



EMPLOYMENT TRIBUNALS

Claimant: Mr M Sharafudin

Respondent: Ottoman Textiles Limited

Heard at: Manchester (in public; by CVP)

On: 24 to 27 May 2021 and
10 Sept in Chambers

Before: Employment Judge Grundy
Mrs A Eyre
Ms C Gallagher

Representatives

For the Claimant: Mr R Sharafudin (lay representative and son of the claimant)

For the Respondent: Mrs C Dean (lay representative and internal accountant of the Respondent)

RESERVED JUDGMENT

- (1) The claimant's claim in respect of damages for breach of contract- wrongful dismissal succeeds.
- (2) The claimant's claim in respect of unfair dismissal succeeds however the claimant would have been fairly dismissed by 10 December 2019 if a fair procedure had been followed by the respondent.
- (3) The claimant's claim in respect of direct discrimination because of race contrary to s13 and s39 Equality Act 2010 is not well founded and is dismissed.
- (4) The claimant's claim in respect of direct discrimination because of religion contrary to s13 and s39 Equality Act 2010 is not well founded and is dismissed.
- (5) The claimant's claim in respect of failure to provide employment particulars pursuant to s38 Employment Act 2002 succeeds.

CASE MANAGEMENT ORDER

- (6) The parties shall file and serve on the Tribunal, and the other side by 4 October 2021 a document setting out the amount of the award they say the Tribunal should make in respect of:-
 - a) the award in respect of 12 weeks notice, (and any deductions if any)

- b) the amount of the basic award in respect of unfair dismissal
 - c) the amount payable in respect of a weeks pay and whether 2 or 4 weeks pay should be awarded pursuant to s38(3) and (4) of Employment Act 2002.
- (7) The remedy hearing shall remain listed to determine the issues above on 11 October 2021 by remote hearing by CVP unless both parties reach agreement on remedy and inform the Tribunal accordingly.
- (8) The parties must agree a bundle of documents for the remedy hearing and supply the Tribunal with an electronic copy by 7 October 2021 if the matters remain in dispute.

REASONS

1. These are the claimant's claims arising on the conclusion of his employment with the Respondent. At a telephone case management hearing before EJ Horne on 20 April 2020 case management orders were made and there was a failed judicial mediation in September 2020. Both parties have had lay representation and the claimant's first language is Dari, which has required the services of an interpreter for clarification of technical matters at times rather than continuous translation/ interpretation. Mr Abu Mazen the claimant's witness required an Arabic interpreter. The hearing has taken place over CVP and this has also had its challenges at times within the technical aspects. There were " bundle" issues at the outset, which were resolved and over 4 days the Tribunal has managed to hear all the oral evidence and closing comments and to reach some preliminary conclusions. The Tribunal set aside a further day in Chambers to finalise its deliberations as there was not enough time to finalise all matters after nearly 4 days of evidence from the lay parties who were not legally represented.

Brief history as amended from that set out in the case management order of Judge Horne

2. The respondent is a small family business. Mr Mevlut Kaygusuz is the managing director. His sister, Ms Hava Kaygusuz, works as a manager and is responsible for the warehouse. The claimant is a Muslim of Afghan origin and has lived in the United Kingdom since 2003. Not long after his arrival he started working in the respondent's warehouse. It is his case that Ms Kaygusuz bullied him throughout his employment. She asserts she has helped the claimant and his family. On 1 October 2019 he asked Ms Kaygusuz to change his working days. His case is that she agreed to the change provided that he gave two weeks' notice.
3. On 24 October 2019 there was a conversation between the claimant and Mr Kaygusuz. He contends that, during that conversation, Mr Kaygusuz told him that unless he was prepared to work Wednesdays and Thursdays, "I don't need you – don't come to work" and he says he said words to the effect of "sticking his favours up his arse." He argues that these words had the effect of

terminating his employment. The claimant submitted a grievance and an appeal against what he thought was his dismissal.

4. The respondent found his grievance to be unsubstantiated. According to the respondent, he remained an employee until he was dismissed, by letter, dated 10 December 2019. The letter informed him that he was dismissed for "continued unauthorised absence." The claimant had not attended in circumstances he asserts he believes he had been dismissed.

Complaints and issues

5. The Tribunal spent some time at the outset of this liability hearing in discussion with the parties to understand and refine the previous issues identified at the Case Management hearing on 20 April 2020.

In respect of the disability discrimination claim of the claimant, the Judge had issued a strike out warning however the claimant had served further medical records since that time and initially intimated that he wished to pursue such a claim.

In the light of the facts:-

- (a) the claimant wished potentially to rely on 3 aspects- pertaining to mental impairment and physical impairment
- (b) no further case management of these issues had been sought and
- (c) the matters outstanding if they were to be litigated further would lead to an adjournment of this final hearing, the claimant agreed that he would withdraw the claims relating to disability discrimination. There is a judgment issued dealing with the dismissal of that claim issued with this judgment. The claimant did want to claim compensation for the effect of the other discrimination on his health, if those claims had succeeded.

