



EMPLOYMENT TRIBUNALS

Claimant Mr R Szymanski

Respondent Shakeaway Worldwide Limited

Heard at: Exeter
(remotely by video hearing)

On: 15 February 2021

Before:
Employment Judge Goraj

Representation

The claimant: in person

The respondent: Mr I Wheaton, Counsel

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS that: -

1. The claimant's complaint of unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 is dismissed.
2. The claimant's complaint of race discrimination is dismissed.

REASONS

Conduct of the Hearing

1. This matter was, with the consent of the parties, conducted remotely by way of a Video Hearing. The matter was conducted in this manner because of the Covid 19 pandemic and also because it was in the interests of justice to do so. This matter was listed for 2 days. The evidence and submissions were completed on the first day and an

oral Judgment was due to be given on the second day. This Judgment was however reserved because of a domestic emergency.

Background

2. By a claim form presented on 11 May 2019, the claimant, who was employed by the respondent as a Brand Manager between 4 December 2017 and 11 February 2019, brought complaints of :- (a) unfair dismissal on the grounds of making protected public interest disclosures (pursuant to section 103A of the Employment Rights Act 1996 (“the Act”)) and (b) direct race discrimination (pursuant to sections 9, 13 and 39 of the Equality Act 2010 (“the 2010 Act”).
3. The claimant describes himself as white Polish or non-British. The claimant is a Polish national.
4. The claimant’s ACAS Early Conciliation Certificate confirms that the claimant’s Early Conciliation notification was received on 12 February 2019 and that the ACAS Early Conciliation Certificate was issued on 8 March 2019.
5. The allegations are denied by the respondent including that the claimant made any protected public interest disclosures.

Witnesses

The claimant

6. The Tribunal received a witness statement and heard oral evidence from the claimant. The claimant also relied on a written statement from Ms Lauren Kirby – Greenall, former Operations Manager at the respondent. The Tribunal explained to the claimant that the Tribunal was likely to place limited weight on Ms Kirby – Greenall’s written statement as the respondent/the Tribunal would not have an opportunity to test her evidence on oath.

The respondent

7. The Tribunal received witness statements and heard oral evidence from :- (a) Mr Andy Clack, Retail Director (the dismissing officer in this case) and (b) Ms C Camfield, Finance Director (the appeal officer) on behalf of the respondent.

Documents

8. The Tribunal received an agreed bundle of documents (“the bundle”).

The issues

9. This matter has been the subject of two case management hearings. The parties confirmed to the Tribunal that (subject to the following clarification) the matters in issue which require determination by the Tribunal are as set out in the case management order dated 16 October 2019 (“the Order”)(which is not contained in the bundle) namely:-

The Public Interest Disclosure claims

- (1) Paragraph 5 of the Order in respect of the claimant’s alleged unfair dismissal for making protected public interest disclosures (the alleged disclosures at paragraphs 5.1). and,

The complaint of race discrimination

- (2) Paragraphs 6 and 8 of the Order in respect of the claimant’s race discrimination claim. The allegation of direct race discrimination relates to the requirement to undertake numeracy and literacy tests as part of the claimant’s recruitment in October 2017 which the claimant says was because of his race. The Order records (at paragraph 6.3) that the claimant relied on the following comparators namely: –(a) his replacement, Darren Arnell and /or (b) other store managers and senior managers and/or hypothetical English comparators. The claimant identified in his witness statement/ during the course of the hearing further alleged comparators namely :- Derek Howard (Maintenance Manager), Ms Kirby-Greenall (Operations Manager), Simon Shepherdson (former Brand Manager) and Stephanie Howard Production Manager (wife of Derek Howard).
- (3) There is a time issue in respect of the claimant’s race discrimination claim as the alleged act occurred in October 2017 and the claimant’s claim form was not presented to the Tribunal until 11 May 2019. The complaint is therefore out of time unless the Tribunal decides that it is just and equitable to extend time to allow the claimant to proceed with his claim.
- (4) It was agreed with the parties that the Tribunal would deal first with the issues of liability (including the time issue in respect of the race discrimination claim).

FINDINGS OF FACT

10. Having given careful consideration to the oral and documentary evidence, the Tribunal has made, on the balance of probabilities, the findings of fact referred to below.

