EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Miss Z Reid **v** **1. Arcadia Group Limited**
2. Top Shop/Top Man Limited

Heard at: Watford **On**: 28-29 September, 22-23 October & 18 November 2020 (in chambers)

Before: Employment Judge R Lewis
Members: Mr T Chapman
Mr S Woodward

Appearances

For the Claimant: In person
For the Respondents: Mr R Santy, Solicitor

RESERVED JUDGMENT

1. By consent, the second respondent is ordered to pay to the claimant notice pay of £236.80.

2. By consent, the second respondent is ordered to pay to the claimant holiday pay of £516.15.

3. The claimant's application for uplift on the above succeeds and the second respondent is ordered to pay to the claimant 25% of the above total, a further sum of £188.24.

4. The total payable by the second respondent to the claimant is £941.19.

5. The claimant's claims of race discrimination fail and are dismissed.

REASONS

Introduction

1. This was the hearing of a claim presented by the claimant on 19 January 2019. The claimant has throughout acted in person. Day A and Day B were both 16 January.

2. The claim form was incomplete, but brought claims for unfair dismissal, race discrimination, and for notice pay, holiday pay and "other payments." A narrative set out events since September 2017. It ended with the events of 26 August 2018. The claim form gave no dates of employment.

3. The response was received on 15 March 2019. Form ET3 was left almost entirely blank. The respondents were represented by the same firm of solicitors throughout.

4. A first preliminary hearing took place before Employment Judge Manley on 18 October 2019; her order was sent on 21 October (28). She listed for a second preliminary hearing on 3 January 2020. Her order of October 2019 indicates that she drew up a provisional list of issues, and ordered the claimant to comment on it.

5. The claimant's mother replied at length on 17 November 2019, addressing a range of issues, many of them not before the tribunal. She attached a number of documents, including pay slips.

6. By letter of 30 December, the tribunal replied that the lengthy email of 17 November "will not be treated as an amendment to the list of issues" but that the information contained in that email may be added to the claimant's written statement.

7. The second preliminary hearing took place on 3 January 2020, and Judge Manley's order (35) was sent to the parties on 15 January.

8. In the January 2020 order, Judge Manley set out the definitive list of issues (36-37), set a case management timetable, and listed the hearing for four days starting Tuesday 28 September.

Procedural points at this hearing

9. Before this hearing the parties had exchanged witness statements. The claimant was the only witness on her own behalf. She had produced a long, discursive statement. The respondent submitted two statements. The statement of Ms Vanessa Griffiths, HR Business Partner, dealt with HR systems, but contained no evidence of personal involvement in the matters which were before the tribunal. Mr Santy decided on the first day of hearing not to call her. The respondents' only witness therefore was Ms Kerry Burgess, employed by the respondents for some 23 years in a variety of

management roles until her redundancy in August 2020. She had had some management responsibility for the claimant throughout the period with which we were concerned, and had been Interim Store Manager between August and December 2018. It had been her decision to dismiss the claimant and to exclude her from the store thereafter. We were grateful to Ms Burgess, who was required to take time from a new employer, for attending the tribunal.

10. This hearing duly started on 28 September, and adjourned on the second morning; the present judge sent a case management order that day. By that stage the claims for holiday pay and notice pay were compromised, although the claimant reserved her right to apply for uplift. As recorded in the 29 September order, the claimant had completed her evidence (subject to questions from the tribunal), and a timetable was set for how the matter was to proceed.

11. The hearing resumed on the morning of Thursday 22 October 2020. Mr Santy confirmed that no CCTV footage of any incident in the store in the period October to December 2018 had been retained, as it was on a one month override.

12. The tribunal, on reflection, had decided to waive its right to put its own questions to the claimant. It did not seem to us fair to try to ask the claimant questions about evidence which she had given three weeks previously.

13. The claimant had written in reply to the September order by stating that she did not think that three hours was long enough to cross examine Ms Burgess. At the start of the hearing, the judge indicated that there was some flexibility, but we should see how matters progressed. In the event, Ms Burgess gave evidence from 10am until 3.20pm, with the lunch break and short breaks.

Failures of disclosure

14. In the course of Ms Burgess' evidence it became apparent that there had been a failure on both sides to give disclosure. The claimant referred to having kept a contemporaneous diary of events. When asked about it, she said that it still existed, although it was messy in format, and contained a lot of irrelevant or intimate information. If the document contained a record written by the claimant on or about the dates of the events complained of, it was plainly a document which should have been made available to the respondents in preparation for this case. (The tribunal has procedures for editing personal or intimate information in a document). The claimant had not done this, and before any further consideration could be given to the point, Mr Santy said that he waived any right to see the document. That was a pragmatic decision, as managing disclosure would have required another adjournment, which would undoubtedly have led to a further delay into 2021.

15. A more serious failure on the part of the respondents came to light. The failure was significant, especially on the part of a large organisation with access to professional support. Although responsibility for dealing with this failure fell on Ms Burgess in the tribunal, we accept that she was wholly free of personal blame for it.

16. In the course of her evidence about the events leading to the exclusion, Ms Burgess referred to an online "Helpline" system. We understood this to be a management system for central record keeping of events or incidents at a store, to be accessed by the store management. As we understood it, a centralised record was created, using a system of reference numbers so that if there were a recurrent incident, there would be continuity on the record.