The Tribunal was conscious that neither the claimant nor the respondent, were legally represented throughout the hearing but both sides explicitly agreed to the above course and the withdrawal judgment should be read alongside this one.

LIST OF ISSUES as on 24 MAY 2021

Refined from the Case management summary at the commencement of the full merits hearing.

6. List of claims identified by Employment Judge Horne at paragraph 20 of the CMS

"Complaints and Issues

At 20. By a claim form presented on 21 January 2020, the claimant raised the following complaints:

20.1. unfair dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA");

20.2. a claim for damages for breach of contract (wrongful dismissal);

20.3. direct discrimination because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA"); and

20.4. direct discrimination because of religion, contrary to sections 13 and 39 of Equality Act 2010;

21. In the claim form the claimant also ticked a box to indicate that he was complaining of disability discrimination."

Further the claimant in the claim form also made a claim in respect of failure to provide his terms and conditions of employment under section 38 Employment Act 2002.

After further discussion today regarding any claim in respect of disability discrimination, the claimant agreed to withdraw that complaint and for it to be dismissed as set out above.

7. UNFAIR DISMISSAL

Issues

1. Was the claimant dismissed in the conversation on 24 October 2019 or by letter dated 10 December 2019?

2. In either case, can the respondent prove that the sole or principal reason for dismissal was the claimant's continued unauthorised absence and breach of his contract of employment? (If so, that was a reason that related to the claimant's conduct.)

3. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

4. If the dismissal is found to be unfair, the respondent will argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event. The parties agreed that this issue should be determined at the same time as the fairness or otherwise of the dismissal.

5. The respondent does not argue contributory conduct by the claimant.

8. WRONGFUL DISMISSAL

The claimant was dismissed without notice. The issue is:

Did the claimant commit an act of gross misconduct before he was dismissed? (If so, the respondent would have been entitled to dismiss him without notice. If not, he would have been entitled to 12 weeks' notice.)

9. FAILURE TO PROVIDE WRITTEN TERMS AND CONDITIONS OF EMPLOYMENT

Did the Respondent provide the claimant with written particulars of employment (on commencement of employment)?

10. DIRECT RACE / RELIGION DISCRIMINATION

Time limit issue

For anything that is alleged to have been done before 7 October 2019, the tribunal will need to ask itself the following question:

1. Was the alleged discrimination part of a continuing state of affairs that ended on or after 7 October 2019?

2.If not, would it be just and equitable to extend the time limit?

Substantive issues - Direct discrimination

(1). Was the claimant treated in the way he alleges?

The only person who is alleged to have discriminated against the claimant is Ms Hava Kaygusuz. It is the claimant's case that she was motivated either by his Afghan origin or his Muslim religion. He alleges-

1. On at least 10 occasions from 2007 to the end of the claimant's employment, Ms Kaygusuz followed the claimant around the warehouse and asked him why he had spent so long in the toilet.

2. One time during the winter of 2015, Ms Kaygusuz forced the claimant to remove and preserve some sticky shrink-wrap from some plastic pallets that had been returned from Ireland.

3. In August 2016 Ms Kaygusuz accused the claimant of deleting a message asking him to come in to work. She threatened that he would be sacked next time.

4. In 2018, Ms Kaygusuz regularly mocked the claimant, saying that they were not in Afghanistan, that he would have to respect women and that they could tell him what to do.

5. On 18 September 2018 Ms Kaygusuz refused the claimant time off for an appointment. (The claimant says that this happened on numerous occasions, but he is content for the tribunal to concentrate on this particular occasion only.)

6. In July 2019, Ms Kaygusuz told the claimant to unload a van. The van driver was Muslim and he and the claimant would greet each other by saying, "Salaam". Ms Kaygusuz was suspicious of them and accused them of overloading the van.

7. During the summer of 2019, when the claimant arrived for work, Ms Kaygusuz would send the claimant away, saying that there were already too many people. She would deny having asked him to come to work.

8. In September 2019, Ms Kaygusuz accused the claimant of not listening to her. In fact, the claimant was hard of hearing and could not hear her well. He was treated like this on many other occasions, but the tribunal will concentrate on September 2019.

(2.) If so, what was the reason why he was treated in that way? Was it because he is of Afghan origin? Was it because he is of Muslim faith?

EVIDENCE AND WITNESSES

11. The Tribunal was provided with an original bundle of documents collated by the respondent in several parts. The Tribunal had a copy of the written transcript and oral recording of a 26 minute disciplinary meeting which took place on 9 December 2019 which had been recorded by both parties. To save time and argument and to try to proportionately use the time available the Tribunal listened to the recording in the hearing.

