EMPLOYMENT TRIBUNALS

Claimant: Mrs M R Hussain

Respondent: (1) B & M Retail Limited
(2) Amy Barnes

Heard at: Manchester (by CVP) **On:** 18 – 22 January 2021
5 February 2021 and
31 March 2021
(In Chambers)

Before: Employment Judge Feeney
Mr J Flynn (IP)
Mr P Stowe (CVP)

REPRESENTATION:

Claimant: Mr S Jones, Counsel
Respondent: Mr I Steel, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claims of race discrimination against both respondents and wrongful dismissal against the first respondent fail and are dismissed.

REASONS

1. The claimant brought a claim of race discrimination and wrongful dismissal following her resignation from the respondent's employment on 31 January 2019. The claimant says that the allocation of overtime was racially biased and as a consequence she did not receive any or received a very limited amount for certain periods of time from April 2018 to January 2019. The claimant also complains that when she raised a grievance the complaint of race discrimination she raised during the grievance process from 11 June 2018 to the appeal outcome letter of 10 December 2018 was not addressed and that this also is race discrimination.

2. The respondent submits that the allocation of overtime was fair and that the allocation of overtime to the claimant was limited because of a belief up to June 2018 that the claimant did not want overtime, once it was understood she did want overtime she was not always allocated 7 hours due to a misunderstanding about the claimant's availability (it was understood the claimant could not work mornings and Tuesdays) , and the fact that she was not skilled in other areas of the business such as tills and replenishment. Further, there was short notice overtime which the claimant would be less available for because she was in the store less than other colleagues. In any event after the 24 June to the end of January 2019 there were only 5 weeks when the claimant did not receive 7 hours overtime and in 4 of those weeks she received 4 hours.

Issues

3. The issues are:-

   (i) Did the respondents subject the claimant to the following treatment:-

      a. They failed to allocate the claimant sufficient overtime from April 2018 to 24 January 2019.

      b. If so, was the reason for that allocation race related and discrimination.

      c. Did the respondents discriminate against the claimant on the ground of race in failing to address the claimant's complaint of race discrimination in the grievance process.

      d. Was the treatment less favourable in that the respondent treated others in not materially different circumstances more favourably.

4. The claimant relies on the following comparators. Nicola Booth, Nicole Booth and Michael Adams. The original case management identified that the claimant relied on her race and ethnicity being Muslim. However, after the second Case Management Discussion this was clarified as being 'the claimant is of Pakistan national origin and is Muslim, a combination of these factors identify ethnic origins, she is of a physical (**check**) ethnic minority including in terms of her skin colour and style of dress.

5. Further, at this Case Management Discussion it was agreed that the Tribunal would look at three selected weeks in particular as it would be disproportionate to look at every week although general propositions could be made in respect of other weeks. The original three weeks chosen were, week commencing Sunday 22 July 2018, week commencing Sunday 30 September 2018 and week commencing Sunday 16 December 2018.

6. Later, the claimant believed she was on holiday the week commencing Sunday 30 September and it was agreed she could substitute a further week – the week commencing the 23 December 2018. However, subsequently, it transpired that the claimant was not on holiday the week of 30 September and

indeed she worked that week. In effect, therefore, detailed information was provided regarding four weeks.

Witnesses and Bundle

7. For the claimant, the claimant herself and her union official, a Mr N Gerrard. For the respondent Ms Amy Barnes, (store manager) Ms Jessica Perkin (regional manager) and Ms Siamah Nasreen (assistant store manager).

8. There was initially an agreed bundle however during the Tribunal hearing there were applications to add additional evidence (all of them were refused). These concerned:-

   (i) the alleged correct grievance procedure;

   (ii) recordings the claimant made of the claimant's thoughts, first referred to on the fourth day of hearing.

9. Decisions were made on the following issues

   (i) Failure to comply with the Unless Order – claimant's application.

   (ii) Inclusion of audio recordings – claimant's application.

   (iii) Inclusion of alleged correct grievance procedure – respondent's application.

Credibility

10. In respect of the credibility of the witnesses, we found Ms Barnes and Ms Nasreen credible witnesses – there were no particular inconsistences in their evidence, their answers were convincing and accorded with the documentation available. The claimant's evidence however we could not wholly accept for the following reasons: the claimant persisted in maintaining that she was experienced on tills, replenishment and merchandising when this was plainly not the case. In addition, she maintained that the week of 23 December she had only worked 12 hours whereas the documentation recorded 20 hours. The claimant did not raise at the time that she had been overpaid and therefore we believed the claimant had relied on out of date overtime records which had been amended later, this was understandable however we found the claimant's insistence that she had only worked 12 was unsustainable in the light of the documentation.

11. Further the claimant also insisted that Ms Nasreen was not her immediate manager when plainly she was rather than Amy Barnes as the claimant maintained.

12. In addition, the claimant was adamant she could work mornings at any time yet her mother suffered from conditions which in our knowledge require the most help early morning and bedtimes. Further the claimant was in receipt of carers benefits which require a minimum of 35 hours care to be provided each

week therefore it is logical there would be some circumscribing of the claimant's availability.

13. At the same time we accept that the claimant was consistent in her account of being told there was insufficient funds for overtime and that Ms Nasreem had said overtime was only given to those who were efficient.

Findings of Fact

14. The respondent is a large business selling a variety of goods at discount prices. The claimant applied for a job with them and was interviewed on 29 June 2017, the documentation relating to this said that the role applied for was 20 hours sales. The document shows that the claimant said that she could work 15 hours and then it said, "no days flexible", and repeated again that 15 was the maximum hours she could work . The claimant also looked after her mother and received carer's allowance for this which requires that the carer provides at least 35 hours care a week and limits the amount a carer in receipt of this benefit can earn. In the claimant's case this equated to 15 hours a week .the claimant's mother suffered from the following conditions : arthritis and rheumatism, with poor mobility.

15. The claimant had considerable experience working in retail customer service, she was offered a job by the respondent and she began work on 8 July 2017. There was some ambiguity as to whether the claimant had originally been taken on a 15-hour contract or not, certainly she received an 8-hour contract in December 2017. The inference is that there as a change in December 2017 but we cannot find the claimant's contract was reduced from 15 to 8 hours as might have appeared the case in view of the fact that she applied for a 20 hour job and said she could only do 15 hours. The claimant's original claim form to the Tribunal at paragraph 6 also stated she had been on a 15-hour contract but this was changed on 19 December however this was crossed out. The claimant's later grievance letter also says that her contract was changed. However no further light was shed on this as to whether there was a reduction in hours at the behest of the claimant or because the respondent made some policy change reducing hours or indeed that there was a change but that the claimant's hours had always been 8. Accordingly, there was evidence that the contract was changed but in what way there was insufficient evidence to draw any conclusions. The claimant's evidence is that she noticed towards the end of March/April that she was not receiving overtime

16. It was the claimant's evidence that she persistently asked Amy Barnes, the Store Manager and sometimes Siamah Nasreen, her immediate supervisor for overtime. Both SN and AB denied this was the case and AB said she did not ask for it until June. The claimant said there would be a notice up outside the office door asking for volunteers and she always signed this. This was denied. We can only decide this on credibility and therefore we prefer the respondent's witnesses' version of events due to our findings on credibility**.** It was correct that the claimant only received two hours overtime between the beginning of April and mid-June.

