EMPLOYMENT TRIBUNALS

Claimant: Mr W Preko

Respondent: Costco Wholesale UK Limited

Heard at: London South via CVP **On: 24, 25, 26 and 28 May 2021 (in Chambers 26 May (pm) and 28 May (am)**

Before: Employment Judge Khalil sitting with members
Ms R Bailey
Mr C Rogers

Appearances

For the claimant: Mr Chukwudolue, Solicitor
For the respondent: Ms R Wedderspoon, Counsel

JUDGMENT WITH REASONS

The claimant's claims of direct race discrimination (S.13 Equality Act 2010), harassment (race) (S.26 Equality Act 2010) and victimisation (S.27 Equality Act 2010) are not well founded and are dismissed

Reasons

Claims, appearances and documents

1. This was a claim for direct race discrimination (race) contrary to S.13 Equality Act ('EqA'), harassment (race) contrary to S. 26 EqA and victimisation contrary to S.27 EqA. Following a Preliminary hearing on 10 February 2020, the unfair dismissal and holiday pay claims were struck out because they were out of time and the Tribunal declined jurisdiction out of time.

2. The issues in this case were agreed at a case management hearing on 10 February 2020 and were as follows:

   - Direct Discrimination (race): paragraph 11 (w) to (ff)
   - Victimisation: paragraph 11 (cc) to (ff)
   - Harassment (race): paragraph 11 (r), (t) and (u)

   (All of the claimant's particulars of claim)

3. The claimant was represented by Mr Chukwudolue, Solicitor. The respondent was represented by Ms Wedderspoon, Counsel.

4. The Tribunal heard from the claimant and Mr Lartey Lawson an ex-employee of the respondent. For the respondent, the Tribunal heard from Mr Kevin Ager, Assistant General Manager (Croydon), Mr Paul Wilson, Assistant General Manager (Croydon) and Mr Kwesi Boachie, General Manager (Croydon).

5. Witness statements had been exchanged. There was a paginated bundle containing 147 pages.

6. The claimant asserted that the respondent had inserted additional documents at 54 (a) to 54 (c) which were not agreed. Upon enquiry, these related purportedly to the claimant's allegation that there was a continuing course of conduct, specifically in relation to a disciplinary hearing involving an employee accused of a racial slur. In addition, the claimant wished for the Tribunal to view a short CCTV video clip of the incident which had ultimately led to the claimant's dismissal which was alleged to be discriminatory.

7. Following a break during which time the Tribunal read the documents it was asked to read as part of its essential pre-reading and having read the witness statements, the Tribunal permitted the admissibility of both items on the basis of their potential relevance and no assertion of prejudice by either side. This was in the overriding objective to deal with the case fairly and justly.

8. Also, on Sunday 23 May 2021, the day before the first day of the Hearing, Mr Chukwudolue had requested an interpreter for the Hearing (TWI

Ghana). However, in his opening statement to the Tribunal, Mr Chukwudolue said this was no longer required. The Tribunal deliberated on the matter and accepted Mr Chukwudolue's submission that the claimant was able to proceed and respond to cross examination in particular. The Tribunal also had regard to Ms Wedderspoon's submission that when she had questioned the claimant at the Preliminary Hearing he seemed literate enough in English to respond. The same remark had been made by Judge Cheetham QC in paragraph 5 of the Preliminary Hearing Summary. The Tribunal were of the view that if an interpreter was essential this should have been requested a lot sooner than 23 May 2021. The case had already been postponed once before. The Tribunal directed that if the claimant needed a question repeated or re-phrased he should say so.

Relevant Findings of Fact

9. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the Tribunal's assessment of the witness evidence.

10. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence.

11. The respondent is a cash and carry warehouse operating throughout several warehouses in the UK.

12. The claimant was employed by the respondent as a Merchandising Service Assistant at the Croydon store from 30 June 2015 until his dismissal on 9 January 2019. The claimant had been previously employed by the respondent too.

13. The claimant's offer letter was dated 13 June 2015 and the claimant signed a UK Employee Agreement on 30 June 2015 (page 54). He also signed for receipt of the 2016 version on 11 July 2016.

14. Under the section dealing with Causes for Termination – without notice, clause 14 says:

> *"Borrowing, using, lending, removal of, or giving away Company funds, merchandise, or equipment without written authorisation of a Manager including, but not limited to:*
>
> - *Taking non-purchased merchandise beyond the point of sale (registers)*
>
> - *Concealing merchandise in such a manner that it cannot be accessed for purchase"*

15. On 19 November 2018, the respondent was notified by a member (customer) that an item which had been purchased had been lost after having paid for it. The item in question was a drone. The member had reported this to Mr Jack Overton , Member Service Supervisor.