12. During the course of the hearing as some of the evidence referred to the premises and what could be witnessed at what distance to avoid confusion as to the site of the respondent's premises and the fencing present, the respondent provided photographs which gave the Tribunal a clearer picture of the venue of alleged events.
13. It is accepted that the photographs covered the following locations-
 1. This shows Unit 5 shutter door on left and Ottoman fire exit to the left of it. The large building in the far right is Ottoman Textiles Ltd (unit 4)
 2. This shows the shutter door of Unit 5 in the middle and Ottoman fire exit to left.
 3. This is a street view from Unit 4
 4. This is Ottoman's loading bay
 5. This is taken from outside unit 5 and shows Ottoman side view of loading bay
 6. Side view of Ottoman loading bay from the shared car park.
 7. This shows unit 4 and 5 from the middle of Alexandra Road
 8. This shows said fence referred to in evidence yesterday
 9. This shows Ottoman entrance with unit 5 to the left
14. At the conclusion of the evidence the respondent also forwarded to the Tribunal the Environmental Policy statement, the Health and Safety Policy statement, and the Ethical Trading Policy.
15. The tribunal set out a template at the outset of the hearing for the evidence to be completed within the time allocated if possible to assist the parties as they were in person and interpreters were used for the claimant and his witness.
16. The Tribunal heard oral evidence from the following witnesses on the claimant's behalf: the claimant himself Mr Mohammad Sharafudin through interpretation of Dari, by Mr H Herydari professional interpreter. From the claimant's witness Mr Abu Mazeem through interpretation of Arabic modern standard by Mr Hamid Muller professional interpreter. (Unfortunately his evidence had to be interrupted by attendance at a pre-existing medical appointment so was carried over 2 days.)
17. The claimant also sought to rely on the written statement of Mr Momen Sharafudin although little weight could be attached to this evidence as he was not able to be called, and he is the claimant's son and was not employed by the respondent, and did not address a relevant issue- concentrating on an event alleged in 2017 which was not one of the 1-8 allegations set out above. The Tribunal ruled that this evidence should not be admitted having read the statement.
18. There was also an issue raised about a man named Mr Ayub Moradi being called, who was of Afghan Muslim origin previously employed by the respondent, but he was said to be unwilling to be a witness by both sides so the Tribunal did not consider it proportionate to take that matter further. There was a witness statement from him, which was supportive to the respondent on the discrimination aspect,(which was in writing at page 105) but the Tribunal did not place any weight on this evidence as it was

challenged by the claimant.

19. The respondent called Mr Michael Pritchard who is not and never has been an employee of the respondent but had a garage business in adjoining premises until March 2019, but he gave helpful evidence - his evidence had to be taken out of turn but all parties agreed this course.
20. Ms Hava Kaygusuz- manager and joint director with Mr Mevlut Kaygusuz- who was the managing director were also called and Mrs Carolyn Dean - company accountant. The respondent also relied on the written statements of Jan Gabor and Laddawan Doherty and " Mr Haider" which the claimant confirmed were not the subject of challenge.
21. The claimant giving evidence through the interpreter certainly believes in the veracity of his own position. It became apparent through the evidence that he has a hearing/auditory issue which the Tribunal considered may have meant that at times he had not fully understood what was being asked of him at work (especially given the language barrier also) but he had not made known his hearing difficulty as he did not disclose this to the respondent. He very much thinks he is wronged and in the transcript of the "disciplinary" comes over as dogmatic. He appeared to have strong views on some political issues and felt able to voice them and could at times be confrontational.
22. Mr Abu Mazeem's evidence was hard to follow and did not add very much and he seemed to want to malign the respondent. This evidence was affected by his issues with the respondent rather than the claimant's, him having left the respondent's employment due to ill health in September 2019.
23. Mr Michael Pritchard seemed a credible and straightforward witness who gave clear evidence about what he had witnessed of the interaction between the claimant and Hava Kaygusuz on one specific occasion and generally.
24. The Tribunal found Hava Kaygusuz was a work focussed, determined woman who gave evidence honestly when she said she did not think the claimant thought she was a " true Muslim" because she had not been married. We accepted that this did not affect the way she treated him. She was proud of the company and had a professional approach to her role. She was overall an impressive witness.
25. Mrs Carolyn Dean appeared to be very dedicated, loyal, financial accountant for the business who lived close by and was very aligned to her role and the business. As the respondent's lay representative in the hearing, it seemed her role was more extensive than solely financial. From her evidence she demonstrated a cool head with the claimant in the grievance meeting. She was very professional and her approach was balanced. The Tribunal also has the benefit of having heard the audio

transcript of her direct dealings with the claimant.

26. Mr Melvet Kaygusuz made plain his frustration and at times anger with the claimant. It was clear he felt affronted and badly wronged by the claimant whom he had helped out over the years over and above his employment.
27. At conclusion of the hearing all parties were informed the Tribunal required a deliberation day which was set aside for 10 September and the parties were content despite the unfortunate delay and Mr Sharafudin junior representing the claimant thanked the Tribunal for having conducted a fair hearing, Mrs Dean also offered her thanks.