17. The claimant mentions one date specifically, 11 June, when she says she spoke to Amy Barnes and Ms Nasreen came in and implied that she wouldn't get overtime because she wasn't efficient enough, Ms Nasreen denied this entirely. Ms Barnes says that somewhere around mid-June the claimant did ask her for overtime and she was given overtime after that point. She says prior to that she did not know the claimant wanted overtime. Accordingly, there was consensus that the matter was raised in June underlined by the fact that in her grievance letter (below) the claimant said she had a discussion then but does not say she was constantly asking both of them before this.

18. Following that the claimant received overtime therefore although we prefer AB and SN's evidence that SN did not make the alleged comment regarding 'efficiency' if we are wrong on this it was of no effect in any event as overtime was allocated following this.

19. The only other reason AB could have been minded to suddenly start giving the claimant overtime when she had not been minded to before (ignoring for the moment that the claimant had no complaints about January to end of March when AB was still the manager) was if the claimant had said as she maintained she did that she was going to take out a grievance. AB denied that she knew anything about a grievance at this stage, and for the reasons we have said we prefer her evidence. In any event we note that there was no allegation of race discrimination in the claimant's subsequent grievance.

20. Mr Steel for the respondent produced a summary of all the claimant's overtime for every week from 1 April 2018 to 27 January 2019 and this showed that the claimant was allocated overtime for the week beginning 24 June (the respondent's rotas started on Sundays). The documentation shows the claimant working four hours on Sunday 24 June, four hours on Thursday, four hours on Friday and four hours on Saturday. This was added up at the end to 8 and 12 (8 denoting the claimant's basic hours and 12 the overtime) which was incorrect as it was 8 and 8. The claimant was paid for 16 hours. Nevertheless, the claimant wanted to work for 15 hours and therefore it is clear that she worked for 16 hours that week thus satisfying her aim.

21. Another difficulty the respondent had was that overtime was usually offered in tranches of 4 hours but they subsequently changed this to accommodate the claimant.

22. Following that week, the claimant received 8 hours overtime week commencing 1 July, no overtime week commencing 8 July, 7 hours the week of 15 July, week commencing 22 July 7.75 hours, week commencing 29 July 4 hours and week commencing 5 August 4 hours.

23. The claimant had sent a grievance letter to the respondent on the 25 June 2018, it was sent to the respondent's HR department so the earliest they were likely to receive it was 26 June. It says "I am writing this grievance letter because I have been very concerned about my situation at work, I have worked in the B and M Rochdale Exchange store for eleven months, I usually work 15 hours a week as I am a Carer, in April 2018 I realised my hours had gone down from 15 to 8, I asked my manager Amy if there was any additional

extra or overtime available, Amy said there wasn't at all to give and that they were cutting back. In the month of May each week my hours were 8 hours and more hours had been given to other staff in June 11th week. I spoke to my manager Amy and Siamah regarding my hours but I felt that they weren't treating me fairly as in not giving me any more hours. I would be grateful if I could meet you with my two managers Amy and Siamah and if a member of USDAW can come to talk about this matter as I have been feeling very upset about the situation for a few months".

24. There was then a telephone call from HR to the claimant on 3 July. The claimant received a letter on 13 July stated "following our phone call on Tuesday 3 July 2018 where you confirmed that you are happy to attend a mediation meeting held by Danielle Bottomley, Area Manager, attended by Amy Barnes, Store Manager. As we discussed to confirm you are entitled to be accompanied by your trade union representative as you requested. Therefore, I have scheduled this meeting for Friday 20 July 2018 at 10 am". However, the claimant withdrew from this meeting, she says in evidence because she felt the situation had improved.

25. On the balance of probabilities, it seems likely that the claimant did speak to Amy Barnes around 11 June and then did receive overtime starting 24 June and that this was before Amy Barnes knew about the fact the claimant intended to take a grievance or had written the letter of complaint. A meeting was arranged but the claimant cancelled it as she felt she was getting her overtime.

26. The claimant then wrote a second letter of complaint on 2 August, as with the first letter this was hand written and it said "I am writing to say I would like to have a grievance meeting with yourself and my union representative regarding my situation at work, I have written to you in the past but then thought things had been resolved at work and I cancelled the last meeting, I now wish to arrange a meeting as soon as possible as I feel this matter should be discussed with HR and my manager, I am feeling stressed at work and I would be grateful for a meeting as soon as possible, my union would also like to be invited to this meeting". At this stage the claimant had had out of 7weeks from 24 June to w/c 5 August 8 hours, 7 hours, 7.75 hours 2 x 4 hours and one week with no overtime on 8 July.

27. This was replied to by HR who confirmed that Danielle Bottomley, the Area Manager, would hear her grievance on 10 August at 3pm and she summarised the issues as:-

    (i) You believe that overtime hours are given to other staff members but not you;

    (ii) That you have spoken to Amy and Siamah in June regarding your hours but you feel they are not treating you fairly in not giving you other hours.

28. This meeting took place as on 10 September. Before the meeting the claimant discussed the grievance with her union representative and he

confirmed that the claimant did not raise any issue of race discrimination with him.

29. Ms Bottomley who did not give evidence to us clarified in the meeting that the claimant thought the overtime hours were being given to others and not her and the claimant said that this started at the end of March and occurred in April and May. She said she had spoken to Amy but she said there were no overtime hours but she was giving hours to others. She recalled that Siamah came in when she was speaking to Amy and she was told that they needed her to work more efficiently. Ms Bottomley confirmed that the claimant was working her contracted hours of 8 but that she wanted to work 15 hours a week. Her union rep said the last eight weeks that she had worked two weeks with under fifteen hours and then it dropped to eight and then up to fifteen. Ms Bottomley said she would need the names of other colleagues because other colleagues can work in different departments and on different days, Mr Gerrard said an example would be Nicole, she was getting 12 hours a week and Nicola 18 hours a week. Ms Bottomley said she would look at other staff who also did not receive any overtime as well as the two cited. She mentioned that if a lot of people wanted overtime and if they wanted people to work the tills employees would get the overtime who were trained on the tills. She was asked what outcome she wanted and she said she wanted her contract increasing to 15 hours, Ms Bottomley suggested that this might not be possible, she asked about a mediation, the claimant said no because she had already spoken to Ms Barnes in the office and that she wanted the overtime split fairly.