11. The claimant, who is a Polish national, was employed by the respondent as a Brand Manager between 4 December 2017 and 11 February 2019. The claimant's letter of appointment dated 1 November 2017 is at page 39 of the bundle. The claimant's statement of terms and conditions of employment, which was accepted by the claimant on 4 December 2017, is at pages 46 – 57 of the bundle. The Tribunal has noted in particular the provisions of the statement of terms and conditions of employment relating to the claimant's job title and the references to the respondent's disciplinary and grievance procedures (including the associated references to the staff handbook).
12. In summary, the claimant was responsible as Brand Manager for the running of 11 stores and his primary duties included dealing with HR issues, store performance/standards, stock control and the opening/closing of stores as necessary. The claimant's line manager from in or around September 2018, was the respondent's Retail Director, Mr Andy Clack. Mr Clack was the dismissing officer in this case.

The respondent

13. The respondent is a milkshake bar retailer which operates via its own milkshake shops/bars and franchises.
14. The Tribunal has had regard to the following policies and procedures of the respondent contained at pages 58 – 68 of the bundle namely :- (a) the disciplinary procedure (b) the respondent's Code of Conduct (c) the respondent's whistleblowing policy (including that the named whistleblowing officer was Ms Camfield - the respondent's Finance Director and appeal officer in this case) and (d) the respondent's office and mobile telephone policy.
15. The Tribunal is satisfied that the claimant would have had access to and knowledge of the above policies in the light of his role and responsibilities as Brand Manager.

The respondent's open-door policy

16. It is the respondent's policy that doors at the entrance to stores should remain open except in extreme conditions in order to promote retail trade. The respondent's provide heat curtains/heaters to stores to mitigate any effects of the open-door policy. Shop staff are required to wear branded short sleeved T-shirts in order to promote the brand. Staff are however permitted to wear long sleeved tops under the T-shirts.

The claimant's alleged disclosures regarding temperatures in store

17. It is recorded in the Order that the claimant contends that :- (a) he made numerous regular oral disclosures to the respondent's Operations Manager, Ms Kirby- Greenall from mid-December 2017 and during the winter period into 2018 and again during a similar period in the winter of 2018/2019, about the temperatures in store and (b) oral disclosures to the Retail Director Mr Clack from approximately October 2018 to January 2019 about the temperatures in stores and the lack of heaters and/or personal protective equipment (paragraphs 5.1.1 and 5.1.2 of the Order).
18. The claimant contended in his witness statement that he and the Operations Manager Ms Kirby-Greenall had tried countless times to appeal to Mr Clack to allow the stores to close their doors and raise the room temperature (and in particular in respect of the Exeter and Southampton stores) but that such concerns had been dismissed. The claimant did not however, identify any specific discussions upon which he relied in support of his claims. The claimant contended in his written statement that the respondent had failed to discharge their duty of care to ensure that all of the stores maintained a minimum of 16° temperature during the winter season as required by law which led to increased staff sickness and staff turnover.
19. Ms Kirby Greenall stated in her written statement that she and the claimant had received numerous complaints from staff and parents regarding issues relating to the temperatures in store which they had brought up on multiple occasions with Mr Clack and his predecessor Mr Prince. Ms Kirby Greenall further stated in her written statement that in response they were allowed to purchase heaters for the stores with the authorisation of directors and that she was asked to advise staff to wear long sleeved tops under their uniforms in winter which advice was written in the weekly newsletters that were distributed to staff. Staff were not however allowed to close the doors.
20. Mr Clack accepted in his evidence that the claimant had, on occasions, raised with him concerns about temperatures in some of the stores and in response to which he had instructed the claimant to buy heaters for the stores. Mr Clack further stated in his evidence that he would only challenge the claimant in respect of the purchase of any heaters if he was aware that heaters had been purchased for the store a short time previously when he would enquire as to what had happened to them.
21. After taking into account all of the above, the Tribunal is satisfied that Ms Kirby -Greenall and the claimant both raised with Mr Clack/ his predecessor Mr Prince on a number of during the winters of 2017/ 2018 and 2018/ 2019 their concerns, following complaints from staff, regarding the temperatures instore including their concerns for the health and safety of staff who were required to work in what they

considered to amount to unacceptably cold conditions as a result of the respondent's open door policy and associated uniform policy.

The issues relating to the contract of Mr Saunders

22. It is recorded in the Order that the claimant contends that :- (a) he made oral disclosures to Mr Clack and Ms Kirby- Greenall in November 2018 in respect of alleged breaches of the data protection regulations in respect of the personal information of Mr Saunders. The claimant has not identified the precise nature of any alleged breach.

23. The claimant did not address the matter in his witness statement. In summary, the claimant contended in his oral evidence that :- (a) it was discovered that a contract which Mr Clack had delivered for signature by Mr Saunders had been left in the office unattended (b) he had informed Ms Kirby – Greenall of the situation and the need for the contract to be collected and (c) that he had also advised Mr Clack that the contract had been left in the store and questioned why it had been left unattended. The claimant also contended during the hearing that the envelope containing the contract had been left unsealed and that another employee had subsequently asked for a pay rise as consequence of seeing the level of pay awarded to Mr Saunders.