17. The existence of the helpline system was not referred to either at paragraph 22 or 23(k) of Ms Burgess' statement, or at paragraphs 15 to 17 of the statement of Ms Vanessa Griffiths.

18. This record was a plainly discoverable document. One issue in this case was the reason why the claimant was excluded from the store. The helpline record, if produced, appeared to be the contemporaneous record of the relevant event or events in the words of the then store manager. During this hearing, Mr Santy obtained the text of the relevant document by email on his phone and offered to read it. That was helpful, but by no means sufficient. We expected it to be disclosed on the morning of 23 October so that the claimant would have the opportunity to read it.

19. Mr Santy added that in the course of inquiries into that document the respondents had come across a saved Snapchat created by the claimant.

20. At the end of 22 October, when the issue of the helpline documents remained to be resolved overnight, we explained to Ms Burgess that we would understand if she were not available to give evidence the next morning; but if she were, she could do so by CVP, which would reduce the imposition on her.

21. Early on the morning of 23 October, Mr Santy emailed the tribunal a number of items. The material included a record of an incident report from the Helpline system. That recorded that on 3 December Ms Burgess had created a record of an incident said to have happened on 30 November. We give details below. Despite the shamefully late disclosure of this item, for which the tribunal received no explanation, and which remains impossible to understand, we accepted that it had been referred to in oral evidence, and that its probative value was such that it would not be right to exclude it.

22. Other material provided by Mr Santy included explanatory notes and comments, and a Snapchat posting by the claimant showing her reaction to the exclusion. That material seemed to us marginally relevant, if at all, and

given the lateness, (and notwithstanding that the claimant could not be taken by surprise by her own Snapchat) we excluded it from our deliberation.

23. On the morning of the fourth day, 23 October, the position was that we accepted the log document of 3 December 2018, which was no more than about seven lines.

24. Ms Burgess had returned to her new employment, and it was stressed to us that her time to give to this matter was limited, and that her new employer appeared unsympathetic to the requirements to give evidence in this case. Mr Santy reiterated that the respondents did not and would not apply for a witness order compelling Ms Burgess to attend on another day (although it was open to the tribunal to do so on its own initiative, but it would not have required her attendance before Christmas).

25. Ms Burgess gave evidence by poor quality CVP for about 25 minutes. This was abandoned because a sustainable link could not be maintained. The parties agreed to her giving evidence by loud speaker on the telephone. The call that followed lasted another 22 minutes. Ms Burgess then had no more time available.

26. The tribunal asked the parties if they wished to proceed or if they applied for an adjournment to enable Ms Burgess to continue. The claimant said that she wished to apply for an adjournment. She was asked what further questions she still had to put to Ms Burgess, and she identified seven questions which she felt she had not asked.

27. The tribunal adjourned briefly, then informed the parties that the application for adjournment had been refused. In refusing the adjournment, the tribunal noted that the default which required Ms Burgess to give evidence was entirely that of the respondents. Neither Ms Burgess nor the claimant was to be criticised. We accepted that although the claimant had been taken by surprise by the report of 3 December 2018, it was only about seven lines long; it was broadly (though not wholly) in accordance with evidence which had already been given; and it seemed to us that focussed questioning about that short document, in light of the list of issues, was a relatively brief process.

28. The tribunal noticed that as on the previous hearing day, the claimant had used time poorly by questioning on points about which she felt strongly, but which were not part of the issues before the tribunal.

29. We considered the further questions that the claimant wanted to ask, and it seemed to us that a number of them were irrelevant (and at least two focussed on the satellite dispute which the claimant plainly wanted to launch, which was to find out the name of the colleague[s] who had either complained about her, or handed over Snapchat material). A number of the questions which she identified repeated questions already asked. None of the

questions which the claimant identified related to the pleaded issue of race discrimination.

30. The tribunal heard Mr Santy's closing. He finished just before 1pm, and at the claimant's request the tribunal took an extended lunch adjournment, offering the claimant the opportunity to reply later. After hearing the claimant's reply, the tribunal reserved judgment.

General approach

31. We preface our findings of fact with a number of matters of general approach. In this case, as in many others, we heard reference to a wide range of points. Where we make no reference to a point about which we heard, or where we do so, but without going into the detail of the evidence, that is not oversight or omission. It is a reflection of the extent to which the point truly assisted us. The tribunal seeks to approach every case with realism. One aspect of realism is that we do not expect anyone to achieve perfection at work. It is understandable that human beings make mistakes every day at work. When people write or speak to each other at work, they may say or do something which with hindsight they criticise or regret. They do not expect their words to be scrutinised later by a tribunal. The tribunal is experienced in cases where only one side has legal representation, and familiar with the difficulties faced by litigants in person. We understand that the procedure is unfamiliar, and that a litigant in person is usually not well prepared to deal with an evidence based analysis of events about which she may have very strong feelings. It is our duty to seek to place parties on equal footing, however difficult that may be.

The claimant's presentation

32. Making all reasonable allowances in the claimant's favour, we make the following points about the claimant's presentation. Many of the points which follow apply to many claimants who represent themselves. We do not make these points to criticise or distress the claimant, but to explain why, taken as a whole, we found that we could not rely on her evidence and submission, and why we prefer Ms Burgess' evidence of the matters which were in dispute.

