acted unfairly in treating the reason as a sufficient reason for dismissing the employee.

7.25 For the reasons we will set out below, we have determined that the dismissal was not an act of discrimination. Had the dismissal been an act of direct discrimination, it is likely we would also have found it unfair.

7.26 There are specific allegations of discrimination which are advanced as discrimination on grounds of both race and religion. We have considered each of the allegations individually. In considering them individually and collectively. We have had regard to all of the facts when considering whether the burden shifts in relation to all or any of the allegations. For convenience we will set them out individually.

Allegation 1 - by Mr Alistair Newman on 24 April 2019 saying to the claimant, "Your religion is backward and ancient and you should enjoy yourself more."

7.27 It is for the claimant who advances an allegation to establish that the factual circumstances relied on occurred at all. It is not possible to infer a primary finding of fact. We have found, on the balance of probability, that the words attributed to Mr Newman were not used by Mr Newman on 24 April 2019. There is no contemporaneous documentation in support. The claimant alleges that there was a witness. We have not heard from that witness. There is no documentation from that witness. The allegation was not made at the time. He continued to be managed by Mr Newman. When the allegation was eventually made, there was no attempt at all to set out the context. The claimant did not discuss his concerns with any employee. On the balance of probability, had the words been said, and

had the claimant, as alleged, believed them to be an act of race discrimination, it is likely there would have been some contemporaneous complaint, discussion, or documentation.

7.28 As we do not accept the words were used by Mr Newman, there is no treatment which we could find to be because of race or religion. It follows that no explanation is called for, because the words were not said at all.

Allegation 2 – by Mr Alistair Newman preventing the claimant from attending Friday prayers. Although not recorded in the claim form, on day one, it was said that Mr Alistair Newman said the claimant must take his break between 12:00 and 13:00. [By amendment allowed on the second day, it was said that this occurred during May 2019.]

7.29 We have found that Mr Newman did not prevent the claimant attending Friday prayers. The nature of this claim is unclear. The alleged factual circumstances have developed and changed over time. In its final form, the claimant alleges that he was prevented from attending prayers by being required to attend lunch breaks between 12:00 and 13:00. He has been inconsistent about how this was communicated. He appears to allege that there was documentation, but he could not point to any documentation which imposed the relevant constraint. He said that he discussed the matter specifically with Mr Newman, and Mr Newman specifically refused. However, there is no contemporaneous documentation in support, and the claimant's own witness statement does not set out any supporting evidence. In his oral evidence, the claimant was clear that there had been a discussion. He alleged he had specifically asked to attend Friday prayers, and that Mr Newman had refused to allow it. This is entirely inconsistent with his statement, and in particular paragraph 127. His written statement is to the effect that he continued to go to Friday prayers and Mr Newman did not notice.

7.30 Mr Newman does accept that there were difficulties with lunch breaks. A number of employees were taking extended lunch breaks in order to go to the gym. The matter was tackled and there were various emails. There was an announcement in an email of 12 March 2019. This email is concerned with reducing lunch hours to one hour when people were taking up to two hours. It says nothing about a requirement to work from 12:00 to 13:00.

7.31 Mr Newman's oral evidence, which we accept, is that it would be better to have staggered lunch breaks. Moreover, Mr Newman did not know the claimant went to prayers on a Friday; he did not have any discussions. He was not aware of any reference to Friday prayers in the claimant's calendar, as he did not look at the claimant's calendar. In his previous employment he had set up a prayer room, and this is inconsistent with any hostility to religious practice.

7.32 As noted, the way in which the claimant puts his case has developed. His oral evidence is at odds with his written evidence. We find that to the extent there was an announcement, that did not constrain the claimant to take his lunch between 12:00 and 13:00. In no way whatsoever did it prevent him from going to prayers during lunch hour from 13:00 to 14:00. We find there was no direct discussion. This allegation fails because the allegation that Mr Newman prevented the claimant attending Friday prayers is unfounded.

Allegation 3 - by the respondent not inviting the claimant to the Presidents Club trip it being the claimant's case that the announcement occurred in January 2019 and that the detrimental act consisted of the omission.

7.33 This allegation dates back to January 2019. It is common ground that it is out of time, unless it is part of a continuing course of conduct. The claimant has not alleged it is part of a continuing course of conduct.