24. Ms Kirby – Greenall contended in her written statement that :- (a) when Mr Saunders was employed in November 2018 Ms Camfield requested that his contract be delivered to the store at which he was receiving training for signature and taken away immediately by a member of management (b) the contract was delivered by Mr Clack who failed to take it away with him afterwards and as result of which the contract was left unattended and exposed to a third party and (c) that another employee was asked to collect the contract from the store.

25. Mr Clack did not address the matter of Mr Saunders' contract in his witness statement.

26. Mr Clack stated in his oral evidence that the issues relating to Mr Saunders' contract had been raised with him by Ms Kirby – Greenall / by the claimant on the basis that it had been left unattended in envelope and that it needed to be collected (b) that no one had raised with him any alleged data protection breach and (c) that somebody had subsequently asked for a pay rise but he could not say whether it was because they had seen the contents of Mr Saunders' contract including whether the envelope containing the contract had been sealed or not.

27. Having had regard to all of the above, the Tribunal is satisfied, on the balance of probabilities that:- (a) Mr Saunders' contract was left in an

office in an envelope unattended and (b) Ms Kirby – Greenall and the claimant both advised Mr Clack that the contract had been left in the office and that it needed to be collected. The Tribunal is not however satisfied on the evidence that the claimant raised any wider concerns with Mr Clack regarding the contract including any alleged breaches of the data protection legislation.

The numeracy and literary tests

28. It is recorded in the Order that the claimant contends that:- (a) he was treated less favourably because of his race (as a Polish national/non-British person) because he was required to undertake numeracy and literary tests when he was recruited in October 2017 and (b) he compares himself with the comparators named at paragraph 6.3 of the Order as further supplemented above. The claimant has not identified the name of any alleged discriminator.
29. The respondent accepted that:- (a) it has a policy of requiring new recruits to undergo numeracy and literary tests to promote business efficiency and (b) the claimant was required to undertake a numeracy and literary test when he was recruited in October 2017 as part of that process. A copy of the invoice relating to such test is at page 36 of the bundle. The respondent however denied that the claimant was treated less favourably than others because of his race in similar circumstances and contends that others were treated in the same manner as the claimant or that their circumstances were materially different.
30. The named comparator identified in the Order is the claimant's successor, Mr Darren Arnell who is British. The respondent contends that Mr Arnell was required to undertake a numeracy/literary test as part of his recruitment and relies in support on the copy invoice at page 34 of the bundle. The claimant does not seek to challenge this. The Tribunal is satisfied on the evidence that Mr Arnell was required to undergo a literacy and numeracy test and was therefore treated in a similar manner to the claimant.
31. The remaining named alleged comparators are identified at paragraph 9 (2) above. The respondent did not contend that any of these comparators had undergone a numeracy or literary test. The respondent however denied that any of the remaining alleged comparators were engaged in similar circumstances to the claimant.
32. Having considered the available evidence, the Tribunal is satisfied in respect of the comparators identified at paragraph 9 (2) above (who are all British) as follows: :- (a) Derek Howard-who was employed by the respondent as a manager originally joined the business in 2005, left in around 2014 and returned in 2016 (b) Mrs S Howard who was employed by the respondent as a production manager was employed for similar

periods as her husband as referred to at (a) above (c) Ms Kirby-Greenall first joined the business as a franchisee around 2015 and moved to the employment of the respondent in around 2016 and (d) Mr S Shepherdson worked as a franchisee of the company and was not directly employed by the respondent.

33. The Tribunal is also satisfied on the evidence that a number of other employees who are British/ non- Polish were required to undertake literacy and numeracy tests during 2016 and 2017 including Lily Stansbury and Jessica Hallas (pages 35 – 37 of the bundle). The Tribunal is further satisfied, on the balance of probabilities, that it was normal practice for prospective employees to be required to undergo such tests upon recruitment at the relevant times.
34. The claimant has not identified any detriment (disadvantage) to which he says he was subjected as result of being required to take such literacy /numeracy tests.
35. The claimant states in his written statement that he first became aware of the alleged difference in treatment regarding the use of literary and numeracy tests during a conversation with Mr Howard in December 2018. The claimant further stated in his statement that he did not raise any concerns with the respondent regarding the matter at that time because :- (a) his wife was pregnant and (b) he suspected that Mr Clack had been attempting to manage him out of the business and that he would therefore have been subject to retaliatory action by the respondent if he had raised such concerns at that time. The claimant relied in support of such contentions on the alleged explosive character of the respondent's chief executive officer and his alleged actions against employees. The claimant did not however provide any supporting evidence in respect of his alleged concerns and the Tribunal is not satisfied that the claimant was prevented from/ had any good reason for not raising with the respondent in December 2018 any concerns regarding the numeracy and literary tests.
36. The claimant stated in his oral evidence that he was unaware of his right to take any action for race discrimination in respect of such matters until he consulted a citizens advice bureau following his dismissal. The Tribunal accepts, on the balance of probabilities, the claimant's evidence that he did not seek any professional advice regarding any potential claims against the respondent including in respect of the use of the literary and numeracy tests until after his dismissal by the respondent/ was unaware of any such rights until that time.