Focus

33. The claimant did not seem to have understood the narrow focus established by the list of issues. There were many satellite issues which the claimant wanted to pursue, but which were not relevant. The claimant repeatedly asked questions about points or events which she felt strongly about, but which were not part of the case. She asked a number of questions about the management of colleagues which went far beyond any issue of comparison. She was keen to know who had given the respondent the Snapchat footage.

There was no pleaded issue about the Snapchat footage and that question could not assist us, but it could satisfy a personal curiosity of the claimant. She wanted to know which colleagues had complained of feeling intimidated by her; while that was theoretically relevant, the claimant explained the request because it would help her show "collusion" against her on grounds of race. There was no issue in this case of alleged collusion. The tribunal reminded the claimant repeatedly that it is not our task to adjudicate on the quality of store management. We have neither the skill nor the knowledge to do so. We told her that our task is limited to deciding the legal claims before us. The claimant struggled to adhere to this discipline.

Managers' knowledge

34. The claimant did not appear to grasp one of the basic themes of Ms Burgess' evidence, although it seemed to us common sense and everyday workplace practice. Ms Burgess' evidence was that she managed individuals on the basis of her knowledge about their circumstances which went beyond the claimant's knowledge, and which included confidential information. She explained for example, that the respondents were flexible about the punctuality and attendance records of two white colleagues who had health problems which affected their reliability. We accept that the respondent did not allow any employee to work alone in the premises, so we could draw no inference about the punctuality of the first person to arrive on site, who had to wait for a second employee before clocking in. The claimant alleged that a black colleague was removed from till work because of a stereotyped assumption about his honesty; in fact, we accept Ms Burgess' evidence that he was removed from till work due to a training need, and then went back to it. Similarly, the claimant asked questions based on understandable ignorance of the detail of the respondents' systems and practices. We deal below with the example of the 'escorting' point.

Misunderstandings

35. The claimant often mis-read or misunderstood the evidence, and was confident that her reading or understanding was correct. She assumed that the workplace gossip was factually accurate. She based a number of questions on mis-readings. A particular one was that the claimant alleged that one colleague who had left employment on 17 August 2018 had been allowed to use her staff store card after the end of employment, and had done so the day after she left. The bundle contained a poor quality photocopy of that colleague's store card account. The transaction in question, when magnified, was in our unanimous view a transaction dated 15 August and not 18 August.

36. The claimant showed poor insight. We mean by this a poor understanding of the impact of her own conduct and interaction with colleagues. The most striking example took place on 19 October, when the claimant had been instructed to attend a meeting at which her lateness and attendance would be discussed with the possible view to termination of her contract. Her shift

was due to start at 1pm, and the claimant signed in at 12.49, left to do a personal errand, then re-entered the store to start her shift at 1.01 or 1.02pm. At this hearing, she referred to the "pettiness" of Ms Burgess in mentioning this. We accept that Ms Burgess made a comment to the effect "you're not helping yourself." She meant that an employee who is to face a disciplinary for poor time keeping should understand that it looks bad to arrive even a little late. The claimant did not see this, either at the time, or at this hearing.

37. The claimant questioned on what she understood to be inconsistencies in points of detail, without understanding that not every inconsistency or point of detail was useful to the tribunal in assessing a bigger picture. It did not for example, seem to us to matter that one attendance was recorded at 10am and at 10.03am on two different pages.

38. A recurrent problem with the claimant's approach was that she identified a negative event at work; and concluded that it had happened on grounds of her race, without thinking out whether any evidence showed that there was a link between the two. When the respondent gave its explanation of the event, the claimant did not, in response, seem to ask herself if the explanation sounded like management common sense; or if it might be based on facts which managers knew, but which the claimant did not. The issues and discussion about Whatsapp set out below seemed to us to illustrate many of the weaknesses and problems in the claimant's approach.

39. The tribunal does not expect members of the public to have detailed knowledge of the law. In this case, there was a real issue about s.23 comparison. The claimant repeatedly compared herself with colleagues, without knowledge of their individual circumstances, or of the systems which applied to them, or of the need, in law, for such comparisons to be 'like with like' so far as relevant. A comparison for example with a white colleague who was permitted latitude about attendance for a health reason is not a like with like comparison. Similarly, comparison with a colleague who signs in late is not like with like if the colleague was the first person to arrive on site, and was not allowed to sign in or enter the premises alone. Both these comparisons were made by the claimant, and neither of them was in our view apt.

Legal framework

40. This was a claim of direct discrimination on grounds of race**.** The claimant is black British. It was therefore brought under the provisions of s.13 and s.39 EQA. S.13 provides that,

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

The protected characteristic of race is (s.9) defined to include colour; nationality; and ethnic or national origins.

The potential acts of discrimination are set out so far as material at s.39. They include dismissal, as well as s.39(2)(d) which provides so far as material:

> "An employer must not discriminate against an employee … by subjecting B to any other detriment."

41. Section 23 was, as mentioned above, significant in this case. It provides that when comparing a claimant with an actual or hypothetical comparator,

> "There must be no material difference between the circumstances relating to each case."

