EMPLOYMENT TRIBUNALS

Claimant:	Mr Navdeep Singh Poonia
Respondents:	1. Spalding Visionplus Limited 2. Ian Stradling 3. Laura Stradling 4. Neil Stradling
Heard at:	Nottingham
On:	19 – 23 April 2021, deliberations 2 June and 11 August 2021
Before:	Employment Judge Jeram, Mr R Chandra, Mr G Edmondson
Representatives:	
Claimant	In person
Respondent	Mr N Singer of Counsel

RESERVED JUDGMENT

1. The claimant's claims of unauthorised deduction from wages and breach of contract are not well founded and are dismissed;
2. The claimant's claims of direct race discrimination and harassment related to race are not well founded and are dismissed.

REASONS

Background and Issues

1. By claim presented on 8 January 2020, the claimant complained of unfair dismissal and unpaid wages. The Tribunal, having notified the claimant that he had insufficient qualifying service to bring a claim of ordinary unfair dismissal, subsequently accepted a letter from the claimant dated 11 March 2020 as an amendment to his claim so as to advance claims of race discrimination.

2. The issues arising the case we discussed before EJ Clark at April and rehearing on 11 November 2020, and subsequently refined at the outset of the final hearing, including how the claimant defined his race for the purposes of s.9 Equality Act 2010.

3. The issues arising the case, in summary, were:

   a. Did the respondent/s do any of the following things:
      i. R1 - TS asked the claimant on or around 15 February 2019 a question using the words to the effect of whether 'this was the Indian way of working';
      ii. R1 and R2 - Refused the claimant leave on 19 February 2019;
      iii. R1 and R3 – Refused the claimant leave in respect of 13 to 21 September 2019;
      iv. R1 and R4 - Dismissed him;
      v. R1 - Reject an allegation of race discrimination against TS.

   b. If so, was that less favourable treatment than the treatment that would have been given to a hypothetical comparator?

   c. Did Tracy Stradling ask the claimant on or around 15 February 2019 a question using the words to the effect of whether 'this was the Indian way of working'. If so, was it unwanted conduct, did it relate to race and if so, did the conduct have the purpose or a fact of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

   d. If TS made the comment alleged, did she do so as agent for, and acting with the authority of the first respondent?

e. Were the claims of direct discrimination and/or harassment presented within the time limits set out at s. 123 Equality Act 2010?

f. Did R1 pay to the claimant that which was less then properly payable to him in respect of:
   i. Wages for the period 15 April 2018 to 6 June 2018;
   ii. Bonus payments for the period 15 April 2018 to termination;
   iii. Wages for the period 13 – 21 September 2019?

g. When were the payments above due to be paid? Were the complaints of unauthorised deduction from wages made within the time limit set out in s.23 Employment Rights Act 1996?

The Evidence

4. We had regard to an agreed bundle consisting of: 265 pages.

5. We heard evidence from the claimant. For the respondent/s, we heard from Ian Stradling (Director), Laura Stradling Lovett (Director), Neil Stradling (Director), Tracey Stradling (wife of Ian Stradling) and Jackie Bolton (Employee Relations Consultant, Fairness Matters).

6. The claimant is of Indian national origin; English is not his first language. With the claimant's agreement, we adopted a document he drafted on 11 February 2021 and headed 'Rebuttal by Claimant as also Final Argument' in addition to his witness statements as his witness evidence. As a precautionary measure we ensured that we took from the claimant's evidence the meaning of his words, rather than adopting a literal interpretation to his words.

The Parties

7. The claimant was employed from 15 January 2018 until his dismissal on 7 November 2019 as Assistant Manager at the first respondent's Specsavers franchise store in Spalding, Lincolnshire. The remaining respondents are directors of the first respondent. The second respondent, Ian Stradling ('IS'), is an optician and is primarily responsible for the store opticians and locums. He is the father of the third respondent, Laura Stradling Lovett ('LSL') who is a dispensing optician

and primarily responsible for shop floor issues. IS is also the brother of the fourth respondent, Neil Stradling ('NS') who works as an optometrist and carries out the administration for the Spalding store, but works between that store as well as two others that the family operate, in Holbeach and Bourne. IS and NS are directors another company that owns and operates the nearby Holbeach store, the manager of which was Tracey Stradling ('TS'), who is the wife of IS. The claimant accepts that TS was not an employee of the first respondent.