16. When the item could not be located, CCTV was viewed by Mr Overton. The CCTV showed that the drone had fallen off the trolley of the customer, had been picked up by the claimant and shortly after, the claimant was seen leaving the Store with the drone.

17. The drone was not returned by the claimant until the following day (20 November 2018).

18. Mr Overton's report/statement of the matter was at page 106. This was not disputed by the claimant.

19. Mr Overton informed Mr Ager of the incident and Mr Ager reviewed the CCTV himself too. He also spoke to Mr David Tapfumaneyi, Service Deli Manager who informed Mr Ager that he had seen the claimant with the Drone in his hand near the front entrance to the warehouse. The claimant had asked Mr Tapfumaneyi for a cigarette. A statement was made by him which was at page 103 of the bundle.

20. Mr Ager resolved to have a fact finding meeting with the claimant on the following day.

21. On 20 November 2018, the claimant arrived for his shift at 4.00am. The claimant spoke to Mr Neil Hattersley and Ms Susan Soper. The content of the conversations was disputed, in particular, whether the claimant did say to them that he had been informed *the day before* that he was suspected by management of having taken (stolen) the drone. The statements provided contemporaneously were at pages 105 and 106 of the bundle. Both statements referred to the claimant coming to the room in which Mr Hattersley and Ms Soper were present at about 5.00am. The Tribunal found this was the start time of their shifts. The statements corroborated each other and short of an allegation of collusion, which was not made, the Tribunal found that they were statements provided at the time which were more likely than not to be an accurate summary of what the claimant said. The Tribunal also had regard to the claimant's own witness statement, paragraph 7, which said (with the Tribunal's emphasis added):

    "*<u>But prior to me coming to work the next day</u>, I heard from a couple of my colleagues the respondent has been saying that 1 had removed the drone from the company's stock*."

22. In relation to the investigation, the claimant's express criticism of Mr Hattersley's statement (in cross examination) was that it was inconsistent with the statement of Mr Osian Williams (Merchandise Manager) who had said the claimant had handed over the drone in a blue bag to him (page 116). The Tribunal found there was no such inconsistency as the statement of Mr Hattersley did not say that the drone had been handed to him. The Tribunal also accepted the evidence of Mr Ager that the claimant would first have walked through the room they were in before handing the drone to Mr Williams in another room.

23. In relation to Ms Soper, the claimant's criticism was not express or altogether clear; the Tribunal found however that the claimant's criticism, in cross examination was that the evidence was not reliable because she had previously been found to have made a racial slur in July 2016.

24. The notes of the fact finding meeting on 20 November 2018 were at page 107 of the bundle. Mr Wheway was present too. The claimant disputed the accuracy of these minutes under cross examination though it was very unclear what specific parts were being challenged or disputed. He had not specified the basis of the challenge in his witness statement. The claimant asserted that the notes were false, that the notes recorded comments he had

not said. This was expressed in the generality, not with any specificity. When Mr Ager was cross examined, Mr Chukwudolue said parts of the notes did not make sense. These minutes were not challenged expressly at the time, unlike those for the 22 November 2018, which were disputed, also generally not specifically, at the subsequent disciplinary hearing page (page 125).

25. The Tribunal found that these minutes were taken at the time and were a fair summary. The notes were unremarkable and mirrored broadly the claimant's explanation subsequently.

26. Mr Ager's interpretation of the incident was summarised in his note at page 108. The Tribunal found that it was Mr Ager's assumption or own view that the claimant had returned in to the building before re-appearing when leaving the store with the drone.

27. The claimant was invited to a further investigation meeting to take place on 22 November 2018. He was informed he had the right to be accompanied (page 109). The meeting time was changed to accommodate the claimant's child care issues (page 111). The claimant was informed that this was in relation to an allegation relating to S.14 of the Employee Agreement.