42. S.136(2) provides,

> "If there are facts from which the court could decide, in the absence of any other explanation, that A contravened the provision concerned, the court must hold that the contravention occurred.'

43. We understand that we need not consider whether the protected characteristic was the only or even the main reason for the treatment in question. We need only ask whether it was a material factor. In a case where the burden of proof shifts, we ask whether it has been shown that the protected characteristic played no part whatsoever in the material event or decision.

44. It often assists the tribunal to break down a claim of this kind into a number of questions. Our first task is to find the facts of what happened. Secondly, we ask if what happened was a detriment in the sense of a negative event which a reasonable worker might consider to be a detriment in the workplace. The third question relates to interpretation and proof. We ask whether the claimant has proved facts from which, in the absence of an explanation from the respondent, the tribunal might infer that discrimination had taken place. If she has, we must then assess the explanation given in evidence by the respondent for the treatment complained of.

45. In a case where the claimant's legal analysis is limited, such as this, it is in our experience often useful to ask the question "what was the reason why" the thing or the event which was alleged to be a detriment on grounds of protected characteristic took place.

46. It is not sufficient to advance a claim of discrimination based on only the negative event and the protected characteristic. There must be some indication of a causal relationship between the two. The analysis by the tribunal must be an objective analysis of what happened and of the reasons put forward. Analysis based on the subjective opinion or feeling of the claimant, no matter how strongly and sincerely felt, is rarely helpful.

47. This claim was not brought as one of victimisation, or formulated as such by Judge Manley. For sake of completeness however we deal briefly with victimisation. Section 27 provides that,

> "A victimises B if A subjects B to a detriment because (a) B does a protected act".

48. Section 27(2) includes in the definition of a protected act,

> "doing any other thing for the purposes of or in connection with this Act; … making an allegation (whether or not express) that A or another person has contravened this Act".

49. Section 27(3) states as follows,

> "Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information that is given, or the allegation is made, in bad faith".

Findings and conclusions

50. The claimant, who was born in 1996, was employed at the respondents' outlet in the Arndale Centre in Luton. She was originally employed as temporary staff working 16 hours a week (131).

51. The claimant's evidence seemed to suggest that there might be something untoward about her presence as an employee in the store. We disagree. Luton has a substantial BAME population, and we accept as a matter of common observation and experience that hourly paid retail work is a significant employer of young BAME workers. The respondents were unable to provide data on ethnic composition of the workforce. We noted in the list of employees at 247A at least four names of apparently nonEuropean origin. We accept Ms Burgess' evidence that she had experience of managing employees from a variety of races and ethnic backgrounds. There was nothing unusual in the employment of a young BAME employee such as the claimant.

52. The claimant was one of a large number of hourly paid staff, employed on a system of shifts and rotas. We accept that the rota for the next week was sent out at the end of each current week, either by WhatsApp and/or posted in hard copy at the staff entrance. We accept that the respondents had considerable experience of organising around staff flexibility, given for example, that many employees had other commitments, including study and other work. Shortly after the claimant started, she experienced a clash of commitments between work and dance classes.

53. Ms Burgess worked for the respondents in Luton for over 22 years. We find that she was an honest witness, who was committed to the respondents and to her work. She was wholly familiar with their procedures. We accept that in managing any individual member of staff she was aware of the respondents' expectations and procedures and sought to adhere to them.

54. Ms Burgess interviewed the claimant and was party to the decision to appoint her. She presented well at interview, and we accept from Ms Burgess' witness statement that the claimant's background of working at Luton Airport was helpful. We accept that Ms Burgess appointed the claimant on merit, and that logic suggests that having done so, she might be unlikely to dismiss her on grounds of race 15 months later.

55. Despite Ms Burgess' attempts to explain, the arrangements for the claimant's line management were not entirely clear to us. We accept that line management between July and October 2017 rested with Ms Harlow and Ms Rochester and between October 2017 and April 2018, with the Topshop Manager, reporting to Ms Burgess; from April 2018 until the claimant's dismissal, Ms Burgess was directly involved in line management. The position is not more clearly stated because Ms Burgess referred to a bewildering succession of structures, management lines according to brand, and changing job titles. We accept her evidence that from October 2017 and for a year, Ms Burgess was the predominant figure in the claimant's continuous line management.

56. We find also that within the respondents' structures and procedures, individual stores, or departments, or team leaders might adopt different management approaches, whether or not that was expressly authorised. It strongly appears that the claimant may have been undermanaged in the period between October 2017 and April 2018, and that that undermanagement may have affected the brand as a whole. We accept certainly that Ms Burgess was more rigorous when she took up line management in April 2018 than had been the case before. We also accept, inevitably in light of her experience, that Ms Burgess had her own views on the standards to be maintained at the store, and of the most effective working methods. These might not always have been in accordance with what predecessors thought or did.

57. In setting out our findings, we proceeded on the basis set out above of our reservations about the reliability of the claimant's narrative. We rely on the disclosed bundle, and on a helpful chronology prepared by Mr Santy. We do not make a detailed fact find about every event mentioned to us. We depart from strict chronology where we think it clearer to do so. We limit ourselves to findings about the eleven issues identified by Judge Manley (36) which are all expressed as claims of direct racial discrimination.