30. We understand Ms Bottomley's point to be that people might be getting overtime who could do shop floor and tills, and that if they needed someone to cover the shop floor and tills this could not be split, (overtime generally being in blocks of 4 hours), so that one person did two hours on the till and another person did two hours on the shop floor – they would need an employee who could do both tills and shop floor, and the claimant was not trained to do tills. Ms Bottomley said that "I believe you are comfortable that you have got your two points across and you are comfortable with that". She was going to investigate two people Nicole and Nicola and set a process in place with Amy for overtime notices to be put up for all staff to see, maybe in the canteen, and then she would come back to her. The claimant asked if she (DB) would check the rest of the staff as well. Towards the end of this part of the meeting the claimant said, "I thought it could be my colour and me being left out", Ms Bottomley said, "that's absolutely not the case".

31. Mr Gerrard told us there was a break in the meeting, there certainly was part of a page was crossed out blank page and it began on a different page which may suggest a resumption. Following this Ms Bottomley said overtime was based on the needs of the business and is given first come first served, and that for the last eight weeks the claimant had been given 15 hours but from now on they would try and give her overtime commensurate with the needs of the business. The claimant said if it happens again she would come back to Ms Bottomley and we will be sat here again.

Ms Bottomley said, "I think Amy has accommodated you to the 15 hours which you wanted".

The claimant said, "but Nicole is getting extra hours and others are not".

Ms Bottomley said, "I understand what you are saying, are you comfortable with your two points that you raise in your grievance",

The claimant said, "yes I will see the outcome when I return off my holiday". This was then adjourned at 4pm.

32. Ms Bottomley wrote to the claimant on 3 October and she said "the main points of your grievance were:-

    (i) You believe overtime hours are given to other staff and not to you;

    (ii) You have spoken to Amy and Siamah in June regarding your hours but you feel they are not treating you fairly as in not giving you other hours".

33. She responded regarding the overtime that " over a period of eight weeks overtime has been issued to a number of colleagues in the store including yourself, you have worked between 12 and 15 hours which is 4 to 7 hours of overtime, you stated you couldn't work over 15 hours therefore I feel you have been offered an appropriate amount of overtime according to your own preferred requests" and in the second complaint "as above over the past eight weeks you have been working your preferred OT hours and therefore I don't consider you are being treated unfairly". She didn't uphold her grievance. She told her she could appeal that decision.

34. The claimant did appeal on 11 October to HR, to a Kate Albertina in HR. She said in this "I really do not consider the matter has been resolved and wish to appeal to the next stage of the grievance procedure, I believe the situation has not changed and other staff are being treated more favourably in the opportunity to work extra hours, other staff are given more extra hours than myself, I do not consider the explanation in the outcome letter to be satisfactory and can only conclude this ongoing treatment is connected to my race. Whilst writing can you please send me copies of all the notes of the meetings of witnesses that have been interviewed as part of the investigation".

35. In respect of this letter after some consideration we decided that when the claimant referred to race in this letter she was referring to the allocation of overtime and not that Ms Bottomley had not explicitly addressed her reference to her colour.

36. Ms Albertina then wrote back to the claimant on 25 October stating "the grounds of appeal are:-

    (i) The situation has changed and the staff are being treated more favourably in relation to overtime;

(ii) That you feel the explanation in your outcome is not satisfactory and can only conclude this is due to your race

A meeting was arranged with Mr Phil Wilkinson, Area Manager, for 31 October 2018, however, the claimant did not receive this letter and was told just before the meeting that she was due in the meeting. She had a brief conversation with Mr Wilkinson where she said he was difficult with her and shouting at her, however as this did not form part of the claimant's claim it was agreed that we would not hear from Mr Wilkinson in order to ensure the case finished in the time allocated. Instead Jessica Perkin undertook the grievance hearing on the 28 November, the claimant's union representative attended.

37. It was the claimant's contention and her union officer that she had had increased overtime hours for a while but they dropped again and then increased again depending on the state of the grievance. The claimant several times in this meeting asked Ms Perkin to look back to April, she said I am looking from your appeal from August. The claimant said that she thought Danielle was going to investigate from April,

Ms Perkin said, "what can we do", and

The claimant said, "I need fifteen hours".

Ms Perkin made the point that she needed to look at the percentage of hours that the claimant was offered, she said she could do anytime, Ms Perkin pointed out that there have been times you have received overtime but you can't do Tuesday's.

The claimant responded, "I would prefer a fixed day off but I can do it".

Ms Perkin says, "you have refused overtime on Tuesday" and

The claimant said, "that's not possible, that's news to me".

Ms Perkin clarified "so at no point have you said to Amy you can't do Tuesdays".

The claimant said, "I can do Monday to Sunday".

The claimant "I haven't said I cannot work overtime, nobody asked me, at no point have I refused to work Tuesdays".

Ms Perkin "it says you previously refused so at any point have you refused",

The claimant said "no, Vicky has Wednesday off, I would like to request from April I have been stressed everybody getting overtime".

Mr Gerrard "what has Danielle done in the investigation, I would expect if she is alleging discrimination a full investigation has been done".

Ms Perkin replied" a review of overtime allocated", she then goes on to say "I will have to pick up with Danielle, other than those two weeks I have got three months, you haven't agreed from your appeal nothing has changed. I have looked at the rotas and process, you have asked for 15-hour contract and the base contract doesn't fit that. In January we have to go back to base hours".

The claimant said, "can I have a look at the letter where I say I am not happy with the outcome"

NG "the point where the grievance has gone in the hours has received back as Rihana is saying it improved and then reverted back".

The claimant said, "who can say she is not going to change".

JP "the explanation is they were giving hours on Tuesday, I can't see the situation has gotten worse, going forward I can speak to Amy, you can work any day".

The claimant "like the staff I want fixed days off, some have Sundays off".

JP "you have had five Saturdays".

Claimant "I want fixed day out to go out with my husband".

JP "you have never worked a Wednesday",

Claimant "I think I have".

JP "you can work any day".

Claimant "yes, but I want Monday, Tuesday or Wednesday off why haven't you gone back to April".

JP "the appeal is that you are not satisfied with your outcome.

Claimant "2.30 31 October I got a call from Sophie, no please or thank you asked me to come quickly".

JP "you didn't turn up".

Claimant "I came in if you can put my contract".

JP "it's not the right way".

Nick "I get you can't (do a 15 hour contract,) the starting point Rihana was she was not getting overtime shared, Danielle states she is going to speak to Amy to share hours, maybe look back to April to substantiate Rihana's claims".

JP "My appeal is based on its not got better, I can make a point to Amy to say where she said she can't work Tuesdays she can work any day, I can go forward and share the hours, I can't give a 15 hour".

NG “I get you can’t do that, there should be an allocation of hours shared fairly, that is Rihana’s argument. We can’t go back to April to change things”.

JP “for me going forward how can we improve this”.

The claimant “I haven’t declined anything”.

JP “she believes you couldn’t do Tuesdays but I will explain you can”.

Claimant “It’s nice to get a day off to do something”.

JP “you have had Saturday off”.

Claimant “Nicky has had Wednesday, can we go back, she only receiving recently gave me Saturdays off”.

JP “you had Mondays and Saturdays off”.

Claimant “she is getting her days off and no argument, she is getting 17 hours”.

JP “If we go through yours it’s the same”.

Claimant “we should go back I am not aware of Tuesdays. Has she got it in writing”.