The events relating to AM

37. On 2 January 2019, the respondent received a letter of complaint about the claimant from the mother of a 19-year-old part-time employee (AM) at one of the respondent's stores. This letter and attachments are at page 74

onwards of the bundle. In brief summary, AM's mother complained about the way in which her daughter had been referred to in a text message from the claimant to another employee, the alleged constant telephone contact with AM on 27 December 2018 and alleged instructions by the claimant to withhold AM's pay. In the accompanying copy texts AM confirmed the dates when she was available to work. AM is also referred to in a text from the claimant as "Little bitch" in respect of her non-attendance at work on 27 December 2018.(pages 75 – 76 of the bundle).

38. The email dated 2 January 2019 was forwarded to Mr Clack and Ms Lauren Kirby-Greenall. The respondent replied to AM's mother by advising her that they would be in touch in order to take a statement.
39. Mr Clack met with AM on 12 January 2019. The respondent's notes of the investigation meeting with AM are at pages 78- 81 of the bundle. In brief summary, AM informed Mr Clack that :- (a) she had received an excessive amount of missed calls from the claimant regarding her non - attendance at work (b) she had been shown a text message by a work colleague which he had received from the claimant in which he had referred to her as "a little bitch" because she had not come into work and which had shocked and upset her and (c) her pay had been withheld.
40. Following the meeting with AM, Mr Clack spoke with a supervisor at the relevant store regarding the allegations relating to the withholding of AM's pay. The minutes of Mr Clack's interview with that employee are at page 82 of the bundle (the copy of that document in the bundle was unclear and the respondent forwarded a further copy at the request of the Tribunal). In brief summary, the supervisor informed Mr Clack that she had received a telephone call from the claimant instructing her not to pay AM because of her attitude to work.
41. After reviewing the paperwork and the policies contained in the respondent's staff handbook and in particular the respondent's policy regarding the use of telephones/texts (page 67 of the bundle) Mr Clack decided to invoke the respondent's disciplinary procedure and to invite the claimant to a disciplinary hearing.

The letter dated 22 January 2019

42. Mr Clack wrote to the claimant on 22 January 2019 inviting him to attend a disciplinary meeting on 28 January 2018 in respect of the allegations relating to AM. This letter is at page 83 of the bundle. In summary, Mr Clack advised the claimant of four main areas of concern namely:- (a) the alleged use of inappropriate and abusive language in a text to a junior member of staff in which he referred to AM as a little bitch in alleged breach of the respondent's policy (b) alleged repetitive and aggressive telephone calls to a junior member of staff (AM) relating to shifts in respect of which AM had previously advised the respondent that she

could not work (c) the alleged instruction to a store supervisor to withhold a wage payment and (d) alleged failure to comply with the respondent's social media policy. Mr Clack also stated in the letter that he was attaching a copy of the associated documentation together with a copy of the relevant policies/rules. Mr Clack further advised the claimant that he would be conducting the disciplinary hearing, of the claimant's right to be accompanied and that if the allegations were substantiated they would amount to gross misconduct which may result in the termination of the claimant's employment.