58. Issue 1(a) was that the claimant was not issued with a Staff Discount Card for three months after joining, unlike two white colleagues who were issued with them immediately. The bundle contained the rules of the Staff Card system (40). They stated that the card was not available to temporary employees at all. As stated above, the claimant was appointed as a temporary employee, and remained such formally until her dismissal.

Therefore, at least an issue arose as to whether the claimant had any entitlement to a card at all.

59. The respondent had produced a schedule, which the claimant said was incomplete, which set out (247A) the names of 23 employees under 26 headings (the discrepancy being employees who left and returned, who were each recorded twice). Of 26 starters, 12 were issued with a discount card. Of the 12 card holders 7 were issued with the card three or more months after starting and 5 within under three months of starting. The claimant was recorded as in the latter group, as the information indicates that her card was issued before completion of her third month. We were unfortunately given no information about the ethnicity of those in question. Ms Burgess' evidence was that she introduced the rule that store cards would not be issued until after three months employment, given the administrative work which issue required, high turnover of staff, and the exclusion from the system altogether of short-term Christmas staff.

60. We accept that the claimant was issued with her store card just under three months after joining. It has been shown that four colleagues were issued with store cards within a shorter period and that many were not. The great majority had no card at all. We accept that the store card was issued only in response to application and not as an automatic entitlement. We can draw no inference in favour of discrimination from the claimant's experience, or from the pattern at 247A. We do not have sufficient information to draw a like with like comparison between the claimant and those whose cards were issued more quickly or more slowly. The sole exception was Ms Raszkiewicz, who was issued a card within three weeks of joining. Ms Burgess knew from personal knowledge that she had joined as Christmas staff, and was issued with a card which expired on 31 January of the following year, and was limited to Christmas staff only. Claim 1(a) fails therefore.

61. Issue 1(b) was a similar issue, relating to a capped discount on purchases within the store of items to be worn at work as a model of the respondents' products; it is not quite accurate to call it a uniform. We accept Ms Burgess giving the same explanation: it was made quickly available to Ms Raszkiewicz because of Christmas; otherwise it was not offered until three months had expired or probation passed; and was subject to refresher, which was linked to length of service and time of starting, and therefore presents no pattern from which an inference could be drawn. The claim fails: the claimant has not proved facts which call for an explanation; if the burden shifted, we find that there was a system which was partly ad hoc, partly random, partly individualised, but without any evidence of an issue of race.

62. Issue 1(c) related to permission to purchase items after the store closure, when the claimant referred to a particular event involving a white colleague called Milly and a Team Leader call Fabio. The claimant's allegation was that staff were allowed to buy items after normal closing time for shopping; her

colleague, Milly, had done so but she, the claimant, was denied the opportunity to do so.

63. Ms Burgess gave evidence, both in her witness statement and orally, that the benefit, of being allowed to shop for a few minutes after tills closed to the public, had been intended as a quick help to staff, but had become burdensome. She therefore ended the practice of permitting staff to shop after work. She did so for sound organisational reasons which applied to everyone. She accepted that there had been an occasion when Fabio, not being aware of the new rule, had served Milly, after which Ms Burgess had reminded Fabio that the rule had changed and that this was not to be done again. Ms Burgess accepted that there may have been an occasion after that when Fabio declined to serve the claimant. The claimant was convinced that the serving of Milly and the refusal to serve her were the same incident, minutes apart if that, and that race was the reason for the difference in treatment. Ms Burgess did not accept that the two events were minutes apart.

64. We find that there was an occasion when after normal public hours Fabio served a white colleague and an incident when he declined to serve the claimant. We accept the explanation, which was that the rules had changed and the service to Milly had been provided in error without authority. We accept that the reason for the refusal of service to the claimant was a reminder and enforcement of a new rule which applied to everyone. Race played no part whatsoever in any of these decisions. This claim fails for that reason.

65. Issue 1(e) was that the claimant was told by team leaders that around Christmas 2017 she was to be on the shop floor five minutes before start of her shift, and white colleagues were not. The claimant felt strongly about this, and clearly felt that she was being required to be present at work for time for which she was not paid. (We attach no weight whatsoever to that last point, which seems to us a commonplace of the practical world of work). Ms Burgess' evidence was that before Christmas 2017 the general system applicable to all staff required them to be on the floor five minutes before start of the shift; but that changed with the introduction of finger printing technology sometime early in 2018. We accept that that was the system which applied to all staff, and that there may have been variations, due to individual circumstances on a particular day or shift (eg travel) or due to health issues or personal issues of which the claimant was unaware. We do not find that there was a system which applied to the claimant but not to white colleagues. If and to the extent that team leaders were more rigorous about the claimant's attendance, we find that any difference in treatment was attributable to her unreliability, which by December 2017 was already manifest (see below).

66. Item 1(f) referred to an allegation that in July 2018 Fabio had reprimanded the claimant for using her mobile phone on the shop floor, unlike Milly who did the same and was not reprimanded. We accept Ms Burgess' evidence,

which was that the default general rule was that no mobile phones were to be used by individual shop floor staff, who were all required to leave mobile phones in the locker. That would be in accordance with our general experience of rules in the retail sector. We also accept that as a matter of common sense and humanity, exceptions might be made in individual emergency cases.