JP “My point is everyone seems to have the same days off, what else can I do to make you happy”.

Claimant “Can you look back from April. I have asked for Saturday as a day off for religious ceremony ….”.

JP “I can confirm back to you what the process is going to be to improve”.

Claimant “4 hour contract Nicole, she did 24 on week 30, week 28 12 hours were given to me, she had 24”.

JP “I’ll go away and tell Amy you can do any day”.

Claimant “If she give me 4 hours more she should give everyone 4 hours more, I need 15 hours”.

JP “They might be able to work more, you could only do 15”.

NG “If there is overtime to be had and the other staff want to do 40 and get it Rihana would be happy with 15”.

Claimant “If you could have a look from 14 April”.

(Claimant??) “This is about going forward to make sure it is fair”.

NG “Communication is not great, she can go to the manager and say I am not getting a fair crack of the week before the grievance so at times Rihana

wasn't getting as much. Rihana is looking for an explanation of overtime allocation from April".

Claimant "So I will be getting more hours".

JP "We will make sure overtime given is fair and consistent".

Claimant "At that point I felt I am the only Asian girl on the shop floor".

JP "There is a few more"

Claimant "Recently"

JP "Is there anything you want to add".

Claimant "Go back to April and check I am just not happy. They don't like they don't see you, I was speaking to Amy once Siamah and said we only give hours to efficient staff, my family said get another job". The claimant was asked if she would consider a transfer and said why would she. I will get stripped of overtime in January, to be honest I don't know, staff don't speak to you nicely."

38. Miss Perkin wrote to the claimant on 10 December. Regarding that the situation has not changed and other staff have been treated more favourably relating to overtime. The letter said:-

> "At the hearing we discussed I had reviewed the time sheets from weeks 23 to 34 and that the only weeks you had not been given the 8 hours overtime were weeks 28 and 29, the reason for this was due to the overtime being on Tuesday and Amy Barnes believed that you could not work Tuesdays, I have investigated this with Amy and can confirm that Amy believed you had previously stated to her and Siamah that you would not be available to work Tuesdays, she believed you had other commitments at your husband's shop on this day. When I checked your file to verify the availability you had actually said that you were available anytime. Amy apologised for realising this and assured me she will offer you overtime even if it is on a Tuesday.
>
> Having reviewed your overtime against other members of staff and other than the Tuesday issue I do not believe that you have been treated less favourably than other colleagues in the time. At the hearing you asked me to look back to the start of the year to see that overtime was not always offered to you, I can see there was sporadic weeks where this was not the case but after speaking to Amy I do not believe this was done intentionally and was possibly given to those that asked first.
>
> I do not believe that the "first come first served" basis should be used unless it is due to time constraints, i.e. the overtime is for the following day and mention to the team who are actually in work that day. I discussed this matter with Amy and can confirm now that overtime in the store is offered by management communicating when it is available

via a notice put up on the communication board and also via huddles. Staff are asked to write their names on the overtime notice which is on the communication board. Management then verify with each staff member what their availability is and this is written down. For example, some staff have different availability and can work differing hours due to childcare issues or benefits, other staff are able to work anything so overtime is split fairly between everyone with these needs in mind.

At the hearing we discussed how there will be lots of overtime in the run up to Christmas but that overtime in January and February next year will be a lot less, if any at all as this is predominantly a quiet period. Again, I can confirm it will be communicated via a notice on the communication board and via huddles, overtime in the Rochdale store in the new year is always very limited and there will probably not be any available until the coming stocktake on 10 February. Sometimes, during this time the wages are that tight that staff are even asked if they would like to take unpaid leave, again this is communicated to staff in the same way as we communicate overtime and only given on a first come first served basis and only when it is agreed between all parties involved and shared out fairly.

At the hearing you insisted I went back to look at weeks from April, I did ask what this would achieve as we would not be paying for overtime that has not been worked and I wanted to look at a resolution for the future. You stated you wanted a 15 hour contract, I explained this was not possible due to staffing structures in the store and base contact hours that we have to work to in January and February when the stores are really quiet.

I do believe I have investigated this matter and it is clear that overtime was not always offered but I believe this has been due to the fact that management made the errors in believing you could not work Tuesdays, I therefore believe this issue has been rectified, and the management team are fully aware of your availability. I therefore partly uphold this point as the overtime could have been given but I do not believe this was due to your race and I believe it was a miscommunication about your availability.

You feel that the explanation of your outcome is not satisfactory you can only conclude this is due to your race. I have reviewed the notes of the original grievance and investigated your concern with all parties involved. I believe that Danielle had investigated your concerns around the overtime and when she reviewed the eight weeks prior to your meeting it was clear that you have been given the required overtime. Danielle said she did not recall you insisting that she went back to April and that in the note it only said the problem started in April, I therefore do not think that Danielle ignored your request as according to the notes this request was never made at the first meeting. Danielle believed your concerns were around the number of hours of overtime and as she had investigated the matter and confirmed that you had over the last eight weeks received this that she did not believe any

> further investigating needed to be done. I therefore do believe the outcome to the original grievance was satisfactory.
>
> In summary, I have investigated the matter and feel confident that overtime will be dealt with in a fair and persistent manner in the Rochdale store, I advise you that the outcome of this appeal is the final decision in this matter and all internal proceedings are exhausted".
>
> Ms Perkin in cross examination said that she felt the Tuesday matter was a genuine misunderstanding as the claimant had stated in the meeting she did want a day off - Monday Wednesday or Tuesday – so it was likely she had said this and that she had on at least one occasion refused overtime on a Tuesday.

39. We agree with Ms Perkin, we were advised that the claimant had only worked one Tuesday in the full 44 weeks under consideration – in week 17- the reason for this was unknown – but this clearly shows that even if it was a misunderstanding, managers did think the claimant could not work Tuesdays. By the time this was clarified it was known that there would not be overtime available to any great extent in January not just because the store was quiet after Christmas (as there would be sales to prepare for) but because the tasks which required cover were not in the claimant's skill set. As Ms Perkin advised the claimant staff had at times been asked to take unpaid leave in January.

40. In respect of the grievance procedure the claimant made the point that the process used did not accord with the grievance procedure contained in the bundle as it should have been conducted by a Director of the company after a line manager had considered it. The respondent then wished to submit a different copy of the grievance procedure as it was suggested the one in the bundle was out of date. We refused this however Ms Perkin gave evidence that she had never seen the one in the bundle and as she had been with the business for around at the time of these events for approximately 6 months and by the hearing less than 3 years we concluded on the balance of probabilities that the bundle copy was out of date. In addition, the respondent's business is a large one and the suggested grievance procedure simply would have been impractical. On the balance of probabilities, we find the grievance procedure in the bundle must have been out of date.

41. We heard further information about the hours that the claimant had worked. In relation to the three weeks that were originally chosen to be spotlighted plus the substituted week the situation was as follows.

    (i) Week commencing 22 July 2018 the claimant's maximum available overtime of 7 hours was given.