FINDINGS OF FACT

The Tribunal has set out in the previous paragraph dealing with evidence the background in relation to its view of the evidence of the witnesses and will now set out the chronology of its findings of fact in relation to the claimant's employment and key events in issue. The Tribunal has not found it necessary to determine every issue of fact that has been put before it but those issues upon which it is necessary to determine in order to reach conclusions as to the claimant's claims.

28. The Respondent's workplace is a diverse environment with many creeds and races employed. By example, the respondent submitted witness statements from individuals who were Czech and Thai. The directors themselves who are of Turkish origin celebrate this diversity. Ms Kaygusuz cited in oral evidence an international workforce from Polish to Chinese, Maori (from New Zealand) to Syrian workers being employed.
29. The claimant was employed as a forklift truck/ warehouse operative from 2003 having been referred for the job by the National Asylum Support Service. The claimant worked full time at first but from 2009 went part time because of family issues. The claimant had not been disciplined for issues of conduct/ misconduct although there was reference to a discussion in 2017 regarding unauthorised absence.
30. The respondent manufactures and supplies soft furnishings to retail clients and because of its commercial relationships is required to operate ethically in order to meet some of those contractual relationships. It has deadlines and orders to meet as any business of this type. The business has been operating since 1986 and usually has 10-15 workers on the factory floor at any one time.
31. The claimant asserted that the Managing Director was dictatorial and that he the claimant, was ordered around by Ms Hava Kaygusuz who was the operations manager. Management in any business within a warehouse setting would no doubt have to be directive about the business operation. The claimant had not brought any grievances until 2019.

32. Mrs Dean the company accountant has a hands-on role in financial matters and a human resources role in the company and was relied upon by Mr Kaygusuz to deal with employee issues. She was clearly efficient and effective in seeking resolution of issues on the ground.
33. The Tribunal found that Mr Mazeem wished to air his own grievance with the respondent about leaving for ill health reasons and whether his days of work should be changed. He accepted that Mrs Dean was available but he had not made any complaint about hours/ days being reduced or changed to her.
34. The claimant's alleged ill-treatment throughout his employment at the hands of Ms Kaygusuz did not take place. The claimant accepted he had not worn his hearing aid at work but only wore it at home. There is a note of alleged memory loss in his medical report provided.
35. Ms Hava Kaygusuz was generous to the claimant having assisted with furniture when he first came to the UK as did Mr Kaygusuz who had also invited the claimant to his home, where he had done some odd jobs for him. Mr Kaygusuz passed on unwanted items to the claimant to assist him in difficult circumstances when he first came to the UK and when his family arrived.
36. As regards the specific incidences relied upon as allegations of race or religious discrimination: regarding Ms Kaygusuz following the claimant around the warehouse and asking him why he had spent so long in the toilet, he asserts on at least 10 occasions from 2007 to the end of the claimant's employment, (no more than once or twice a year in the period) this did not occur however she did enter the men's toilet on one occasion having shouted and not been heard when Mr Sharafuddin had been in there, because a truck driver had told her there was no toilet paper and she sought to rectify the problem. There was no "following the claimant round" and no "asking him why he spent so long in the toilet."
37. There was an episode regarding "sticky shrink wrap" when the claimant claims during the winter of 2015, Ms Kaygusuz forced him to remove some sticky shrink-wrap from some plastic pallets that had been returned from Ireland which did not occur in the way alleged. This would not be a task that would have any value for the respondent "to preserve the shrinkwrap". The claimant agrees that task in itself would not have value. He was not asked to reuse the shrinkwrap but was asked to put the pallets back on the shelf. Ms Kaygusuz believes the claimant may have misheard her asking about the pallets, if he harbours some ill - feeling for a task she was not asking him to complete.
38. In August 2016 the claimant asserts Mrs Kaygusuz accused the claimant of deleting a message asking him to come in to work and threatened that he would be sacked next time. It is accepted that in 2016 there was a discussion about "reading" text messages and following the instructions sent in the circumstances where the text message was about coming in to