67. We accept that there were exceptional occasions when members of staff were permitted to use their phones. We have not been shown evidence which indicates any more than that, and given the vagueness of the allegation, and in light of our general observations about the claimant's narrative and unreliability, we do not accept that it has been shown that any difference in treatment was attributable to race. As with much of this case, the claimant's evidence goes no further than the exercise of managerial discretion in individual circumstances, not all of them known to the claimant.

68. Items 1(g) and (h) refer to the WhatsApp group. The store had a large number of staff who were shop floor assistants, working personal shifts and patterns. The respondent was in the course of introducing an app for staff. The roll out had problems, and did not reach Luton until January 2019, after the claimant's dismissal. Until the app reached Luton, local management used a Whatsapp group to communicate with staff. Ms Burgess said that it worked partly for team building and improving social interaction. It was also used to send out the rota for the following week. Ms Burgess, when manager, also posted a paper copy of the rota where staff could not miss it. The claimant asked a number of questions about whether it was wise, or correct, or prudent, to use Whatsapp as a means of communication with staff. That was a good example of something about which the claimant felt strongly, but which was not our concern as a tribunal, although it seemed to us one practical short term solution to an IT delay.

69. The claimant challenged one item, in which Fabio had sent an email to the whole group to ask the claimant where she was, as she was late. Her complaint was that that should not have been sent to everyone. We agree. The claimant said that Fabio later agreed that it had been a mistake to send the Whatsapp to the group, and that it should have gone only to the claimant. That was correct, although both the rota itself, and the claimant's absence, were visible to anyone else who should have been at work on the same shift. Our finding is that Fabio made a minor everyday mistake, and while he may be criticised for it, we saw no evidence whatsoever that race played any part in it.

70. The main Whatsapp event in the case occurred early in the claimant's stress related absence after 3 September. Ms Burgess removed her from the Whatsapp group. She told us that as the claimant's absence was stress-related, and as she was told that the stress was work-related, Ms Burgess took the decision that the claimant might be upset by messages from and about work, and removed her. She did not consult the claimant before doing

so. At the time, on a date which was not clear, Ms Burgess texted the claimant to explain the position (156):

> "I just wanted to say, the only reason I removed you from the group was so you didn't get bombarded with messages while you're not well. No other reason. You will be added once you're back to work and all is well. Q [Identified as another black worker by the claimant] got removed as he has left. Talk soon x"

71. That was thoughtful, decent language from a caring manager. Ms Burgess made a management judgment call. Many managers are accused of harassing an absent employee if they try to keep in touch; Ms Burgess was here criticised for doing the opposite. While we agree that she might, as a counsel of perfection, have asked the claimant whether she would prefer to be in the group or out of it, we do not fault Ms Burgess for the legitimate exercise of discretion, and we can see nothing whatsoever that might link this event with race.

72. The claimant also alleged that leavers had remained in the Whatsapp group after employment ended. We accept Ms Burgess' denial, because it accorded with managerial daily common sense: leavers had to be removed from the Whatsapp group because some of the information sent to the group was business sensitive, and a former employee could not be permitted to know about eg staffing or security arrangements.

73. We deal with items 1(d), (i) and (j) together. They seemed to us to engage the same issues and sequence of events. We accept the respondents' evidence that from early after she began working, the claimant was unreliable in attendance and punctuality. She began on 20 July; the first recorded conversations about reliability and attendance were on 19 and 21 August (133-135). There is a gap in the records of dealing with this matter between about September 2017 and April 2018, and we refer to our comments above about undermanagement. (We do not take the absence of records as evidence that no issues arose in that period). Between April and July 2018 there were a significant number of conversations between the claimant and Ms Burgess about unreliable attendance.

74. The claimant recorded as an act of discrimination "having lateness recorded on payslips." The claimant's payslips (216-231) were revealing. The bundle appears to contain a complete set, being 15 payslips issued at four / five weekly intervals. The reference to lateness is in fact where the payslips record "absence deduction". It seems to us significant that that deduction appears on 11 out of the 15 payslips, indicating a significant pattern of unexpected absences. We accept the probability that the payslips are electronically generated centrally, and form part of a national system applicable to all employees. It is implausible to suggest that they were altered on grounds of race and we do not agree that they were.

75. The bundle contained a number of notes made by managers of conversations with the claimant. The claimant resented record keeping by Ms Burgess and regarded the fact of maintaining records of conversations as an act of race discrimination. We disagree. It was plainly a standard management tool to create a written record, and was both common place and justified on the information available to Ms Burgess. We can see no evidence whatsoever of race playing any part in either the decision to note conversations, or the content of any conversation which we saw, or the practice of filing the notes with the claimant's record, or of not copying them to the claimant unless asked: the claimant objected to all of these aspects of the record keeping at this hearing.

76. Ms Burgess gave evidence that two white male colleagues, one of them named in the pleading, generally received latitude in relation to attendance and punctuality because of health reasons (which were of course confidential, and not known to the claimant), and in relation to one of them the health reasons were medically certificated. We accept that that is accurate evidence, rendering any issue of comparison between the claimant and either male colleague for discrimination purposes untenable.