28. An investigation meeting took place on 22 November 2018. There notes of this meeting were at page 112 of the bundle. Mr Wheway was present too. As already noted, the claimant disputed the accuracy of these minutes. Although the notes recorded that the claimant had declined to be accompanied, the claimant disputed this at the subsequent disciplinary hearing. The notes recorded that the claimant was asked who had told him that a manager had accused him of theft, but a name was not provided. Further, the notes recorded the CCTV of the incident was viewed. Further, the notes recorded that the statements of Mr Hattersley and Ms Soper were read out to the claimant. The claimant said he didn't hand in the drone as he was in a rush to go because he had a 'sickle cell appointment'. The Tribunal noted that at the disciplinary hearing on 19 June 2017, there had been some reference and acknowledgment of the claimant having sickle cell disease (page 96). The meeting was adjourned until the following Monday and the notes recorded that the claimant was informed to bring a witness. In a separate document written by the claimant he had stated "*I want to postpone this meeting as I don't have a witness by Monday".*

29. The dispute about the whether or not the claimant had been forewarned about the respondent's management suspicion the day before was raised by the claimant at the time. The challenge to the reliability of Mr Hattersley's and Ms Soper's statements however, was not. Indeed, Mr Ager was cross examined about the respondent's grounds of resistance which stated in paragraph 33, that Mr Hattersley had taken receipt of the drone, but Mr Ager did not say he had (and the Tribunal found that as the investigation officer he would not have), approved or given instructions in relation to the legal defence. It was not the document and could not be the document, relied upon by Mr Ager at the time. Mr Ager also rejected Mr Chukwudolue's interpretation of Mr Hattersley's written statement. Mr Boachie rejected that interpretation too.

30. The Tribunal found that these minutes were taken at the time and were a fair summary. The notes were unremarkable and mirrored broadly the claimant's explanation subsequently save in relation to whether he had declined to be accompanied and the nature of the appointment he needed to attend. The claimant had, in the first invitation to this meeting been informed of his right to be accompanied and the Tribunal found that it was more likely than not that the claimant had not initially wished to be accompanied. The Tribunal also found the reference to the sickle cell appointment was recorded on the claimant's explanation although no weight was attached by the respondent to the subsequent different explanation.

31. A further investigatory meeting was scheduled for 26 November 2018. The meeting did not take place as the clamant was certified as being sick by reason of work related stress until 31 December 2018 (page 117).

32. That meeting was thus postponed until after the claimant's certified sick period and his pre-arranged annual leave in the first week of January 2019. A letter confirming these arrangements was sent to the claimant on 26 November 2018. The letter also stated that the previous meeting on 22 November 2018 had been paused because of the claimant's request to have an accompanying companion contrary to his position at the start of that meeting.

33. In consequence, the claimant's paid suspension was converted to sickness absence on statutory sick pay. The Tribunal found payment of SSP was in line with clause 8.1 of the claimant's Employment Particulars (page 43).

Although Mr Ager said under cross-examination that the claimant had received 6 days of sick pay already in the 12 month period, the issue of whether or not the claimant had already utilised 6 days of sick pay at full pay was not an issue before the Tribunal and this was confirmed by Mr Chukwudolue in closing submissions.

34. The claimant was invited to a further investigation meeting on 7 January 2019. The minutes of this meeting were at page 121. The claimant was accompanied by Mr Kouassi. These minutes were not said by the claimant to be disputed. At this meeting the claimant was asked if he had details of the appointment he said he had needed to attend. The claimant explained he had to meet someone bringing him medicine for his back from Ghana. He pulled out bottles from his bag. The statements Mr Ager had obtained were also read out to the claimant.

35. On the same day, the claimant was invited to a disciplinary hearing to take place on 9 January 2019 to be chaired by Mr Wilson. The claimant was informed of his right to be accompanied, details of the charge and was forewarned that he could be dismissed for gross misconduct. In a separate letter of the same date, all of the investigation notes were sent.

36. The disciplinary hearing took place on 9 January 2019. The claimant was accompanied by Mr Kouassi. The minutes were at pages 124 to 126 and were not said to be disputed by the claimant. The CCTV of the incident was reviewed at this meeting too. The claimant said he had discussed with a member/person by a car if the drone was his. It was disputed by Mr Wilson that there was any conversation that could be seen which the claimant had with another person. The claimant said he had spoken to a man in the corner (the Tribunal understood this to mean out of view). Over 40 seconds later the claimant was seen leaving the store. He confirmed he had also asked Mr Tapfunmaneyi for a cigarette. The claimant said he was caught in two minds because he had to meet his friend so he resolved to leave with the item as he was working the next day when he could have a ‘long conversation’. The claimant referred to being told by Mr Ager that someone had called the claimant the night before. There followed a discussion about the notes of 22 November 2018 not being agreed (though in that meeting Mr Ager had raised the point about a manager thinking the claimant had stolen the drone, now being raised by the claimant).