    (ii) Week commencing 30 September the claimant was due to do the maximum hours of 7 but it appeared that she did not work that week. However, it has since been clarified that in fact the claimant did do those hours and she was not on holiday that week, she was on holiday the two weeks prior to that.

(iii) Week commencing 16 December. The claimant was due to work 6.5 hours of overtime and worked this overtime.

(iv) In the week commencing 23 December it showed that the claimant worked 20 hours that week and was paid 4 hours holiday for Christmas day.

42. This last week caused considerable discussion at the Tribunal as the claimant had chosen this week to substitute for the week of 30 September. This was because she believed that she only worked 12 hours in that week, 8 hours contract and 4 hours overtime and she based this on a photograph she had taken of the original rota. However, as Ms Barnes and Ms Nasreen's evidence stated and as was apparent from the documentation that originally allocated overtime would often get changed depending on circumstances and that it was the respondent's case that that particular week the claimant worked 12 hours overtime and also received 4 hours holiday pay.

43. This claimant agreed as a general principle that the rota would be changed but not necessarily specifically in relation to this week. The claimant was adamant it could not be the case that she had worked 20 hours however the paperwork from the respondent supported this contention.

44. The Christmas week which began on the 23 December was scrutinised considerable amount at the hearing. It has to be understood that for each week there would be several documents, one would be the original typed rota, one would be a handwritten one and one would be a typed one as amended with late given overtime. The week of 23 December showed the claimant working on the Sunday 12.30 to 4.30, on the Monday 2pm to 6pm, the Tuesday was Christmas day and the respondent was closed. There were then hours written in on the Wednesday which were not decipherable from the copy in the bundle at the first instance but a later copy showed 4 hours**.** There were then two handwritten entries, 2 to 6 on Friday and 2 to 6 on Saturday. The totals said contract 8, overtime 12, the claimant was also allocated 4 hours holiday pay for Christmas day.

45. While the claimant vehemently denied that she had worked those hours there was no question that she had accepted payment for those hours and never queried them.

46. In addition, we heard from Amy Barnes in detail how the payments were arrived at from what might appear at first glance a rather scrappy system, the respondent gave a colloquium 'commitment to pay' which is the end product of analysing information from several sources by the manager who then advises payroll what each member of staff should be paid. Ms Barnes said she was unaware of anybody being overpaid but she was certainly aware of people being underpaid, where there was a mistake in the calculation there was a form that the manager had to fill in, in order to rectify the hours on commit to pay.

47. We were advised now that the respondents had a new software system whereby all this information was inputted as data and the software did the

calculation for payroll, presumably relieving the manager of that problem. We can only conclude that the claimant did undertake 20 hours that week and received holiday pay as well as all the documentation supports that contention and also in the light of the fact that the claimant did not query her payment, nor the fact that she had actually received more than 20 hours. We find that the claimant's photograph was a "early doors" version of the rota and that during that week things had changed, possibly with other members of staff being sick and some members of staff being unavailable.

48. If we ignore this week as it was only added because it was erroneously believed the claimant was on holiday in one of the previously chosen weeks, in the weeks the claimant chose herself the documentation showed that she had received overtime hours of 7 hours twice and 6.5 on one occasion.

49. The claimant had no complaint about the week of 30 December however she received no overtime on 6 January and the 13 January. Whilst she had been prewarned that this may well be the case it was still evident that other people had received overtime in those two weeks. In relation to that we will come on later to the respondent's generic explanations for why the claimant might not have received overtime. Following this the claimnat went on sick leave.

50. On 11 January 2019 the claimant applied to ACAS. On 24 January the claimant resigned, she said she attended the office with a resignation letter and a sick certificate. Ms Barnes in evidence was adamant that she had never seen the resignation letter and indeed it was only produced on the first day of the Tribunal. Again, there was considerable dispute about whether or not this resignation letter had been given to Amy Barnes at the time of their meeting on 24 January.

51. The resignation letter said

" Please accept this letter as notice of my resignation from the position of sales assistant at b and m store, Rochdale.

The reason I am resigning is because I have been racially discriminated against over the last 9 months All of which has been brought to your attention in grievance meetings.

In addition, hr has been complicit with their actions as evidenced with outcome of my grievances.

I have lost complete trust in the management team do not feel comfortable working with yourselves, as I feel extremely stressed and anxious about what happened at work. Therefore, I have no alternative to resign from my position as of 31.01.2019"

52. On 24 January Ms Barnes filled in an exit interview on the respondent's computer system whilst she was sat with the claimant which stated that ill health was the reason for the claimant leaving and that she was giving notice to 31 January.

53. On or around 29 July 2019 when the claimant had been acting in person and was communicating with Mr Steel about the bundle she did advise that she wanted some matters adding to the bundle, these included "resignation letter dated 24 January 2019, rotas and timesheets, sick notes, wage slips, letter of new employment, notes I've wrote, CV. " Clearly the resignation letter was never provided by the claimant to the respondent. The claimant said she thought the respondent would have a copy when it was realised it was not in the bundle it was produced by the claimant. However, it is unclear why this issue was not raised earlier during the process of disclosure and agreeing the bundle as it was not provided until the first day of the hearing.

54. Amy Barnes was adamant she had not received the resignation letter, she said when she saw it in the bundle she was stumped and that she would not have forgotten in a million years if she had received it, because it contained such a serious allegation.

55. In respect of the resignation letter ultimately, we find this was a misunderstanding or a lack of recall by the claimant, that the claimant intended to bring a letter of resignation and give it to Ms Barnes, but that in the end the resignation letter was not actually given in. We find this because although the claimant was pressed quite hard about why the resignation letter was suddenly typed and more orderly than normal handwritten grievances for example, the claimant replied she had a friend who had typed it for her as she thought it was an important document. In addition, we surmise this friend must have kept a copy of the letter or the claimant did, however that really does not explain why the claimant did not produce it earlier. However, if she had not given the letter to Amy Barnes it would perfectly explain why the respondent did not have a copy and why AB was surprised to see it. In addition, we would be surprised that the claimant and AB would sit down together to fill in the online exit interview document when the claimant had just given her such an uncompromising and critical document.

56. It was suggested on behalf of the claimant that the fact that the exit interview date of leaving accorded with that in the resignation letter was support for the claimant's contentions and the fact that the exit interview said a different reason for leaving, i.e. ill health rather than race discrimination was because there was on option for race discrimination in the exit interview. However, at the same time there was an option for disagreements with manager and there was an option that was open for any text.

57. We have considered what Amy Barnes' interest would be in destroying such a letter and this makes no sense at all as if somebody has complained of race discrimination then in all likelihood it will be followed up whether you destroy a letter or not, and in our experience most managers would be on the phone to human resources with a letter of that description. Further, seeing it was typed a manager these days would assume there would be a copy so that destroying it would achieve nothing. In the light of the letter being in the claimant's possession and not the respondent's and the other factors above we find that there was such a letter but it was not given to Amy Barnes on 24 January.