77. In due course, Mr Burgess formed the view that in light of the claimant's attendance and unpunctuality, she should be invited to a formal meeting to discuss termination of her employment. We accept that Ms Burgess awaited the claimant's return from one month of certificated sick leave and made the arrangements for the meeting to be held on 19 October. As stated above, the claimant was due to begin shift at 1pm that day, and the meeting was to be held during the shift. She signed in at 12.49pm and then went to collect an item ordered online from another store, returning to her workplace a minute or two after 1pm. We refer to our findings and comments above about the exchange which then took place.

78. At the start of their meeting, the claimant named a colleague or colleagues whom she wished to have as her companion. Ms Burgess declined to release the named companion from shop floor duties and proceeded in the absence of the companion, a matter which we deal with below. The meeting proceeded and we accept that the note is a broadly accurate summary. Ms Burgess informed the claimant that she was dismissed, asked for her store card and other company property to be returned, and accompanied her out of the staff area of the store into the public area.

79. We deal with the latter point first. The claimant asserted that each of being escorted and asked to return her discount card was an act of discrimination. We find that the reason the claimant was escorted was that at the moment of dismissal she was in an area of the premises which was reserved to employees, but having been dismissed she had ceased to be an employee. Procedure therefore required that as the claimant was now a member of the public, she could not be in that area unaccompanied, and should be escorted back to the public area. We accept that that is a general protocol wholly

unrelated to race. The claimant's comparison with voluntary leavers could not be sustained: they remained employees until the end of their last shift, and therefore were permitted access to the staff area until the end of their last working day of employment.

80. We accept the logic and practice of Ms Burgess' evidence that the claimant ceased to be entitled to her store card as soon as she was dismissed (40) and was asked to return it. We have mentioned above that the claimant was mistaken in her belief that a colleague's account records showed that she had been allowed to use her store card after dismissal.

81. We find that the reason for the claimant's dismissal was accurately set out in the dismissal letter of 22 October (190) namely, "unsatisfactory levels of lateness." We accept that that was the genuine belief of Ms Burgess and it was based on the reasonable evidence of her own observation, along with the series of records of discussions with the claimant. We accept that the claimant was put on warning of the discussion and its possible consequences; but that she did not have the opportunity of a companion. She was also subsequently denied the right of appeal (see below).

82. We can see no basis whatsoever for the assertion that a white employee in materially identical circumstances would have retained her employment. The assertion that the claimant was dismissed on grounds of race is a mere assertion and the burden of proof does not shift; if it did, we would find that the respondent has made good its reasons for dismissal and that race played no part in her dismissal whatsoever.

83. The final allegation was emotive. On 22 December 2018 the company sent the claimant an exclusion order, barring her from entry to any store within the First Respondent's group, and offering her a right of appeal against the exclusion, which the claimant did not exercise. The claimant asserted that she had been excluded from the store because she was black. Ms Burgess asserted that she had been excluded because of rude and aggressive behaviour in the store between dismissal and the date of exclusion.

84. The evidence which was produced in the course of this hearing was that on Monday 3rd December Ms Burgess had logged an incident with the respondents' systems alleged to have taken place the previous Friday in the following language:

> "A former employee who had her contract terminated has visited the store on Friday. Every time she visits the store she is very abusive towards staff. This is the third time the store is reporting the offender's abusive language and will look in to issuing a banning notice. The offender is just aggressive towards staff and swears too.… She points towards [Ms Burgess] and shouts "There's the bitch who sacked me she's racist." Refers to other members of staff as "bitches." The store has CCTV."

85. As the claimant correctly pointed out, there was no evidence of the first two alleged reports. There was no evidence of the actual complaint from any identified member of staff. There was no evidence of the CCTV footage having been retained. (We note that even if the claimant had appealed, there was no guarantee that the CCTV footage could have been produced, allowing for timing and override timing). The claimant's case was starkly that the contents of this document were untrue. We noted that after receipt, it was forwarded on 3 December by Mr / Ms Din to approximately 30 recipients with Arcadia Group email accounts as a logged incident.

86. Ms Burgess' evidence was that she was responsible for the log and its contents, and that she was responsible for asking for the exclusion order procedure to be followed. She said that she triggered that procedure about 10 times a year and had done so about 50 times during her career. She said that she had done so many times to white people.

87. We attach considerable weight to the language of the report of 3 December. If it were untrue, Ms Burgess, after 22 years of employment, placed her career on the line. She referred to the incident being visible to many colleagues, and to the availability of CCTV. She must therefore have known, when writing the report, that enquiry might be made of the colleagues and that CCTV might be retained (the report gave a precise date and time). She must have known that if the allegation were fabricated, and could not be verified, the consequences for her would be very severe. It seemed to us wholly improbable that Ms Burgess would have fabricated such a serious report, particularly making specific factual points which could easily be verified. We therefore accept that there was an evidential basis for her report, despite the absence of any record of any earlier incident.

88. We accept that the log report, and the exclusion order, were issued because Ms Burgess had reasonable belief that each was true and accurate. It follows that we do not accept that the exclusion order has been shown to have been issued on grounds of the claimant's race or that race played any part whatsoever in the decision to do so.