8. LSL interviewed the claimant for employment at the store. The claimant told LSL that he had management experience at a Specsavers store in Essex and suggested that he demonstrate his sales experience to her by working on the shop floor for an afternoon. LSL agreed to the suggestion, and she was impressed by what she saw. We accept that the claimant's evidence that he made available to LSL a copy of his CV, from which it would have been evident, on reading it, that he was educated in India and worked as a model in India. We also accept LSL's evidence that she could not recall seeing the CV, much less its contents, and that what was at the foremost of her mind was the that fact that the claimant had claimed he worked as a manager at Specsavers in Saffron Walden and his proven sales performance that afternoon on the shop floor. LSL created and offered him the role of Assistant Manager. His starting salary was £18,000 and he was subject to a three-month probationary period.

9. In fact, throughout his employment, the claimant carried out the role of dispenser; the title of Assistant Manager was a notional one. That arrangement, we find, suited to both parties: it suited the claimant's perception of his own status in the store and it justified the first respondent's decision to pay the claimant at a significantly elevated rate.

10. The claimant is clearly intelligent, articulate and self-assured. It was evident from the evidence before us that the claimant approached significant aspects of his employment as being open to re-negotiation and, failing that, challenge. Having heard from them, we consider that Ian Stradling and Laura Stradling Lovett were likely to have found him to be a challenging employee to manage.

11. The claimant is of Indian national origin, having moved to the UK approximately 10 years prior to the events in question. It is plain when the claimant speaks that English is not his first language, both from his command of the language, as well as his accent. We accept that LSL had knowledge of the claimant's country of origin having had possession of his CV, but there was no evidence before us to

support the claimant's contention advanced when he gave evidence, that he and his country of origin, were the subject of familial discussions around the dining table. In fact, in a different context i.e. the Holbeach incident, we accepted IS's evidence that he tends to avoid discussing work where at all possible at home.

12. The claimant later suggested, when cross examining IS, that he specifically told him that he was of Indian origin, something that IS denied. We accept that IS did not know of the claimant's national origin until he became aware of the allegation made against his wife by Fairness Matters in August 2019. We also find, insofar as it is relevant, that TS was unaware of the claimant's country of origin until then also. We accept the evidence of NS that he was unaware of the fact at any stage during the claimant's employment.

13. There were, as the Tribunal discovered, some 8 or so employees at the Spalding store with names that suggested that they, like the claimant, were likely to be of South Asian origin, an usually high proportion of staff when measured against the local population. We accept that IS did not initiate conversations with his employees about their ethnic backgrounds but rather acquired any such information passively i.e. when arising and volunteered in general conversation. Two of those employees had origins in Nepal and Uganda. For this reason, we are satisfied that the fact that the claimant was likely to have originated from outside of the UK was not in itself an unusual feature and was not therefore likely to be something that would attract the attention of, or draw comment from, the Stradling family generally.

Contract of Employment

14. The claimant contract of employment provides as follows:

'Basic Salary: £18,000

Normal Working Hours: 37/5 hours over per week [sic]

Salary Review Date: April of each year (commencing April 2018)

. . .

3.4. The Company reserves the right to extend the Probationary Period . . If that occurs, the Company will confirm to You in writing at the expiry of the Probationary Period the length of any extension.

3.5 If at the end of the Probationary Period. . .the Company considers your performance and behaviour to be satisfactory, it may confirm your continued employment in writing to You. . .

. . .

6.2 If at the end of the Probationary Period… the Company confirms your continued employment in writing to you, you may thereafter be considered for a discretionary performance related bonus in accordance with the bonus measures and scheme rules as may be communicated to you from time to time. Any such bonus payments (if any) will be paid monthly in arrears. Any bonus schemes (if any) and payments (if any) are not contractual… and do not form part of your contract of employment. Any bonus scheme/s (if any) may be amended or withdrawn at any time of the Company's discretion..

6.3 The Basic Salary shall be reviewed by the Company with effect from each Salary Review Date. There is no obligation to award an increase. . .

. . .

8.2. . Sufficient notice of requests to take holiday must be given to the Company. The final decision in granting requests to take holiday rests with the Company'.