Respondent's explanations for overtime allocation - generic

Generic reasons for shift allocation

58. The first point the respondent made was the claimant's availability in that there was a genuine misunderstanding about her availability on Tuesday and/or the claimant's recollection was incorrect, and this explained the non-allocation of overtime once overtime was being allocated from June and that the respondent's managers also understood that the claimant could not work early mornings because of her caring responsibilities for her mother. Whilst the claimant denied this we find her evidence on this unconvincing, she recounted the different difficulties her mother had (Arthritis etc, to be confirmed) but at the same time said she did not need to help her mother necessarily in the morning and it was acceptable for her to not be available randomly in the mornings. We have to say we find that we do not find the claimant credible on this point from our overall experience of individuals requiring caring, it is almost universal that they would need assistance in the morning with getting up, showered, dressed, breakfasted and then possibly they then could be left. Whilst the claimant possibly might have been able to make arrangements with other members of the family to cover her it seems more likely in the balance of probabilities to us that she advised the respondent she was not available in the morning. The claimant provided no in-depth evidence regarding how random or short notice early morning shifts would be catered for giving her caring responsibilities.

59. The respondent provided a breakdown of the claimant's comparators and what shifts they worked and this showed that they worked both morning and afternoon shifts, and accordingly the respondent submitted on this point that the comparators obtained more shifts because they were available over a longer period of time during the day.

60. In addition, the comparators were willing to work up to forty hours a week and therefore overall were more flexible whereas the claimant was limited to an extra seven hours a week and a total of fifteen hours a week.

61. In addition, Jessica Perkin pointed out that as a percentage of the total hours the claimant and her comparators were available to work the claimant obtained a much higher percentage than the others who would have had to have worked up to forty hours (if on a zero-hours contract) overtime to meet the maximum amount of hours they were able and willing to work.

62. In respect of Tuesday the claimant only worked one Tuesday between April 2018 and January 2019 and that was in week 17. The claimant's comparators worked as follows. Michael Adams in the same chosen weeks worked not every day each week but a combination of all weeks showed that he worked all days. Nicola Booth appears to have had Wednesday off but otherwise worked all days including she worked six days on occasions (week 38). Nicole Booth again appeared to have Wednesdays off but was on holiday for week 27.

63. In respect of the hours worked Michael Adams, Nicola Booth and Nicole Booth were all unlimited in the hours they were prepared to work and had and in the chosen weeks they worked the following amount of overtime:

    (i) Michael Adams week 17 (6 hours) week 27 (18 hours), week 38 (36 hours), week 39 (26.5 hours).

    (ii) Nicola Booth week 17 (16 hours), week 27 (18 hours), week 38 (43.50 hours), week 39 (31.50 hours).

    (iii) Nicole Booth unlimited: week 17 (16 hours), week 27 (4 hours), week 38 (34 hours), week 39 (25 hours).

    (iv) In the same weeks the claimant worked as follows week 17 (7 hours maximum), week 27 (7 hours maximum), week 38 (6.5 hours), week 39 (12 hours plus 4 hours holiday past her maximum).

Skillset

64. In addition, the respondent stated that the claimant's comparators obtained more overtime because they were trained in more areas of work on the shop floor. The claimant was not trained on tills and she agreed she had not asked to be trained on tills so accordingly if the tills needed to be covered whether wholly or partly the claimant could not be chosen for that overtime shift. In relation to merchandising the claimant insisted that she was able to do this however we found the claimant completely unconvincing, this was a very specific task which not many workers were trained to do and in fact none of the comparators could do this but this involved setting up for a new promotion, whether it was a product or a theme such as Easter and specific instructions would be received from Head Office which had to be implemented and whilst the claimant said she had worked to plans, after hearing from the respondent's witnesses we were satisfied that if the claimant worked to plans this was in her shop floor role delegated from either her immediate manager or a merchandiser. In respect of pricing one of the comparators Nicola Booth was trained in this, again this was an early morning task where goods prices had to be changed and notice would be given of this and it had to be done before the store opened.

65. Finally, replenishment, there was a considerable discussion about this at the Tribunal, the claimant arguing that she was trained in replenishment, again this is one of the reasons we found the claimant not to be a credible witness as it was clear from our own experience as shoppers and from the evidence given by the respondent that replenishment was a specific task where individuals would go to the warehouse and obtain pallets of goods that would be taken into the shop and put on the shelves from the pallets and this would be done before the shop opened as understandably the respondent would not want large pallets blocking aisle ways once shoppers were admitted. Once the store opened then any merchandise was needed was provided and obtained in cages which were more vertical and took up less room. We have

all seen these in various retailers, this was described as gap filling. The claimant was adamant that this was replenishment but we do not accept her evidence. Further, the fact that the claimant was not available in the mornings meant that she hadn't been trained on replenishment because this had to be on the job training in the morning and the respondent understood the claimant could not do a morning shift. Accordingly, the respondents submitted that the fact that the claimant was only trained in shop floor meant that her opportunities for overtime were limited. They provided a comparison of her comparators and Michael Adams could do shop floor, tills and replenishment. Nicola Booth could do shop floor, tills, replenishment and pricing and Nicole Booth could do shop floor and replenishment.

Short notice overtime

66. Overtime was sometimes available at short notice and the staff in the building would be offered it first, following which staff at home would be contacted by telephone. Therefore, the more hours an employee was in the building the more often they were likely to pick up short notice overtime.

General

67. The respondents also submitted information which showed that some white non-Muslim staff received no overtime and other Pakistani national Muslim staff did receive overtime.

The Law

Direct Discrimination

68. Section 13 of the Equality Act 2010 states that:-

(i) A person (A) discriminates against another (B) if because of protected characteristic A treats B less favourably than A treats or would treat others and

(ii) At paragraph if the protected characteristic is race less favourable treatment including segregating B from others.

69. A protected characteristic of race was redefined at a second Case Management Hearing on 15 November 2019 as "the claimant is of Pakistani national origin and is Muslim, a combination of these factors identifies her ethnic origins, she is of a visible ethnic minority including in terms of her skin colour and style of dress. "

Race Discrimination

70. The claimant brings a claim of race discrimination in respect of direct and harassment.

71. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. This is where (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.

72. Section 136 of the Equality Act 2010 sets out the burden of proof to be applied in discrimination cases. This says that if there are facts from which a 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.

73. The shifting burden of proof rule assists Employment Tribunals in establishing whether or not discrimination has taken place. In **Martin v Devonshires Solicitors [2011]** the EAT stressed that "While the burden of proof provisions in discrimination cases are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination – generally that is facts about the respondent's motivation … they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another and still less where there is no real dispute about the respondent's motivation and what is in issue as its correct characterisation in law", and in **Laing v Manchester City Council** Justice Elias then President of the EAT said that if the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination then that is the end of the matter. It is not improper for the Tribunal to say in effect there is an open question as to whether or not the burden has shifted but we are satisfied here that even if it has the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race. At the same time he also said the Tribunal cannot ignore damning evidence from the employer as to the explanation for his conduct simply because the employee has not raised a sufficiently strong case at the first stage. That would be to "let form rule over substance". So, if the matter is not clear a claimant needs to establish a prima facie case of discrimination, which is shorthand for saying he or she must satisfy stage one of a two-stage shifting burden of proof then the burden shifts to the respondent to explain the conduct.