89. We have made this finding on the understanding that a claim of direct refusal of service by a store on grounds of race is a matter to be litigated in the County Court. Although there was no pleading of victimisation, it seemed to us right, given the employment nexus which preceded the exclusion, to make the decision on the pleaded allegation. We would have made precisely the same finding if the claim were brought as one of victimisation, although we do not express any view in this judgment as to whether the words attributed to the claimant in the report of 3 December constituted a protected act.

Discussion: uplift

90. The claimant made an application for uplift on her award. Section 207A of TULRCA 1992 provides as follows:

> "If in the case of proceedings, it appears to the employment tribunal that
>
> (a) The claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies
>
> (b) The employer has failed to comply with the Code in relation to that mater and
>
> (c) That failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so increase any award it makes to the employee by no more than 25 percent."

91. Section 207A(3) contains a parallel provision for unreasonable failure on the part of an employee leading to a reduction in awards.

92. The Acas Code of Practice on Disciplinary and Grievance procedures (2015) is expressed in general terms and uses language which is aspirational as to standard of behaviour. Paragraph 13 of the Code provides that:

> "Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in disciplinary action."

93. Paragraph 15 deals with what is a "reasonable request" to be accompanied. It states:

> "A request to be accompanied does not have to be in writing or within a certain timeframe. However, a worker should provide enough time for the employer to deal with the companion's attendance at the meeting…. If a worker's chosen companion will not be available…. The employer must postpone the hearing."

94. Paragraph 26 provides that an employee should have a right of appeal against a disciplinary sanction.

95. We accept first that we have jurisdiction under s.207A. The claim before us concerned a matter, ie a disciplinary process, to which a relevant Code of Practice applied. We make an award to which uplift can apply. We now turn to find whether there has been a failure to comply and whether it was unreasonable.

96. The complaint is based on two matters. In the invitation letter of 15 October (181) Ms Burgess, using template wording provided from HR, wrote:

> "You have the right to be accompanied at this meeting by a work colleague of your choice or a Trade Union Representative."

97. The evidence was that the claimant named a companion or companions at the start of the meeting of 19 October but they were both working on the floor,

and Ms Burgess declined to release them from duties. She made the point that the claimant had not notified her in advance of who her companion would be, and therefore she had not had time to arrange cover. We make two findings. First, the letter of 15 October did not require the claimant to give advance notification of the choice of companion. Secondly, it was the respondent's duty, when the chosen companion was not available, to adjourn the meeting to make the necessary arrangements. We find that the respondent failed to adhere to the appropriate requirement of the Code, and that to the extent that the failure was based on poor advice from the central HR function of a large corporation, it was unreasonable.

98. Secondly, the claimant's dismissal letter made no reference to a right of appeal. On 31 October the claimant wrote to say (191):

> "I wish to appeal your decision to dismiss me even though you told me I could not appeal".

99. On 7 November Ms Clarke, Group ER Advisor, wrote the following:

> "As you were informed in your contract of discussion meeting, we would not normally hear an appeal in these circumstances however, in exceptional cases we would review the decision to terminate on the below points:
>
> - New information/evidence that was not available during the disciplinary hearing.
>
> - Outcome was disproportionately harsh or inconsistent with the type of misconduct.
>
> Based on the information provided the decision to terminate your contract still stands."

100. It is difficult to reconcile that letter with the language of the claimant's letter of appeal to which it purports to reply. The claimant wrote "I believe I have been treated unfairly", even though she did not use the words harshly or inconsistently. We find that the respondent denied the claimant the right to appeal, and that the denial constituted a second breach of the Code. The failure is particularly difficult to understand in a case where the claimant was unaccompanied at her dismissal meeting. In light of the resource and advice available to the respondent, and to the fact that the breach appears to have been authorised by its HR function, we find that the second failure to abide by the Code was unreasonable.

101. The claimant in submission raised a number of other points which she submitted were breaches of the Code of Practice, including making the unannounced welfare telephone call to her on 20 September, failing to provide her with copies of the notes of that meeting, and in her letter of appeal failing to allow her mother to accompany her to the disciplinary meeting. None of those points succeeds.

102. This was a very large well resourced organisation, which in breach of the ACAS Code, and with HR support, denied the claimant two of the fundamentals of fair process. We therefore set the uplift at the maximum level open to the tribunal.

103. In closing, and without visible enthusiasm, Mr Santy invited us to reduce the judgment sums under s.207A(3) on the basis that the claimant had failed to submit a grievance in relation to any of the matters complained of. We agree that the claimant did not submit a grievance. We do not find her failure unreasonable. Clearly, she could not have submitted a grievance about holiday pay or notice pay before the failure to pay, which arose after dismissal and after the peremptory denial of her right of appeal. We accept that the claimant could be criticised for a failure to present a grievance about any of her concerns of racial discrimination, but in the exercise of discretion, having regard to the circumstances as a whole, it does not seem to us that that is a matter in which she should be penalised by reduction.

Identity of respondents

104. The bundle contained the claimant's terms and conditions of employment and offer letter (131, 132). We accept that the other party to the claimant's contract of employment was the second respondent. That being so, the consent awards and any award of uplift are made against it only.

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Employment Judge R Lewis

Date: 24/11/2020

Sent to the parties on: 27/11/2020

For the Tribunal Office