7.34 It is accepted the claimant was not invited to the Presidents Club. We have limited evidence on this. He had been invited previously. Other Muslims were invited. There is some evidence that there was a shift in the emphasis and it was seen as a development opportunity. The important criteria considered were performance and whether the person has attended previously. However, we have little documentary evidence in support. As regards difference in treatment, the claimant can only point to the fact that he had been invited previously. It may be possible to say that as there were others of different race and religion invited there is some argument that he was treated differently; however, a difference in race/religion and difference in treatment is not in itself sufficient to turn the burden. There is nothing in the factual circumstances of the specific allegation which would indicate that the refusal could have been because of religion or race. We have considered whether there are any facts arising in the case as a whole, or in relation to any other allegation of discrimination, which turn the burden. We can identify no such facts, and none has been advanced by the claimant.

7.35 In the circumstances, we do not need to consider whether time would be extended in relation to this allegation, albeit we note that the claimant has given no evidence to demonstrate why the claim was not brought earlier and has not advanced any argument in submissions. This allegation fails in any event because there are no facts from which we could conclude that the relevant provision has been contravened.

Allegation 4 – by removing the claimant from the employer forum on a date unknown it being the claimant's case that he learned of the removal on 19 July 2019, as his photo and details were removed. The claimant could not specify the nature of the forum, but described it as informal. He was not aware who removed his details, or when.

7.36 Allegation 4 is a bare assertion that the claimant has been removed from a forum. The claimant has not given details about the nature of that forum.

It is respondent's case that it did not have an intranet. During the hearing, the claimant suggested the forum was a website. No details of that website have been disclosed. No documentary evidence demonstrating his original inclusion, or the nature of the alleged exclusion, has been served. It was accepted that there should have been documentary evidence and that the claimant has failed to disclose it.

7.37 If we take, on face value, the claimant's assertion that in some way some of his details were removed from some form of forum, we must ask whether there are any facts from which we could conclude that the provision, had been contravened.

7.38 There is insufficient evidence before us on which we could find that the claimant had been treated differently. There is simply no adequate evidence before us on which we could reach that conclusion.

7.39 We should note that the respondent has not been able to produce an explanation, and that is because the nature of the allegation is fundamentally unclear. It is not supported by adequate oral evidence; it is not supported by documentation. Therefore, the respondent's explanation, that it knows nothing of this matter, in this case would in itself be a defence. We reject this allegation.

Allegation 5 - on 6 August 2019 the respondent removed and/or omitted the claimant's name from the office seating plan. It is not known who removed/omitted the claimant's name but the email setting out the seating plan was said by Lucy Woodhouse. The claimant submits that his name was removed/omitted from the seating plan because of his race and/or religion.

7.40 Allegation 5 concerns the removal of the claimant from the office seating plan. We accept that he did not appear on the seating plan. At the time, he was at risk of redundancy. He was absent from work due to ill health, and it was unclear when he would return. It is the claimant's case that he was omitted because a decision had been made to terminate his employment. That is a possibility. If placing him at risk of redundancy was itself an act of discrimination, it is likely that omitting him from the seating plan would be an act of discrimination, as it would be for some form of continuing conduct. However, there is nothing in the omission itself which would suggest that the reason had anything to do with race or religion.

7.41 The claimant's primary case is that the omission occurred because a decision had been made to make him redundant. Unless the decision to make him redundant was an act of discrimination, establishing that he was omitted because of the impending redundancy is an explanation and an answer to the claim itself. We have considered above whether the dismissal was an act of discrimination and have found that the respondent has proven its explanation. That explanation holds for both the initial section for redundance and the dismissal itself. We found there is nothing which turns burden reject this allegation.

7.42 The final allegation is that the dismissal was an act of direct race or religious discrimination. In support of this allegation, the claimant relies specifically on the cumulative effects of allegations 1 to 5. It is the claimant's case that those allegations are discrimination which turns the burden. We have found that the factual events described in allegation 1 and allegation 2 did not occur. We have found that there are no facts which would turn the burden in relation to allegation 3, 4, and 5. We find that there are no facts from which we could find the relevant provision had been contravened. There are no facts which from we could say the dismissal was because of race or religion. In any event, we are satisfied the respondent has made out an explanation. We have explored in detail the reason for dismissal. We have noted that there was a rational business decision underpinning the selection of the claimant's position for redundancy. There was a process whereby the claimant was consulted, and he was considered carefully for further employment.