74. In **Laing** Elias suggested a claimant can establish a prima facie case by showing that he or she has been less favourably treated than an appropriate comparator. The comparator must of course be in the same or not materially different circumstances. A paradigm case is where a black employee better qualified than a white employee is not promoted where they were the only two candidates for the job. However, the case obviously becomes complicated where there are a number of candidates and there are other unsuccessful white candidates who are equally well qualified. If there are no actual comparators of course hypothetical comparators can be used.

75. The question was asked in **Madarassy v Nomura International Plc [2007] CA,** is something more than less favourable treatment required? Lord Justice Peter Gibson stated in **Igen v Wong [2005]** that "The statutory language seems to us plain. It is for the complainant to prove the facts from which the

> Tribunal could conclude in the absence of an adequate explanation that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the Tribunal could conclude that the respondent could have committed such an act … The relevant act is that the alleged discriminator treats another person less favourably and does so on racial grounds. All those facts are facts which the complainant in our judgment needs to prove on the balance of probabilities.

76. **Igen v Wong** also said it was not an error of law for a Tribunal to draw an inference of discrimination from unexplained unreasonable conduct at the first stage of the two-stage burden of proof test. It seems the difference between the approach in **Madarassy** of Mummery in saying that a difference in treatment and a difference in status is not enough, and that of Elias in **Laing v Manchester Council**, which followed **Igen v Wong** stating that it was sufficient to establish genuine less favourable treatment if at the first stage the employer cannot rebut by evidence and it takes into account the fact that a claimant will not have overt evidence of discrimination but could have evidence of how they had been treated differently to other employees who do not share the relevant protected characteristic.

77. In the recent case of **Efobi v Royal Mail [2017] EAT** it was suggested that there was no burden on the claimant to establish a prima facie case before looking to the respondent's explanation, and that the Tribunal was required to look at all the facts of the case and draw its own conclusions as to whether the burden had shifted. However, in another recent case **Ayodele vs Citylink Ltd (2018) Court of Appeal** decided that the correct position was as stated in **Madarassy**.

78. Another approach is to consider whether a Tribunal should draw inferences from the primary facts which would then shift the burden, and if a non-convincing explanation is provided then discrimination would follow.

79. Regarding inferences Employment Tribunals have a wide discretion to draw inferences of discrimination where appropriate but this must be based on clear findings of fact and can also be drawn from the totality of the evidence. In **Glasgow City Council v Zafar [1998]** unreasonable conduct by itself is not sufficient. However, where it is said that the unreasonable conduct is displayed ubiquitously an employee would need to provide proof of that, i.e. A was treated badly not because of his race but because the employer treated all employees badly. There must be some evidence of this and it not just be an assertion, and likewise with unexplained unreasonable conduct.

80. Inferences can be drawn from other matters such as breaches of policy and procedures, statistical evidence, breach of the EHRC Code of Practice, failure to provide information.

Time Limits

A time limit issue does arise in this case as it developed in tribunal as a clear divide arose between the period April to mid June and the rest of the claimant's employment. If we found discrimination in that earlier period the claimant was out of

time and we would need to exercise our just and equitable discretion for such a claim to proceed **(section 123 Equality Act 2010).** There are a number of factors which can be taken into account, reasons for the delay, the prejudice to the respondent compared to that of the claimant, illness of the claimant, merits . The tribunal has a wide discretion but at the same time the matter goes to jurisdiction and the claimant has to persuade us to accept a late claim. We have borne in mind **Robertson vs Bexley Community Centre (2003) CA** and **Aberttawe Bro Morgannwg University LHB vs Morgan (201)8 CA.**

Wrongful Constructive dismissal

This is a claim within the tribunals contract jurisdiction for notice pay. Wrongful dismissal is usually claimed where an employee is dismissed for gross misconduct but they establish there was no gross misconduct.in relation to constructive dismissal the claimant must meet the test for constructive dismissal set out in **Western Excavating (ECC) Ltd vs Sharp CA (1978).** ie that the respondent was in fundamental breach of contract entitling the claimant to resign with or without notice**.** The breach can be one act or a series of acts which culminate in a last straw prompting the claimant to resign. Further the acts described as breaches must without reasonable and proper cause destroy or seriously damage the relationship of trust and confidence**, London Borough of Lambeth vs Agoreyo CA 2019**

Claimants closing submissions summary

81. The fact that in the chosen weeks the claimant had received overtime was not conclusive as the claimant was entitled to take a broader approach. She did not accept she was not on holiday in that third week and the hours record for Christmas week must be wrong as she could only work 15 hours a week.

82. The claimant was skilled in all areas due to her previous experience so the skill set argument is not relevant.

83. The tribunal should draw inferences from – the use of the wrong grievance procedure, the denial the resignation letter had been received and its suppression, the number of ‘misunderstandings’ and the fact no record of them, the failure to deal with the claimant’s allegation of race discrimination, JP did not refer to skill set as reason the claimant did not get overtime, the lack of documentation regarding the grievance investigations.

Respondents closing submissions summary

84. The respondent’s evidence should be preferred – both parties agreed there was a meeting in June, the claimant did not mention earlier meetings in her grievance letter, the claimant was disingenuous in saying she could work mornings as from her description of her mothers, difficulties and what she helped her with and from the fact she would have to look after her for 35 hrs a week it was inevitable she would be needed in the mornings, also she had only ever worked one Tuesday and was adamant in the grievance she wanted one day free and the fact that she agreed she had turned down one Tuesday

at least, make it more likely that she had said or at least given the impression she could not work Tuesdays.

84. The claimant had not shifted the burden of proof as in fact she had been given overtime since 24 June on 27 out of the relevant 30 weeks (i.e. from middle of June). She had received 7 hours in 16 of the 27 weeks from 17 June; and on 8 occasions out of the 27 she had received 4 hours. In January she knew she would not receive overtime.

85. The respondent's explanations should be accepted regarding the difficulties granting the claimant overtime – that they were unaware of it, that she could not or believed she could not work Tuesdays and mornings, that she could only do shop floor work, that short notice overtime would inevitably go to those working longer hours on more occasions, that she could only do 7 hours, and that overtime shifts were generally in blocks of 4 hours.

In respect of wrongful dismissal the respondent had not acted in breach of contract as due the factors above they had not treated the claimant in a discriminatory manner because of her race

Conclusions

1. Firstly looking at the four weeks the claimant has selected there was only In one occasion when she did not receive seven hours overtime and that was week 38 when she received 6 1/2 hours. Therefore, there is ostensibly no discrimination, or only 30 mins on one occasion. We bear in mind too that the claimant chose these weeks on the basis these represented her best case. Accordingly, whilst there no one addressed de minimus it must be the case that such a small deficiency is insufficient for the burden of proof to shift. However, the claimant was allowed to look more generally at the weeks and make generic points.