The hearing on 28 January 2019

43. A disciplinary hearing was conducted by Mr Clack on 28 January 2019. The claimant was accompanied at the meeting. The respondent's notes of the disciplinary meeting are at pages 84-88 of the bundle. The Tribunal is satisfied that the notes of the meeting, which were signed by the claimant, are a broadly accurate account of what took place. In very brief summary, the claimant :- (a) contended that he had not received a copy of the respondent's Handbook-which was made available during the hearing (b) contended that he had not appreciated that AM had been unavailable to work on the day in question (c) admitted that he had informed AM that he would be charging her for loss of company earnings but contended that this had been done in accordance with a contractual right to do so (d) admitted that he had contacted AM on more than one occasion when she had failed to attend for work on the relevant date (e) stated that he did not remember sending the text message in which he had referred to AM as a little bitch and that he had tried but had been unable to locate it on his phone (f) contended that swearing was in any event normal practice in the business and that he was aware that the chief executive used swear words to describe people (and in respect of which the claimant provided supporting emails) (g) the claimant stated that he wished to apologise if he had sent the text message and (h) stated that he had been supportive to AM including that he had a conversation with her about becoming a supervisor. At the conclusion of the meeting the claimant contended that he felt that he had not been given a fair investigation including as swearing was common in the business including by the chief executive officer. The claimant did not at any point say that he considered that he was being disciplined because he had raised any concerns relating to the temperatures in the stores and or/in respect of Mr Saunders' contract.
44. Following the meeting, Mr Clack undertook further investigations regarding the text message. Mr Clack obtained from AM a screenshot of the telephone number (page 93 of the bundle) which she had for the claimant which Mr Clack considered confirmed that the message had been sent from the claimant's phone.

The conversation on 11 February 2019

45. Mr Clack contacted the claimant by telephone on 11 February 2019 to advise the claimant of the further investigations which he had undertaken and of his decision to dismiss the claimant with immediate effect with a month's notice (rather than gross misconduct). A transcript of this discussion is at pages 89-90 of the bundle. The claimant did not contend during this conversation that he was being dismissed because he had previously raised concerns relating to the temperatures in store and/or in respect of Mr Saunders contract.

The letter of dismissal dated 11 February 2019

46. Mr Clack wrote to the claimant by letter dated 11 February 2019 confirming the claimant's dismissal. This letter is at pages 91 – 92 of the bundle. In brief summary, Mr Clack advised the claimant that the claimant had failed to persuade him that he had not used the alleged inappropriate and abusive language towards AM, as evidenced by the text message, and that the claimant had therefore failed to comply with the respondent's mobile phone policy which clearly stated that using abusive language towards an employee was forbidden. Mr Clack further stated that he did not believe the claimant's contention that he did not remember sending the message and that he believed that the claimant had deliberately failed to bring his mobile phone/laptop to the hearing to prevent them from being accessed during the disciplinary hearing.

47. Mr Clack advised the claimant that based on his findings he considered the claimant's actions to be totally inappropriate and unacceptable for a person in his position as Brand Manager and that he was therefore dismissing him for his conduct. Mr Clack confirmed that the claimant would receive one months' money in lieu of notice together with any other accrued entitlements. Mr Clack advised the claimant of his right of appeal.

The claimant's appeal

48. The claimant wrote to Ms Camfield by email dated 13 February 2019 exercising his right of appeal. The claimant's letter of appeal is at pages 94-97 of the bundle. The claimant's lengthy letter of appeal contains a wide range of allegations relating in particular to alleged failings in the investigation and disciplinary procedure, unfair treatment/ inconsistent treatment of him particularly in relation to the alleged use of foul language within the business (including an allegation that he had been treated less favourably because of his Polish origins in relation to the alleged use of foul language within the business) and raised a grievance against Mr Clack in respect of the latter's alleged use of foul language in the presence of others including the claimant. The claimant contended that he had not been provided with a copy of the respondent's Handbook .The

claimant further stated in his letter that he had taken legal advice and had decided to pursue a number of claims via the ACAS process.

49. The claimant did not make any reference in his letter of appeal to any concerns which he had raised regarding the temperatures in store/did not suggest that any such matters had played any part in the decision by Mr Clack to dismiss him. Further, the claimant did not raise any concerns in his letter of appeal relating to any alleged unfair treatment in respect of the literacy and numeracy tests which he had undertaken at the commencement of his employment with the respondent. The claimant referred in his letter of appeal to alleged breaches of confidentiality by Mr Clack including, unparticularised allegations that Mr Clack had exposed confidential information to a third party and had breached the General Data Protection Regulations/questioned why Mr Clack had not been dismissed for such matters. The claimant did not however suggest that he had raised any such matters with Mr Clack and/or that any such matters had played any part in the decision by Mr Clack to dismiss him.