- work and Ms Kaygusuz saw a " read" receipt on the message but the claimant did not come on the day requested but the next day. There was no threat to dismiss indeed the claimant's employment continued for 3 more years, and the Tribunal so finds.
39. It was put forward that in 2018, Ms Kaygusuz regularly mocked the claimant, saying that they were not in Afghanistan, that he would have to respect women and that they could tell him what to do. The Tribunal rejects and does not make such a finding.
 40. On a particular occasion in 2018 when there was an incident, the Tribunal accepted the evidence of Mr Michael Pritchard on the facts of incident. He confirmed he rented the garage unit next door but left in early 2019 so was witness to this incident in 2018. From his evidence we find he could see and hear sufficiently and indeed having heard two people (Ms Kaygusuz and the claimant) in an argument and shouting; he went out to find that Ms Kaygusuz was upset and the claimant said "he was not taking orders off women." He thought the claimant was being aggressive and we accept his evidence that he, "confronted Mr S" telling him it was "not nice to speak to women like that". He explained he thought Ms Kaygusuz was being " overspoken" by the claimant and we accept that evidence. He had no axe to grind and no reason to benefit from giving evidence.
 41. We find Ms Kaygusuz was upset by the claimant and she interpreted the claimant's behaviour that she should "be quiet to him", for cultural reasons, but she was trying to explain, "In England you have to listen to women and respect them." He was shouting and screaming and pointing at her. She gave honest evidence when she said, " I did lose it with him a bit and told him how inappropriate it was for him to express his opinions to me." She believes the claimant "has issues about her being single" (given her age and Muslim religion and culture on the claimant's part).
 42. The Tribunal does not find on 18 September 2018 Ms Kaygusuz refused the claimant time off for an appointment. Ms Kaygusuz has a knowledge of the claimant's family circumstances, - 5 sons and 1 daughter, whom she has met and she was well aware that the daughter has had some health issues such that she was well disposed to the claimant where this was concerned. She denied refusing time off and she made sure he could go to family health appointments and Tribunal accepts this.
 43. The allegation that in July 2019, Ms Kaygusuz told the claimant to unload a van. The van driver was Muslim and he and the claimant would greet each other by saying, "Salaam" and that Ms Kaygusuz was suspicious of them and accused them of overloading the van is not found by the Tribunal.
 44. The Tribunal accepted Ms Kaygusuz evidence that she made a reasonable management request to recount the load as there was a query on the product count between 20 or 21. She explained and we accepted that " Haider" who was a customer and a Muslim had no issue with the

recount. The Tribunal does not accept Ms Kaygusuz was suspicious of Haider and the claimant. In fact Ms Kaygusuz was amenable and trusting of Haider and explained he had on occasion requested and been granted a place for prayer on the Respondent's premises.

45. During the summer of 2019, the Tribunal accepted the respondent's order book was quiet on the soft furnishings side and all employees' hours were reduced. It is not accepted that when the claimant arrived for work, Ms Kaygusuz would send the claimant away, saying that there were already too many people. She accepted he was angry when he turned up on a day she had texted him and seen a "read receipt" and the message was "not to come." There were no text messages produced to the Tribunal but we accepted the oral evidence of Ms Kaygusuz on this issue.
46. In September 2019, Ms Kaygusuz accused the claimant of not listening to her. In fact, the claimant was hard of hearing and could not hear her well. Ms Kaygusuz had not been informed, by the claimant of this issue, and she explicitly said and we accept her evidence that " for 16 years I did not know he was deaf". He confirmed when cross- examined by Mrs Dean he did not and had never worn a hearing aid at work.
47. There was a contretemps over an order for Spain when the claimant did not listen and said he was going to go, the claimant was angry and in a rage, Ms Kaygusuz walked away as she wanted him to calm down. The claimant accused Ms Kaygusuz of controlling him, she said to the claimant "you have to do the order its the order that pays your wages." Ms Kaygusuz was giving the claimant a reasonable management instruction.
48. From October 2019 the claimant wanted to change his working days to do 2 working days on Monday and Tuesday but the respondent wanted the claimant to work on Wednesdays and Thursdays. Ms Kaygusuz had told him she could not accommodate him working Monday and Tuesday and he would have to see the M.D. about this.
49. He wanted to work on Monday and Tuesday but they were not convenient for the respondent's business needs and Ms Kaygusuz tried to change the shifts of others to accommodate the claimant but this was not possible to allow him to work Mondays and Tuesdays.
50. Ms Kaygusuz made clear she was not accommodating the request to change the working days, although the claimant did work on 21 and 22 October which were a Monday and Tuesday on which days the respondent was coincidentally short of staff and it was agreed there was work available for the claimant on these days. Ms Kaygusuz's evidence was most of time she had resolved issues with the claimant, but the claimant wasn't prepared to listen on this occasion and she expressed she couldn't reason with him and she suggested he needed to speak to the MD about the days of work going forwards.