2. Further if we are wrong on in respect of the burden of proof we find that the respondent has produced an explanation which satisfies us that there are non-discriminatory explanations as to why the claimant did not always receive that is hardly evidence that would displace the weight of evidence the respondent has produced. These are not knowing she wanted overtime, believing she could not work mornings and Tuesdays, the claimant's limited skillset, the claimant's limited hours which meant she did not pick up as much short notice overtime.

3. The overall distribution of overtime shows that the claimant did receive a substantial amount of overtime from 24 June. She received 7 hours in 16 of the 27 weeks after 17 June 2018. She then received 4 hours in 8 weeks. Any deficits are on the balance of probabilities, and on the basis it is inherently plausible that the weeks she did not receive seven hours would accord with the factors produced by the respondent in terms of Tuesdays, mornings, skill set short notice and 4 hour shifts being the norm.

4. In respect of comparators the claimant withdrew Michael Adams and relied on the other two and a hypothetical comparator. We have recited all the factors which affected the allocation of overtime to the comparators – they were trained in more areas and they were available in the mornings. Whilst they did get a fixed day off a week the other factors explain the difference. In addition, if their aim was to work 40 hours a week as Jessica Perkin said they were less successful than the claimant in hitting their own targets. As set out above in the relevant weeks only Nicola Booth worked over 40 hours in week 38 otherwise none of the comparators received 40 hours in any of the weeks. All the evidence on skill sets and availability points to a hypothetical comparator being treated no differently than the claimant.

5. We accept that the 6 and 13 January the claimant was not allocated overtime because the business is extremely quiet in those weeks and although other people did receive some overtime, again this is explicable by the factors applying to the others in regard to their skill set, early morning working. post Christmas change in skillset requirements.

6. In respect of the overtime up to June, the claimant clearly did only receive two hours overtime between April and June. The respondent's explanation from their witnesses is that they were unaware that the claimant wanted overtime until she spoke to Amy Barnes on 11 June. On the balance of probabilities, we accept this explanation as we found the respondents' witnesses more credible and from the claimant's first grievance the most which could be gleaned is she may have asked on one other occasion other than the 11 June.

7. We also prefer the respondent's witness evidence because it accords with the time line of the claimant raising around 11 June that she had not received any overtime, making the respondent then aware she wanted it following which she did get overtime. We also prefer the respondent's evidence as Amy Barnes was unaware the claimant had brought a grievance when allocating her overtime for the week commencing 24 June 2018.

8. If we are wrong in our findings on credibility and the claimant had asked for overtime many times, been told none was available, had not said she could not work mornings or Tuesdays, her claim would be viable from April to June. However it would be out of time and the claimant has not persuaded us it would be just and equitable to extend time. She was satisfied in June that the problem was resolved. Whilst she then felt the allocation of overtime dropped again the evidence shows that it dipped but picked up again and we have found post 24 June the failure to allocated 7 hours overtime every week was due to a number of plausible factors and bearing in mind others did not receive the overtime they wanted.. Therefore in the light that any problem was resolved ,that the claimant's suggestion it was not is not substantiated, and given she made a reasoned decision to put April to mid June to one side ,she had union assistance when making this decision, the respondent has been prejudiced in defending this claim due to the fast moving nature of the business, and although a lot of information is captured a lot is not and remembering after a considerable period of time why on various days

overtime was allocated the way it was is very difficult.. Accordingly we would not extend time.

9. IN summary we are satisfied that the propositions put forward by the respondent as to why the claimant from April to June did not receive overtime and on occasions did not receive seven hours overtime are valid. On the balance of probabilities there were a number of strong factors which militated against the claimant obtaining overtime as set out above..

10. In respect of the grievance, we accept that Danielle Bottomley took a rather broad brush and pragmatic approach to the claimant's grievance and that she did not look into the race element, we would criticise her for immediately saying that was "absolutely not the case" without looking into it further.

11. However, towards the end of the meeting with the claimant she asks her whether she is happy to proceed in relation to the two issues raised in her written grievance and she confirms that she is. Accordingly, it was understandable that Danielle Bottomley thought that the race issue was an impulsive remark by the claimant and not one she wished to pursue as part of her grievance.

12. In addition, in respect of not pursing the race claim we also rely on the fact that the claimant had not mentioned this to Mr Gerrard prior to the meeting and accordingly it did not appear to be a matter which the claimant had thought through particularly in the light of the fact her grievance letter did not mention it. Accordingly, whilst it would have been best practice to follow this up in more detail with the claimant in the circumstances it seems we find it was plausible that Ms Bottomley understood that was not pursued and that it would be sufficient to look back on the previous eight weeks. That would be the reason she did not look into the race claim in any further detail.

13. Further as she found rational reasons for the non-allocation of overtime i.e. that it had not be understood the claimant wanted overtime she had answered the grievance.

14. Further, we accept that Danielle Bottomley would not have understood that the claimant was insisting that she went back to April as this is not a matter that was insisted on in the meeting with the claimant and Mr Gerrard

15. In respect of Ms Perkin, we find that her letter did address the race claim because she found coherent reasons why the claimant had not, on very few occasions got her full seven hours, it was entirely rational to conclude that the reasons she identified were the reasons for that rather than any connection with the claimant's race.

16. In relation to the issue of not following the correct grievance procedure from which it was suggested we draw an inference we have found that the incorrect grievance procedure was in the bundle. The grievance procedure followed was in accordance with most such procedure in that it was heard by someone more senior to the claimant and her line managers, then the appeal someone more senior again and or from HR would not be anything out of the ordinary..

17. In relation to the lack of documentation we do not draw an inference from that as the outcome letters did reflect the evidence obtained however clearly as a matter of good practice going forward the respondent should take and retain contemporaneous notes.

18. In respect of the failure to mention the skill set earlier as an issue we accept this was an extremely complex exercise and that calculations and reasonings made immediately needed considerable exploration before the whole picture would be apparent. Indeed, minute and extensive scrutiny of the records was required to elicit the information required. In addition there was an oblique reference to it in the Danielle Bottomley grievance.

19. Our overall conclusion therefore is that the allocation of overtime when it was less than seven hours was not due to the claimant's race and the way in which the claimant's grievance was handled was generally not deficient, where it was deficient in relation to the first hearing this was not because of race discrimination but because the respondent was not aware the claimant wished to pursue the issue. Further any claim in relation to the first grievance alone would be out of time and we would exercise our discretion not to extend time for the same reasons as above.

20. Accordingly the claim of direct race discrimination against both respondents fails.

Wrongful dismissal

The claimant did resign when she failed to get over time in January and following the outcome of the grievance. However it follows from our findings above that as we do not find the respondent treated the claimant in a less favourable way because of her race it follows that we find that the respondent was not in fundamental breach of contract regarding the overtime or the grievances. Insofaras the claimant puts her case more generally (and we did not have full submissions on this) the respondent did not act without reasonable and proper cause .

Employment Judge Feeney

Date: 20 April 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

21 April 2021

FOR THE TRIBUNAL OFFICE

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