The appeal process

50. The claimant's appeal was determined by the respondent's Finance Director Ms Camfield. The claimant was invited to and attended an appeal meeting on 22 March 2019. The letter inviting the claimant to the hearing and the minutes of the subsequent meeting are at pages 103 and 104-106 of the bundle. In very brief summary, the claimant accepted that he had sent the text in question to AM and apologised for any distress which it had caused. The claimant however denied any further allegations. The claimant reiterated his previous contentions regarding the alleged unfairness of the investigatory and disciplinary process/ outcome including in respect of alleged inconsistent treatment with regard to the use of language /the inappropriate severity of the sanction of dismissal. The claimant did not make any reference during the appeal meeting to any concerns relating to the temperatures in store and/or any alleged data protection breaches/suggest that such matters had played any part in his Mr Clack's decision to dismiss him.
51. Following the appeal hearing Ms Camfield undertook further investigations into the matters raised in relation to the allegations relating to AM. Ms Camfield subsequently wrote to the claimant by letter dated 29th of March 2019 dismissing the claimant's appeal. This letter is at pages 107- 108 of the bundle.

THE SUBMISSIONS

52. The Tribunal has had regard to the oral submissions of the parties.

THE LAW

53. The Tribunal has had regard in particular to the statutory/associated provisions and authorities referred to below.

The claimant's complaint of unfair dismissal pursuant to section 103 A of the Act

54. The Tribunal has had regard in particular to the following statutory provisions: -Section 43A, 43B and 43 C of the Act.

55. The Tribunal has also had regard in particular to the following authorities :-

Maund v Penwith District Council 1984 ICR 143 CA
Blackbay Ventures Limited t/a Chemistree v Gahir [2014] IRLR
EAT416
Chesterton Global Limited (trading as Chestertons v Nurmohamed)
[2018 ICR 920 CA.

56. The Tribunal has reminded itself in particular in respect of the claimant's protected public interest disclosure dismissal claim that:-

(1) it is necessary for the claimant to establish the factual basis for his claims including that:- (a) he made qualifying disclosures which in his reasonable belief were in the public interest and tended to show one of the relevant failures listed in section 43B (1) of the Act and (b) such qualifying disclosures were made in accordance with the provisions of section 43C-H of the Act and (c) the necessary causal connection between any such disclosures and his dismissal.

(2) As the claimant had less than two years' service at the time of his dismissal it is necessary for him to satisfy the Tribunal, on the balance of probabilities, that any such protected interest disclosures were the principal reason for his dismissal.

The claimant's complaint of race discrimination

57. The Tribunal has had regard in particular to sections 9, 13, 23, 39, 123 and 136 of the 2010 Act. The Tribunal has also had regard in particular to the recent Court of Appeal Judgment of **Adedji v University Hospitals Birmingham NHS Foundation Trust CA A2/2020/0025** regarding time limits.

58. The Tribunal has also reminded itself in particular of the following matters:

—

(1) It is necessary for the claimant to establish the factual basis for his claim including such facts from which the Tribunal could conclude, in the absence of another explanation from the

respondent, that he has been treated less favourably in similar circumstances to his named comparators/hypothetical comparators because of his race.

- (2) If the claimant is able to establish such facts, the burden passes to the respondent to satisfy the Tribunal, on the balance of probabilities, that the alleged protected characteristic of race played no part whatsoever in the alleged act.
- (3) Race does not have to be the only or principal reason for any less favourable treatment. It is sufficient if it is a significant influence on the alleged treatment. Further significant for such purposes, means more than minor or trivial.
- (4) If a complaint of race discrimination has not been presented within the relevant statutory time limit (as is the case in respect of the claimant's claim relating to the numeracy and literacy tests undertaken at the time of his recruitment) a complainant will only be entitled to proceed with his/her claim if the Tribunal considers that it is just and equitable for him/her to do so. When deciding whether it is just and equitable to allow any such extension of time the Tribunal will have regard in particular to:-
(a) the length of and reasons for any delay and (b) the balance of prejudice between the parties.

THE CONCLUSIONS OF THE TRIBUNAL

The complaint of unfair dismissal pursuant to section 103A of the Act (paragraph 5 of the Order)

59. The Tribunal has considered the claimant's complaint of unfair dismissal pursuant to section 103 A of the Act in accordance with the issues identified at paragraph 5 of the Order.

The temperatures in store

60. The Tribunal has considered first the whether claimant made the alleged protected public interest disclosures (or any of them) identified at paragraph 5.1.1 and 5.1.2 of the Order relating to the temperatures in store.

61. In summary, the claimant contended that he made the alleged oral disclosures to Ms Kirby- Greenall (Operations Manager) and Mr Clack regarding the low temperatures in store/lack of heaters during the winters of December 2017/ 2018 and 2018/2019 . The claimant further contended that when he made such disclosures he had a genuine and reasonable belief that they were made in the public interest and that they tended to

show that the health and safety of staff had been and/or was likely to be endangered because of the low temperatures/lack of adequate heaters. The claimant also contended during the hearing that he believed that the respondent had acted in breach of its legal obligations to maintain a minimum working temperature of 16 degrees.