51. At the end of that week there was a telephone call between the claimant and the MD in which the accounts differ of what was said- we find there was no agreement, and there was impasse about the working days and after a heated exchange, in the context of 16/17 years of employment and the claimant being immovable we find on a balance of probabilities the MD did say words alleged by the claimant, "he told me not to come" and " stick the favours up your arse" which the claimant interpreted as a dismissal.
52. On 25 October 2019 the respondent sent a letter (at page 57) to the claimant to confirm that he could reduce days but he was needed on Wednesday and Thursday. The claimant did not return and the respondent then wrote letters on 1 November 2019 and 8 November 2019 asserting unauthorised absence by the claimant.
53. Carolyn Dean found a letter from the claimant on 8 November which was on the MD's desk at 3.30pm The claimant wrote that letter at page 60 which is undated. In the letter he asserted the phrases above were used and he considered himself dismissed. The claimant did not attend any work shifts thereafter.
54. On 11 November 2019 the letter was acknowledged by Carolyn Dean, at page 61 and a grievance meeting was convened by the respondent with her and the claimant present.
55. On 18. November 2019 a grievance meeting took place, the minutes are at page 62. Mrs Dean had invited comments on the notes in page 62- 64 and the claimant had again asserted the words spoken by the MD.
56. The letter regarding the outcome of the grievance was sent on 19 November 2019 at page 69. The claimant sought to appeal against the dismissal but the respondent denied there had been a dismissal and rescheduled the disciplinary meeting, which was ultimately held on 9 December 2019.
57. The claimant applied for early conciliation on 20 November 2019.
58. There is a transcript of the meeting attended by the claimant on 9 December 2019 framed as a disciplinary hearing arising from continued unauthorised absence as the respondent viewed it. Mrs Dean was calm and was asserting that there had been no dismissal. The claimant was very forceful about repeating his points. On any view the claimant asserted he had considered himself dismissed. He mentioned a Tribunal during the meeting and he asserted, " I know you are doing your way lawful, but he is the boss. He is controlling the company, he is owner. And he phoned you no come, that's it. You legal way because of legal matter."
59. The respondent sent a letter of dismissal on 10 December 2019 page 77 asserting dismissal for continued unauthorised absence. The respondent held an appeal in writing on 16 December 2019 at page 78.

60. There was a contract of employment for the claimant dated 5 October 2009 at page 88 of the bundle, which the claimant denied receiving. We accept Mrs Dean would have ensured the claimant had it during her tenure given her efficiency. She was employed after 2003 by the respondent.
61. At no time was the respondent able to produce to the Tribunal the original contract of employment prepared for the claimant when he commenced employment in 2003 and so the Tribunal is not satisfied on a balance of probabilities that it was supplied to the claimant.

THE LAW

UNFAIR DISMISSAL

62. The Tribunal has to determine on a balance of probabilities the burden of proof being on the employer, the reason for the claimant's dismissal and when the dismissal occurred. The Tribunal considered section 98(1) and (2) Employment Rights Act 1996 in that the Respondent asserted a reason relating to conduct.
63. Whether there was a fair or unfair dismissal requires consideration of s98(4) ERA 1996 in particular,

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

64. The respondent raised a " Polkey" argument in that even if there were procedural faults in the dismissal process, the claimant would have been dismissed in any event for his continued unauthorised absence and refusal to work and therefore should not receive any award.

WRONGFUL DISMISSAL

Damages in respect of breach of contract arising from Wrongful dismissal

65. As regards wrongful dismissal, we considered Article 3, Extension of Jurisdiction (England & Wales) Order 1994, which is the Employment Tribunal's jurisdiction to hear contract claims.
66. The tribunal must consider whether the conduct of the employee was, on the balance of probabilities, so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summary terminate the contract, Laws v London Chronicle (Indicator Newspapers)

Ltd [1959] 1WLR 698, CA; and Briscoe v Lubrizol Ltd [2002] IRLR 607, CA.

67. Was the respondent entitled to dismiss the claimant without notice because the claimant had committed an act of gross misconduct? It was not in dispute that the claimant was dismissed without notice and his notice entitlement was 12 weeks.
68. The respondent says the claimant has committed gross misconduct by continued unauthorised absence. They say the claimant breached the duty of trust and confidence. The respondent claims that for these reasons it was entitled to dismiss the claimant summarily. The claimant denies all the allegations made against him by the respondent and avers that he did not breach his duties in any way.

SECTION 38 2002 Breach of the right to receive written employment particulars

69. The Tribunal considered whether the Respondent failed to give the Claimant an itemised statement of his particulars of employment as required by s1 of ERA 1996?
70. Is the Claimant entitled to an award under section 38 of EA 2002? This type of claim only succeeds where a claim in Schedule 5 of the Employment Act 2002 is successful. Such claims would include unfair dismissal, discrimination claims and breach of contract. If so should such award be for 2 or 4 weeks pay?

DISCRIMINATION CLAIMS

71. The Tribunal considered the relevant provisions of the Equality Act 2010, in particular section 13 of the Equality Act, subsection 1, which provides:

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

It is clear that the protected characteristics relied upon by the claimant are firstly race in that he is of Afghan origin and secondly he is of the Muslim religion.

72. The Tribunal were obliged to consider whether the treatment of the claimant was “because of” the protected characteristic. The Equality Human Rights Commission Code of Practice states that:

“Whilst a protected characteristic needs to be a cause of the less favourable treatment, it does not need to be the only or even the main cause.”

73. Burden of proof

Section 136 of the Equality Act 2010, provides:

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

(3) But subsection (2) does not apply if A shows that A did not

contravene the provision.