37. Following an adjournment, Mr Wilson decided to dismiss the claimant. He concluded that the claimant had several opportunities to hand in the drone to Mr Tapfunmaneyi (who was a manager), to the membership desk or to the service assistants by the entrance. The underlying reason was that the claimant had taken the drone off the premises despite there being opportunities to hand it in.

38. In oral testimony, Mr Wilson confirmed he was not at the time influenced by the statements of Mr Hattersley or Ms Soper. This was consistent with his reasons given at the time. Further, that it would have no difference if in fact the claimant did have a conversation with a member out of view. The claimant also confirmed to the Tribunal with some reluctance, that the membership desk was up to 30 yards from the entrance; Mr Ager's evidence was that it was about 20 yards. Further the claimant confirmed there was no paperwork required to complete. The Tribunal found the time taken would have been a handover with a brief explanation -less than a minute.

39. The claimant was given a right of appeal which he exercised. No reasons were provided in the claimant's letter of appeal (page 129). The claimant was sent notes of the disciplinary hearing on 9 January 2019 (page 130). The appeal was heard by Mr Boachie. The minutes were at pages 132 to 138 and were not said to be disputed by the claimant. The claimant was accompanied by Mr Kouassi. Mr Stevens was present as a witness for the respondent. At this hearing the claimant raised previous incidents in 2017 involving 'coconut cups' which the Tribunal found related to the incident concerning promotional items becoming detached and in his trolley amongst his personal shopping – this was set out in paragraph 15.3 of Mr Ager's witness statement. The other matter was in relation to a disciplinary process about alleged falsification of time sheets. The claimant said he felt his dismissal was unfair and discriminatory and when asked who was targeting him he replied 'John'. The Tribunal found this was a reference to John Nicolas. The claimant also referred to Ms Soper having made a racial comment in the past.

40. In relation to the timesheet falsification issue raised, the Tribunal was taken to documents in the bundle in relation to the claimant being investigated and disciplined for falsification of time sheets. At the investigation meeting on 12 June 2017, the Tribunal found that with the exception of being allowed to leave early on 2 occasions, the respondent considered that

claimant was not able to explain 6 other occasions of timesheet and/or swipe records irregularity (page 89 of the bundle listed 8 dates 2, 6, 9, 13, 16, 19, 25 and 27 May 2017) in response to which the claimant had replied that's 'the way I work'. The claimant appeared to be justifying self-regulation or self-policing based on his own sense of time owed. He said on page 91 he was 'taking what I'm owed' and further at the disciplinary hearing on 19 June 2017, he said 'I want to take my hours back' in response to which Mr Wilson said whilst he accepted that in theory, 'you left yourself wide open by not swiping'. Falsification of company records and/or swipe records is listed as an offence for which an employee can be dismissed without notice (11.3 of the Employee Agreement, page 51). A final counselling notice was issued on 19 June 2017 with a right of appeal which was not exercised. The right of appeal was made clear in the minutes which were not disputed.

41. There was a subsequent grievance raised by the claimant dated 3 July 2017 (page 99 to 101) addressed to Mr Scott Schruber, Regional Operations Director. Having regard to self-stated difficulties the claimant said he experienced with English not being his first language, the Tribunal found this letter was written for the claimant. He raised a series of concerns including about the recent disciplinary action and the inaction following the racial comment by Ms Soper. (The respondent conceded that this grievance included a protected act and the Tribunal was satisfied that it did too). Also, that he had asked to experience a different area of merchandising away from drinks and spirits, but this had not happened. There was a dispute about whether this grievance had been dealt with. The claimant alleged that he heard nothing more. The respondent relied on the letter dated 4 September 2017 (page 102) as the response under the 'Open Door' Policy (2.1 of the Employee Agreement, page 45). In oral testimony, the claimant confirmed his address on the letter was correct. The letter referred to some initial enquiries made including informal attempts to meet with the claimant – the attendance record did show the claimant having several days of annual leave in August 2017. Even on the claimant's case, there was no evidence of any written follow by the claimant, or Mr Lawson who said he was acting as the claimant's shop steward by now and had accompanied the claimant at the last disciplinary hearing.

42. The bundle contained the documents relating to the incident involving a racial comment by Ms Soper in July 2016 at pages 54 (a) to (c). She was alleged to have used the phrase 'working like a nigger' which she had said

in the disciplinary hearing was a reference to black people working in the cotton fields. The claimant believed the phrase used to have 'there are so many black people working here, it's like working in a cotton farm'. The Tribunal found the precise language used, having regard to the issue in the case, was not relevant. On either account, the Tribunal accepted the language was offensive and inappropriate. The comment was not made to the claimant. The claimant and others were apologised to. Mr Ager who chaired the hearing accepted Ms Soper had not intended to be offensive particularly as the recipient was a person with mixed race children.