62. In summary, the respondent accepted that the claimant had raised concerns with Mr Clack regarding the temperatures instore but denied that the claimant had a genuine and reasonable belief that such concerns were made in the public interest and/or tended to show that the health and safety of an individual had been or was likely to be endangered and/or that the respondent acted and /or was likely to act in breach of any legal obligation (including that there was any legal obligation to maintain the store temperatures at a minimum of 16 degrees).
63. The Tribunal is satisfied having regard to its findings of fact above and to the relevant legal provisions/authorities that the claimant (together with Ms Kirby – Greenall the respondent’s Operations Manager) made the disclosures to Mr Clack (and his predecessor Mr Prince) during the winters of 2017/2018 and 2018/2019 identified at paragraph 22 above concerning the low temperatures in stores including that he/they had received complaints from staff regarding the cold working conditions/ lack of adequate heaters.
64. The Tribunal has reminded itself that the claimant is however also required to establish that he had a reasonable belief that the information being disclosed tended to show one of the relevant failures identified at section 43 B(1) of the Act. The test is a subjective one with an objective element. Further what is reasonable will depend on all the circumstances assessed from the perspective of the employee at the relevant time.
65. The Tribunal is not however satisfied that the claimant has established on the facts that he had a genuine and reasonable belief at the relevant time that the health and safety of staff at some of the respondent stores had been or was likely to be endangered by such working conditions and/or that the respondent had acted or was likely to act in breach of their legal obligations for the purposes of section 43 (B) (1) (b) and (d) of the Act.
66. When reaching such conclusions, the Tribunal has taken into account in particular that whilst it is satisfied on the facts that the claimant / Ms Kirby – Greenall had received complaints from the staff regarding the cold working conditions and had raised the above mentioned concerns regarding such conditions there was no evidence before the Tribunal of any health condition sustained by any employees/likely to be sustained by any employees by reason of such working conditions. Further there

was no evidence before the Tribunal that the respondent had breached any legal obligations/were likely to breach any such legal obligations (including that the respondent was under any legal obligation to retain a temperature of 16 degrees in store as contended by the claimant during the course of this hearing).

The alleged breaches in respect of Mr Saunders' contract

67. The Tribunal has gone on to consider whether the claimant made the further alleged protected public interest disclosures to Mr Clack and Ms Kirby in November 2018 in respect of alleged breaches of GDPR relating to the personal information of Mr Saunders.
68. Having had regard to its findings of fact at paragraph 27 above the Tribunal is satisfied that the claimant's contact with Ms Kirkby – Greenall/ Mr Clack relating to the contract of Mr Saunders was very limited/ related to the need to return the contract to Mr Clack/management. Further that the Tribunal is not satisfied on the basis of its findings of fact that the claimant made any disclosure and/or qualifying disclosure to Mr Clack and or Ms Kirby-Greenall (including in respect of any breach of any legal obligation) relating to the contract for the purposes of section 43 B (1) of the Act.

Were any such disclosures (or either of them), in any event, the principal reason for the claimant's dismissal.

69. In case the Tribunal is wrong, and that the above mentioned alleged protected public interest disclosures (or either of them) did constitute qualifying and protected public interest disclosures for the purposes of sections 43 B (1) and and 43 C of the Act, the Tribunal has gone on to consider whether they were, in any event, the principal reason for the claimant's dismissal for the purposes of section 103 A of the Act.
70. The Tribunal has reminded itself for such purposes that the claimant does not have the necessary qualifying service to bring an ordinary complaint of unfair dismissal and it is therefore for the claimant to satisfy the Tribunal, on the balance of probabilities, that the above alleged protected public interest disclosures (or either of them) were the principal reason for his dismissal.
71. In summary, the respondent contended :- (a) that there is no evidence to support the claimant's claim that the above alleged disclosures (or either of them) were the reason for the claimant's dismissal and (b) that the reason for the claimant's dismissal was the events relating to AM.
72. Having given the matter careful consideration the Tribunal is not satisfied that the alleged protected public interest disclosures (or either of them)

were the principal reason for the claimant's dismissal – the principal reason being the claimant's conduct in respect of AM.

73. When reaching this conclusion, the Tribunal has taken into account in particular the following matters:-

74.