74. If the Claimant can prove a 'prima facie' case of discrimination, then the burden shifts to the Respondent to show that such discrimination did not in fact occur. In the recent Supreme Court case of **Royal Mail Group Limited v Efofi (2019) EWCA Civ 18** it was confirmed that the burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove on the balance of probabilities those matters which he wishes the tribunal to find as facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred.

75. To establish a prima facie case, the Claimant has to show that he was treated less favourably than others were or would have been treated, and in addition to this also needs to show 'something more' which indicates that discrimination may have occurred:

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 the balance of probabilities, the respondent had committed an unlawful act of discrimination.

(Madarassy v Nomura International plc [2007] ICR 867 at [56] per Mummery LJ)

76. The time limits for bringing discrimination claims is set out in section 123 Equality Act 2010. It provides:

proceedings on a complaint within section 120 may not be brought after the end of

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable".

77. If, however, the Claimant can demonstrate that the discrimination suffered over a period of time amounted to a continuing act of discrimination extending over the whole period then the relevant date for s.123 purposes will be the end of that period (s.123(3)(a) Equality Act 2010).

78. The burden is on Claimant to show that there has been a continuing act of discrimination, and in order to prove so he must show that the acts complained of constituted a continuing state of affairs rather than a succession of unconnected or isolated acts (**Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530 (CA)**).

79. When considering whether acts are "so linked as to be continuing acts or to constitute an ongoing state of affairs," one relevant factor will be whether the same or different individuals were involved in the alleged discrimination (**Aziz v FDA [2010] EWCA Civ 304**).

80. Further, in order to constitute part of a continuing act of discrimination an act must actually be discriminatory. Consequently, a non-discriminatory act is not capable of extending a continuing act or the relevant period for section 123 purposes, even if it is in some way connected to a previous discriminatory act (***South Western Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168 (EAT)**).
81. If the claimant is unable to show that there was a continuing act of discrimination extending to within the three-month time limit then he must show that it would be just and equitable to extend that time limit, and that he brought his claim within such further period as was just and equitable. The burden is on the Claimant to show that this extension should apply, and it is the exception, not the rule (***Robertson v Bexley Community Centre, T/As Leisure Link* [2003] IRLR 434 (CA)**). In considering this question, the Tribunal should look at all relevant circumstances, and can be assisted by considering the factors contained in s.33 of the Limitation Act 1980 (see *Robertson*).
82. The Court of Appeal in the case of ***Adedeji v University Hospital Birmingham NHS Foundation Trust* (2021) EWCA Civ 23** held when exercising its discretion to extend time although it has been suggested (in *Keeble*) to consider the list of factors in section 33 of the Limitation Act 1980, the Tribunal is not required to go through such a list. However, the factors almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of and reasons for the delay and (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh).
83. All of the Claimant's allegations are out of time, and many are very significantly out of time. As the Tribunal did not conclude discriminatory conduct there can be no continuing act arising in respect of Ms Kaygusuz's actions.
84. Therefore the Tribunal will only have jurisdiction over any of Claimant's claims if the Claimant can show that he presented his claims within such further period as was just and equitable. As to this aspect:
1. The burden is on Claimant to show that there should be an extension of time and this is the exception rather than the rule (*Robertson*);
 2. It does not appear that Claimant has advanced reasons within his witness statement as to why it would be just and equitable to extend time in relation to the complaints, which he makes, in particular those which appear to be historic but neither did the respondent seek to assert prejudice in presenting its case in 2021.
85. The Tribunal, having heard evidence over 4 days, had a short time on the fourth day for deliberations and so set aside a further day in reconsideration of all of the papers, the notes of evidence taken, the recording heard, the law applicable and the submissions made. The judgment was reserved to

give proper time for that process and judgment. The conclusions reached are as follows;

CONCLUSIONS
DISCRIMINATION

86. The Tribunal rejected the claimant's allegations on the facts he asserted to support direct race or religious discrimination. The findings of fact at paragraphs 34-50 above are read in to the judgment here. There was no discriminatory act therefore the claimant cannot rely on alleged continuous act. In any event there were large gaps in timing within this chronology. Given that the respondent was not actively arguing the Tribunal should exclude those complaints and seemed to be taking a pragmatic stance, in the circumstances that the Tribunal had heard all of the evidence the Tribunal considers it would be just and equitable to allow the complaints of discrimination which are prima facie out of time to be heard.
87. Furthermore it was not asserted by the respondent that they had been placed at litigation disadvantage by not being able to find witnesses due to a delay in the claimant making his claims and in fact they still found and called an independent witness in Mr Pritchard. We consider there is a public interest in making an adjudication on the facts having heard all the evidence in this particular case.
88. Regarding those claims that arise of alleged race and religious discrimination, the Tribunal did not accept the claimant's evidence where it was in conflict with that of Mrs Hava Kasugusuz (paras 34-50 of this judgment.) Her evidence had the ring of truth. She made concessions such as "losing it a bit" (in the face of the claimant's attitude and belligerent demeanour) and whilst there were disagreements she had plainly kept the claimant on board and it was only latterly when he was interested in driving a taxi for a living, that it appeared she was unable to appease him. The Tribunal attached substantial weight to the evidence of Mr Pritchard, which was supportive of the respondent and particularly corroborative of the evidence of Mrs Hava Kasugusuz and Mrs Dean leading the Tribunal to conclude they are also truthful witnesses.
89. The Tribunal was impressed, by the diverse workforce of the respondent, which was a true melting pot of races and religious beliefs. The evidence pointed to a welcoming working environment with good practices and procedures to manage the issues, which can arise where there is a mix of cultures and religious beliefs in a small family run firm.
90. The Tribunal concluded the actions of Mrs Kasgusuz were for operational reasons and applied uniformly without fear or favour and were intended to progress business interests where the business has prospered for a number of years with quality retail customers. If any factual matter could be read as satisfying the first part test of **Madarassey**, which we do not conclude the facts as so doing, we wholly reject that she targeted the claimant due to his Afghani origin and nationality nor his Muslim faith. We bear in mind she is a Muslim of Turkish origin herself and say this for completeness sake.