43. There was a further appeal hearing on 23 January 2019. The minutes were at pages 139 to 144 and were not said to be disputed by the claimant. At this meeting the claimant agreed that with his experience, he knew he had to hand something in; he didn't on this occasion as he had to meet someone at East Croydon. Mr Boachie also confirmed that he had seen the CCTV and also referred back to the statements of Mr Hattersley and Ms Soper about the claimant being told the previous day and asked the claimant if he understood 'what it looked like' and the claimant confirmed he did. The claimant said he was spoken to by Callum White in the morning (20 November 2019) who had told him that he had heard he had taken the drone.

44. Following a further adjournment, Mr Boachie took a statement from Mr White (page 145) who said the claimant had called him asking if his name had been mentioned about stealing the drone and that he had heard he had been accused of stealing the item.

45. Mr Boachie rejected the claimant's appeal and sent him his outcome letter on 25 January 2019 (pages 146-147). Mr Boachie concluded that the claimant's actions contradicted his claim he was in a hurry; that he had the opportunity to hand the item to the membership desk which was in close proximity to where the claimant said he had been speaking to a member (or to Mr Tapfunmaneyi); alternatively the claimant could have reported the found item to a supervisor or manager. He did take in to account the statements of Mr Hattersley and Ms Soper and that Mr White's statement was that the claimant had phoned him asking if his name had been mentioned as he had heard (already) which was the opposite order of events.

Applicable Law

46. The Tribunal had regard to sections 13 (direct), 26 (harassment) and 27 (victimisation) of EqA.

47. The burden of proof is set out in S.136 (2) EqA. This provides:

"*If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."*

48. S.136 (3) provides that S. 136 (2) does not apply if A shows that A did not contravene the provision.

49. The guidance in ***Igen Ltd v Wong 2005 ICR 931 and Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205*** EAT provides guidance on a 2-stage approach for the Tribunal to adopt. The Tribunal does not consider it necessary to set out the full guidance. However, in summary, at stage one the claimant is required to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, (now any other explanation) that the respondent has committed an act of discrimination. The focus at stage one is on the facts, the employer's explanation is a matter for stage two which explanation must be in no sense whatsoever on the protected ground and the evidence for which is required to be cogent.

50. The Tribunal notes the guidance is no more than that and not a substitute for the Statutory language in S.136.

51. In ***Laing v Manchester City Council 2006 ICR 1519 EAT,*** the EAT stated that its interpretation of Igen was that a Tribunal can at stage one have regard to facts adduced by the employer.

52. In ***Madarassy v Nomura International PLC 2007 ICR 867 CA***, the Court of Appeal stated:

"*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on a balance of probabilities, the respondent had committed an unlawful act of discrimination"*

53. In ***Martin v Devonshires Solicitors UK EAT/0086/10/DA***, Justice Underhill the then President, stated that question in any victimisation claim is:

"*what was reason that the respondent did the act complained of: if it was wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation, and if not, not."*

54. In ***South Western Ambulance NHS Foundation Trust v King 2019 UKEAT 0056***, it was said if any of the constituent acts are found not to be an act of discrimination, then it cannot be part of a continuing act. The EAT said in paragraphs 23, 33 and 37:

"23. *Given that the time limits are such as to create a jurisdictional hurdle for the Claimant, if, ultimately, the acts relied upon are found not to form part of conduct extending over a period so as to enlarge time, then the claim would fail, unless, that is, the Tribunal considers that it would be just and equitable to extend time in respect of any acts that are proven but out of time.*

33. In order to give rise to liability, the act complained of must be an act of discrimination. Where the complaint is about conduct extending over a period, the Claimant will usually rely upon a series of acts over time (I refer to these for convenience as the "constituent acts") each of which is connected with the other, either because they are instances of the application of a discriminatory policy, rule or practice or they are evidence of a continuing discriminatory state of affairs. However, if any of those constituent acts is found not to be an act of discrimination, then it cannot be part of the continuing act. If a Tribunal considers several constituent acts taking place over the space of a year and finds only the first to be discriminatory, it would not be open to it to conclude that there was nevertheless conduct extending over the year. To hold otherwise would be, as Ms Omeri submits, to render the time limit provisions meaningless. That is because a claimant could allege that there is a continuing act by relying upon numerous matters which either did not take place or which were not held to be discriminatory.