- (1) The “dismissing officer” in this case was Mr Clack. The claimant did not contend and, in any event, there was no evidence before the Tribunal to suggest that Ms Kirby – Greenall (to whom the claimant contends he made some of the disclosures) was involved in any way in the decision to dismiss the claimant. Ms Kirby Greenall's evidence was, in any event, supportive of the claimant.
- (2) The relevant findings of fact in this case clearly show that the events leading to the claimant's dismissal were precipitated by an external complaint relating to the claimant's alleged conduct towards AM.
- (3) The allegations relating to AM were potentially serious including as they related to :- (a) an alleged inappropriate comment by the claimant (an employee of management status) about AM to a junior colleague (b) excessive phone calls to AM and (c) the withholding of AM's pay.
- (4) There was no evidence before the Tribunal to establish any casual connection between the events relating to AM/ the disciplinary action taken against the claimant in respect of AM and any disclosures which the claimant had previously made regarding the temperatures in store and/or the contract of Mr Saunders.
- (5) The claimant did not contend at any time during the investigatory, disciplinary or appeal processes that the respondent was taking and/or had taken action against him because he had made the alleged protected public interest disclosures. Further, the only mention of any such alleged disclosures by the claimant in the investigatory, disciplinary and appeal papers is the brief and unspecified reference to an alleged data protection breach by Mr Clack in the claimant's letter of appeal.

75. In all the circumstances, the claimant's complaint of unfair dismissal pursuant to section 103A of the Act is dismissed.

The claimant's complaint of race discrimination

76. Finally, the Tribunal has considered the claimant's complaint of direct race discrimination in respect of requirement to undertake literacy and numeracy tests at the time of his recruitment in 2017. In summary, the respondent contended that the claimant's claim was out of time and further that, in any event, there is no evidence that the claimant received any unfavourable treatment in comparable circumstances because of his race.
77. The Tribunal has considered first whether the claimant has established facts from which the Tribunal could conclude in the absence of any other explanation less favourable treatment because of his race in respect of the requirement to undergo a literacy and numeracy test in 2017.
78. The claimant has established that he was required to undergo a literacy and numeracy test during his recruitment.
79. Having given the matter careful consideration, the Tribunal is not however satisfied that (leaving aside at the moment any time issues) that the claimant has established any facts from which the Tribunal could conclude that he has been treated less favourably in respect of such tests by reason of his race (Polish national).
80. When reaching this conclusion the Tribunal has taken into account in particular that:- (a) the claimant accepted (in the light of the invoice provided by the respondent, that the comparator whom the claimant named in the Order (his replacement Mr Darren Arnell who is British) was also required to undertake such a numeracy and literacy test (b) the Tribunal is not satisfied that the other comparators whom the claimant named during the course of the hearing were in broadly similar circumstances as the claimant accepted in his evidence that they were either franchisees or were previous employees of the business who had left and returned and (c) the other invoices provided by the respondent in support of its contention that such tests were part of its normal recruitment policy (paragraphs 30- 33 above).

The time issue

81. Finally, the Tribunal has considered whether it would, in any event, have been just and equitable to have extended time pursuant to section 123 of the 2010 Act to allow the claimant to have pursued such a complaint of race discrimination.
82. The claimant's complaint of race discrimination is significantly out of time. The events in respect of which the claimant complains date back to October 2017 (the invoice at page 36 of the bundle). The claimant did

not present his claim form, which included his complaint of race discrimination, to the Tribunal until 11 May 2019.

83. In summary, the claimant has explained the delay on the basis that he did not become aware of any disparate treatment until December 2018 at which time he feared retaliatory action if he raised any such complaint internally and further that did he did not, in any event, know of his right to bring a complaint to the Tribunal until he obtained legal advice from a citizens advice bureau following his dismissal.
84. In summary, the respondent contended that it would not be just and equitable to extend time to allow any such claim to be pursued as the events go back to October 2017 and further there was no good reason why the claimant did not pursue the matter further at the latest in December 2018 following his discussions with Mr Howard.
85. Having given the matter careful consideration, the Tribunal is not satisfied that it would, in any event, have been just and equitable to have allowed the claimant's claim of race discrimination to proceed.
86. When reaching this conclusion the Tribunal has taken into account in particular that: –(a) the primary events in question go back to October 2017 (b) further, there was no good reason why the claimant, who is an articulate person of managerial status, did not, at the latest, pursue the matter in December 2018 following his conversation with Mr Howard (paragraph 35 above) and (d) whilst the prejudice to the respondent in this case is minimal, it is nevertheless prejudiced by being required to defend a claim in respect of events which go back to October 2017 and which are therefore significantly outside the statutory time limit.
87. The claimant's complaint of race discrimination is therefore dismissed

Employment Judge Goraj
Date: 19 March 2021

Judgment sent to the parties: 22 March 2021

FOR THE OFFICE OF THE TRIBUNAL