7.43 The claimant does allege that the dismissal was unfair. In that sense he says that the decision was unreasonable. Whilst all discrimination will be unreasonable, not all unreasonableness is discriminatory. Where there is unreasonable conduct of some form, it may be possible to infer discrimination, but only in so far as there is a failure to explain the unreasonable conduct. In this case, the conduct was both reasonable and rational. The explanation is clear. There is no failure to explain unreasonable conduct.

7.44 For all the reasons we have given, we reject all allegations of discrimination.

7.45 We have previously noted that the claim form does not set out adequately or at all any wages claim. There is no claim of breach of contract. The claimant has not sought to argue that there is a wages claim set out adequately or at all in the first claim, or a contract claim in the second claim. We therefore need consider these points no further.

_____

Employment Judge Hodgson
Dated: 22 December 2020

Sent to the parties on:

29/12/20.

.....
For the Tribunal Office

Appendix 1

The first claim - 3322609 2019

Direct discrimination

1. There are claims of direct discrimination. The claimant relies on the protected characteristics of race and religion. He describes himself as a Muslim of Asian ethnicity.

2. The allegations of direct discrimination are as follows:

    a. Allegation 1 - by Mr Alistair Newman on 24 April 2019 saying to the claimant, "Your religion is backward and ancient and you should enjoy yourself more."

    b. Allegation 2 – by Mr Alistair Newman preventing the claimant from attending Friday prayers. Although not recorded in the claim form, on day one, it was said that Mr Alistair Newman said the claimant must take his break between 12:00 and 13:00. [By amendment allowed on the second day, it was said that this occurred during May 2019.]

    c. Allegation 3 - by the respondent not inviting the claimant to the Presidents Club trip it being the claimant's case that the announcement occurred in January 2019 and that the detrimental act consisted of the omission.

    d. Allegation 4 – by removing the claimant from the employer forum on a date unknown it being the claimant's case that he learned of the removal on 19 July 2019, as his photo and details were removed. The claimant could not specify the nature of the forum, but described it as informal. He was not aware who removed his details, or when.

    e. Allegation 5 - on 6 August 2019 the respondent removed and/or omitted the claimant's name from the office seating plan. It is not known who removed/omitted the claimant's name but the email setting out the seating plan was said by Lucy Woodhouse. The claimant submits that his name was removed/omitted from the seating plan because of his race and/or religion.[2]

Wages

[2] This allegation was allowed by an amendment on day 3 of the hearing. The wording is taken from the application.

3. There is reference in the claim form to commission. The claim form does not state there was a failure to pay commission. There is reference to not being paid for a referral. In relation to each matter, the claimant fails to set out in his claim form the contractual term, whether the contractual term was express or implied, the method of calculation, the sum due, and any sum actually paid. The claim form has insufficient detail to raise any arguable claim of deduction from wages.

4. The claimant sought to add claims of failure to pay commissions in his first claim and breach of contract in his second claim. The application to amend failed to set out adequately or at all any claims and it was refused. The tribunal expressed the view that the wording of the first claim did not raise any specific allegation of failure to pay commission and there was no claim of breach of contract in the second claim. It follows that no such claims were pleaded. The claimant was asked to confirm if he disputed the tribunal's analysis. The claimant accepted that the claim form raised no relevant claims.

The second claim – 2200425/2020

Unfair dismissal

5. The claimant alleges he was unfairly dismissed. The respondent accepts he was dismissed, but alleges there was a fair reason which amount to redundancy or was some other substantial reason and that it acted fairly in dismissing him.

6. It was specifically clarified there was no breach of contract claim.

Direct discrimination

7. The dismissal is put as an act of direct discrimination. The claimant relies on the protected characteristics of race and religion.

Withdrawn claims

8. The following claims of direct discrimination were specifically withdrawn and dismissed: by not providing the claimant with training for his new role; failing to provide provision at social events for individuals who do not drink alcohol; failure to have a one-to-one meeting; and failure to invite the claimant management meetings.

9. The claim of indirect discrimination claim was withdrawn and dismissed.

EJ G Hodgson
12 October 2020