37. That analysis seems to me to be supported by the conclusions reached by the EAT in the Jhuti case where it was held that:

Accordingly, we consider that (after a substantive hearing) where there is a series of acts relied on as similar or continuing acts, there is no warrant for a different interpretation to be applied and we reject Mr Jackson's argument that in the case of a series of acts none of the acts need be actionable. In our judgment, at least the last of the acts or failures to act in the series must be both in time and proven to be actionable if it is to be capable of enlarging time under s.48(3)(a) ERA. Acts relied on but on which a claimant does not succeed, whether because the facts are not made out or the ground for the treatment is not a protected disclosure, cannot be relevant for these purposes ." (Emphasis added)

Conclusions and analysis on the issues

55. The following conclusions and analysis are based on the findings which have been reached above by the Tribunal and the application of the law to the issues including the burden of proof. Those findings will not in every conclusion below be cross-referenced unless the Tribunal considered it necessary to do so for emphasis or otherwise.

56. 11 (w) 'not being moved to another section of merchandise April 2017' – There were wholly insufficient facts from which the Tribunal could conclude that there any less favourable treatment because of the claimant's race. It was not alleged in his grievance of 3 July 2017 that this was because of race (page 100). There were no comparators named or their circumstances in his claim form or his witness statement or in oral testimony. This was important as the claimant was asserting his request to move 'like other staff'. There was no pursuance of the outcome of the grievance or, if on the claimant's case if there was no outcome received, any pursuance of a non-outcome at any time thereafter with Mr Schruber. The claimant did not advance any positive case in this regard in evidence. The burden of proof did not shift.

57. 11 (x) 'nothing done about a racial comment by Ms Soper in July 2016' The issue was whether the respondent had addressed the racial slur by Ms Soper. The documents in the bundle at page 54 (a) to (c) showed the respondent had dealt with this incident. Ms Soper had received a counselling notice (written warning) following an investigation meeting.

As found above, the investigation notes referred to the claimant having apologised to the person to whom the comment had been made and to a number of other employees who had been informed of the comment. Also, Mr Ager accepted that the comment had not intended to be offensive. Mr Ager confirmed this in oral testimony too. He said he had regard to his otherwise favourable working knowledge of Ms Soper too. There were thus wholly insufficient facts from which the Tribunal could conclude that there was less favourable treatment because the alleged less favourable treatment/detriment – that nothing was done – did not occur. To the extent that the claimant appeared to argue that Ms Soper was treated more leniently than when the claimant was given a final counselling warning in relation to the ATS timesheets/falsification, the Tribunal concluded that the circumstances were materially different. The accusation against the claimant related to integrity and honesty and was reasonably considered to be wilful conduct over multiple dates. The Tribunal also noted that the claimant had previously received a counselling notice on 17 February 2017 (page 98). The burden of proof did not shift.

58. 11 (y) & (t) 'Promotional stock in the claimant's trolley May 2017' - There was no positive case asserted in the claim form or in the claimant's witness statement about this allegation at all. The only evidence before the Tribunal was the information provided at the appeal hearing and in Mr Ager's witness statement, paragraph 15.3 which was an observation or instruction by Mr Brian Curran, the former General Manager, not to mix personal shopping items with shop merchandise. There was no further action taken. There was thus no detriment/less favourable treatment to the claimant. If the alleged less favourable treatment was about being challenged about the promotional items in his trolley (which had become detached from the main items), the Tribunal concluded that this was not a detriment – it was within a manager's discretion to pull up a member of staff in such circumstances. Alternatively, there were no facts from which the Tribunal could conclude that Mr Wilson would have treated a hypothetical white comparator differently. The Tribunal noted that no allegation of discrimination was put to Mr Wilson throughout his entire cross examination. Mr Lawson's witness statement did not cite any assertion of race discrimination against any of the respondent's witnesses. His own complaint of discrimination against this respondent is about alleged disability discrimination. The burden of proof did not shift.

59. For the same reasons above, the conduct was not harassment related to the claimant's race. It was not unwanted conduct which violated the claimant's dignity or created an intimidating or hostile environment related to the claimant's race.