UNFAIR DISMISSAL

91. It was clear to the Tribunal from the evidence of all of the respondents' witnesses who were involved from October 2019 that the claimant did not want to continue to work in the respondent business on Wednesday and Thursdays. A line in the sand had been reached but the issue had not been resolved. In good faith Mrs Kaygusuz told the claimant to speak to her brother the MD to resolve the issue. Unfortunately there was not an agreement on days and hours.
92. On a balance of probabilities Mr M Kaygusuz was likely to have been annoyed and angry at the immovable attitude of the claimant and taking in to account the charitable way he had shown kindness to the claimant we think it likely his feelings got the better of him and the Tribunal finds he spoke to the claimant in an ill- advised way on 24 October as the claimant alleges. At this stage the issues about days and times of work were still not agreed and the claimant took his words at face value as a dismissal.
93. Despite the respondent concluding the claimant had not been at work thereafter (save for the meetings) and his absence was not authorised, if Mr Kaygusuz spoke to him as we have found he was entitled to treat himself as dismissed. The reason he was "told not to come" was in effect a reason related to conduct - he had not come in on the hours the respondent sought for him to work and he was not going to agree to the days of work being Wednesday and Thursday going forward.
94. The reason for dismissal was a reason related to conduct however as at 24 October 2019 this did not amount to gross misconduct, as only a short time had elapsed of absence and the dispute on attendance /working days was not resolved as between the two. The claimant had worked on Monday 21 and Tuesday 22 October 2019. However there was no authorisation from the respondent for him NOT to be at work on Wednesday and Thursday.
95. The Tribunal determined that it was unreasonable for the respondent to conclude that there was sufficient reason to dismiss at that stage hence we conclude the dismissal was unfair. However the reason for dismissal - continued unauthorised absence and the claimant's refusal to consider flexibility or work Wednesday and Thursday was not capable of resolution.
96. The Tribunal cannot condone the words used by the MD to the claimant in anger on 24 October 2019, however the events would have led to a fair dismissal by the involvement and participation of Mrs Dean by 10 December 2019 and the Tribunal concludes that there can be no compensatory award for on-going losses as the employment would have fairly ended within a few weeks from the end of October and at the latest by 10 December 2019.
97. The Tribunal considers that over these weeks the respondent would have held meetings as in fact it did do and fairly terminated the claimant's employment. It may have been at that stage the continued unauthorised absence had followed warnings and then could have amounted to gross

misconduct but that stage had not been reached on our findings having accepted what Mr Kaygusuz said at the end of October.

98. In those circumstances the claimant would be entitled to a basic award.

WRONGFUL DISMISSAL

99. As stated above at the time of dismissal the claimant had not been guilty of gross misconduct and therefore the respondent is in breach of contract because they have not paid the amount due of 12 weeks contractual notice pay. This is due and owing in the circumstances here save that there may be deductions if the claimant was paid any sums after 24 October for attendance at meetings and the Tribunal has no evidence about this, or if he was paid any sums from 24 October to 10 December 2019.

FAILIURE TO PROVIDE TERMS AND CONDITIONS OF EMPLOYMENT

100. Given the factual findings at paragraphs 60-61 above the claimant was not provided with his terms and conditions and therefore his claim under section 38 succeeds. We take in to account the respondents could provide a 2009 contract which itself is over 10 years old.

101. As the claimant has succeeded in another claim under schedule 5 of the 2002 Act we can make an award of pay in this regard. It is a matter for the Tribunal's discretion as to whether the Tribunal should award 2 or 4 weeks pay for this breach.

102. In the circumstances the Tribunal listed a remedy hearing on 11 October 2021 by CVP and that hearing remains so listed and the parties are directed to the standard directions and those above.

Employment Judge Grundy

14 September 2021

ORDER SENT TO THE PARTIES ON

15 September 2021

FOR THE TRIBUNAL OFFICE