60. 11 (z), (aa) & (u) 'Falsification of time sheets/not swiping out June 2017' - Having regard to the findings above in relation to the claimant being investigated and disciplined for falsification of time sheets, the Tribunal concluded that there were no facts from which the Tribunal could conclude the claimant was treated less favourably because of the claimant's race. The criticism of the Managers who had approved his timesheets was materially different to what the respondent considered to be deliberate and wilful actions going to trust and integrity in relation to the claimant. The Tribunal accepted Mr Wilson had spoken to Mr Everton Green, Merchandising Manager and Mr Iain Thomson in relation to checking timesheets (*where authorisation had been given to leave the site*). But ultimately, responsibility for accuracy rested with the employee. Quite remarkably, no allegation was made against Mr Wilson that his disciplinary sanction had anything to do with the claimant's race. Neither was it put to Mr Wilson, in so far as it was being alleged, that the final counselling notice which the claimant received compared with Ms Soper's disciplinary warning, albeit not issued by Mr Wilson, had been more harsh because of the claimant's race. There was no evidence that Mr Wilson would have treated a hypothetical white comparator in the same circumstances differently. The reason why the claimant was disciplined was because of Mr Wilson's belief in his misconduct. For the avoidance of doubt, the case before this Tribunal was not one of unfair dismissal including whether this warning was manifestly inappropriate. The claimant was given a right of appeal which he never pursued or to request a different appeals officer. That was not the responsibility of the respondent without any request.

61. For the same reasons above, the conduct was not harassment related to the claimant's race. It was not unwanted conduct which violated the claimant's dignity or created an intimidating or hostile environment related to the claimant's race.

62. 11 (bb) 'Grievance of 3 July 2017 not dealt with' - As found above, the grievance letter did not appear to be written by the claimant. He had made clear in these proceedings English was not his first language more than once. Mr Lawson, who was acting for the claimant as a shop steward did

not pursue the grievance on the claimant's behalf. Neither did the claimant. The Tribunal concluded that if a response had not been received it could have been chased up. It was unexplained why the claimant, on his case had not pursued this. The Tribunal, however, concluded that Mr Schruber did send the letter dated 4 September 2017 and that it was received by the claimant as the address was correct and if it had not been received, the claimant or Mr Lawson would have said so. The initiating grievance was written after all with some output in mind even if this was informal. The claimant had 2 avenues Mr Nicolas or Mr Schruber. Nothing had been pursued since September 2017 at all. The Claimant said he had attempted to call Mr Schruber several times. The Tribunal accepted that the claimant had called Mr Schruber but could not be satisfied when this happened or that it was more than once, which number he called, or what happened when the call was made (for example did he leave a voice message) as no evidence was given in relation to any of these matters. That the respondent was attempting to deal with the matter under its open door policy –which was inherently informal hence the informal approach - was open to them to do so. There were no facts from which the Tribunal could conclude the claimant was treated less favourably because of the claimant's race. The less favourable treatment/detriment alleged – that the grievance was not responded to – did not occur. The burden of proof did not shift.

63. 11 (cc), (dd) & (r) 'suspension converted to sick pay 26 November to 31 December 2018' - The employment particulars provided 6 days sick pay then SSP for a period of sickness absence. There was no issue before the Tribunal about whether the claimant had received 6 days full pay already – Mr Ager did say this had been used up in any event, but in submissions Mr Chukwudolue confirmed that was not an issue before the Tribunal. There was no dispute the claimant was certified sick after 26 November 2018 until 31 December 2018. As such, this issue was simply a non-starter. There were no facts from which the Tribunal could conclude the claimant was treated less favourably/subjected to a detriment because of the claimant's race – being paid SSP because the claimant was sick was not a detriment. Alternatively, there were no facts from which the Tribunal could conclude that the respondent would have treated a hypothetical white comparator differently The reason why the claimant was paid SSP after 26 November 2018 until 31 December 2018 was because he was on sick leave.

64. If this was issue about the decision to suspend, as an allegation of gross misconduct, there was nothing irregular or improper to suspend the claimant to enable an investigation to take place without interference. The employee agreement provides for this (page 49).

65. For the same reasons above, the Tribunal concluded there was no causal connection between the claimant's grievance of 3 July 2017 and the respondent's decision to suspend the claimant and subsequently convert the claimant's absence to sick absence and pay sick pay. The Tribunal also concluded that Mr Ager was not aware of the content of claimant's grievance to Mr Schruber which contained the protected act. He had not been sent a copy of the letter, neither did the claimant assert he had told him. There were no assertions made that Mr Schruber had informed him. The claimant referred to the existence of a petition about the comment from Ms Soper though there was no evidence provided about this to the Tribunal, neither was it relied upon as a protected act.

66. Also for the same reasons above, the conduct was not harassment related to the claimant's race. It was not unwanted conduct which violated the claimant's dignity or created an intimidating or hostile environment related to the claimant's race. There was no interference with the claimant's sickness absence period. The investigation process was paused and resumed after the sick leave period (and annual leave) and thus was the opposite of coercing the claimant into a hurried investigation.

67. 11 (ee) 'Investigation, dismissal and rejecting the appeal against dismissal January 2019' - There were wholly insufficient facts from which the Tribunal could conclude that there any less favourable treatment because of the claimant's race. The only link provided to the Tribunal was that because Ms Soper, who had made and been disciplined for making a racially offensive comment, had provided a statement to Mr Ager about what the claimant had said about being aware the day before he returned the drone that management thought he had taken it. However that statement was corroborated by Mr Hattersley and also to a sufficient extent by Mr White. Ms Soper's remark was also a one-off comment made almost 2 ½ years before the incident leading to the claimant's dismissal. At the investigation and appeal stage, the statement was considered to be relevant, but was not taken in to account at the dismissal stage. The Tribunal found the evidence of Mr Boachie, the appeals officer, particularly credible. He has been employed for 19 years and occupies a senior position with the

respondent. He is black and of Ghanaian origin. He explained that he had on occasions spoken to the claimant in Ghanaian (TWI) to illustrate that the claimant would have been comfortable to converse with him. He spoke passionately and eloquently about the respondent's efforts in relation to on-going (yearly) diversity training. His evidence was 65% of the workforce at Croydon were BAME. He explained that at Croydon, there had been five dismissals in the previous 12 months for misconduct, three BAME, two white. If the respondent, in particular, Mr Wilson was motivated by race, the claimant could have been dismissed in June 2017 for gross misconduct based on the respondent's belief that the claimant had been falsifying records. The 'opportunity' existed then. The claimant did little to support his own case in relation to the incident leading to his dismissal. His case that he was in a hurry and/or that he had to meet his friend *precisely* at a given time without even a delay of 1 minute was, as found by the respondent, devoid of any plausibility. Nothing was produced to the respondent to support his account, for example, evidence in relation to a pre-arranged meeting (texts/messages), a statement from the person he was meeting or, why he could not contact the person he was meeting to say he would be a minute or so late. The explanation, was quite frankly, unbelievable. There was no evidence that the respondent would have treated a hypothetical white comparator in the same circumstances differently. The reason why the claimant was investigated for suspected gross misconduct and then dismissed was primarily because of the respondent's belief, triggered by the incident caught on CCTV, that the claimant had picked up a drone belonging to a customer and left the store when he could and should have handed it in before leaving. That had nothing to do with the claimant's race, neither did the sanction. The Tribunal saw no flaw in the procedures followed. The burden of proof did not shift.

68. For the same reasons, the Tribunal concluded there was no causal connection between the claimant's grievance of 3 July 2017 and the respondent's decision to investigate and subsequently dismiss the claimant and then reject his appeal. The Tribunal also concluded that whilst Mr Wilson was aware of the grievance and had discussed the reasons for the final counselling warning he had given with Mr Schruber, he was not made aware of the complaint about the racial comment from Ms Soper at the time. There was no evidence before the Tribunal to suggest this did or might have happened. A key part of the claimant's grievance was this counselling notice which Mr Wilson accepted was discussed with Mr

Schruber. In addition, Mr Wilson accepted he was previously aware of the comment made by Ms Soper, but he had not been involved with the disciplinary hearing. Mr Boachie was also not aware of the protected act. He had not been sent a copy of the letter, neither did the claimant assert he had told him. There were no assertions made that Mr Schruber had informed in. The conclusions above in relation to a petition are repeated. In addition, he only joined the Croydon store in September 2018.

69. Neither the final act or any of those earlier acts have been found to be discriminatory at what was a final hearing of the issues. Accordingly the continuing act was not made out. On that basis, it was not necessary to decide if it is was just and equitable to extend time as there were no discrimination or detriment claims proven/made out in respect of which any discretion needed to exercised.

70. For the avoidance of doubt, the racial comment made by Ms Soper was not before the Tribunal to determine under any head of claim. It might have been asserted to be an allegation of harassment (out of time or as part of an alleged continuing act) but this was not pleaded, neither was this confirmed to be an issue in the case subsequently. At both points – when the claim was issued and at the case management hearing, the claimant was represented by Mr Chukwudolue, a Solicitor.

71. At the conclusion of the Hearing, the respondent made an application for costs but because of insufficient time the Tribunal directed that the application should be made in writing, on notice and the Tribunal would determine whether a Hearing is required or not.

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Employment Judge Khalil

10 June 2021