15. The respondent's holiday policy provides as follows:

'You must agree the dates of any holiday with your store director ***at least four*** *weeks in advance, using a holiday request form. . . Holidays are normally allocated on a "first-come, first-served" basis, so it is advisable to book as far in advance as possible. If the number of people [sic] ask for the same holiday, your manager or store director will decide who receives the holiday, based on store needs and when the request was made.* ***Do not commit to any expenditure until your holiday dates have been formally approved.*** *If it is not possible to give 6 weeks advance notice, while every effort will be made to grant your request, the decision will depend on there being adequate colleague cover over the desired period. And as result you may have to arrange a shift swap with a colleague of an equivalent grade.* ***Holiday taken without prior authorisation will not be paid and may be viewed as an authorised absence****. . .****Holiday taken without prior authorisation will not be paid and may be viewed as an unauthorised absence****'*

(emphasis as original)

16. The respondent's holiday policy was contained in the staff handbook, to be found in the staff room.

Basic Salary

17. On 15 April 2018, the claimant successfully completed his probationary period. The claimant was not invited to meet with IS or LSL, and they did not write to the claimant to confirm the successful completion of his probationary period.

18. In around May 2018, the claimant he sought a meeting with IS and LSL. He requested the meeting so as to discuss an increase in his wages based on his track record of sales. IS met with the claimant and agreed that the claimant was performing well and agreed an increase of his annual wages to £21,000. No discussion took place as to the commencement date.

19. On 23 May 2018 the claimant received a letter headed *'Pay Review'*. It stated

> *"Dear Navdeep, following completing your probation and as discussed, we are increasing a basic salary and including a bonus. . .the amendment below will substitute the relevant paragraph of your previous Terms and Conditions of employment: Pay: Basic £21,000 per annum. Salaries are reviewed annually in April each year. The company is under no obligation to award an increase Please sign both copies and return one for the increase to be implemented".*
>
> (emphasis applied)

20. The letter contained no implementation date. The claimant signed the letter on 23 May 2018. The increase was effected on 6 June 2018 which was the next pay period following 23 May 2018 and the increase in pay appeared in the claimant's next pay slip on 28 June 2018.

21. In around July 2018, the claimant approached IS and LSL stating that he believed his salary increase should have been applied from mid-April 2018, on completion of his probationary period. IS explained to the claimant that the increase in salary was unconnected to the passing of his probationary period and that that was why the increase took effect on the date of the next payroll following the letter i.e. 6 June 2018.

Bonus

22. The claimant was, on successful completion of the probationary period, eligible to join the respondent's discretionary bonus scheme. Claim forms for staff to complete to claim their monthly bonus were to be found in the staff room. The

terms of the scheme were displayed in the staff room. At the relevant time the notice in the staffroom stated:

'As from the 1 October 2017 a new bonus structure will replace our current bonus… The bonus will be paid monthly in arrears and the month from the first of the month and end on the last day of the month. Each dispenser is responsible for recording their own sales and these are to be handed in to Ian on the last day of the month or as soon after to enable the sales to be checked. . .'

(emphasis applied)

23. The claimant and IS and/or LSL met on several occasions during his employment to discuss the bonus scheme and his apparent reluctance to claim a bonus.

24. Other dispensers did not claim the bonus to which they were entitled because, for example, the additional income would have an adverse effect on their tax credits. On the uncontested evidence before us, the claimant told IS and LSL that that he did not wish to submit claims because it was *"beneath him and he was insulted that he had to claim it".*

25. Although the claimant consistently failed, and subsequently refused, to submit claims for his sales bonuses, the theme throughout his employment was that he sought a bonus scheme designed for him personally, in addition to, or in substitution for, an increase in his basic salary. We have little doubt that, in the claimant's mind, his 'forbearance' on a claim to a higher basic salary was so as to better his chances of securing a more lucrative bonus scheme. That approach was not shared by IS or LSL who, we find, were for much of his employment genuinely concerned that he should claim his bonus in order to maximise his income.

26. In October 2018, the claimant told IS that he sought a personalized bonus scheme, based on a percentage the sales of the company as a whole. IS reminded the claimant that there was only one bonus scheme, that which was available to all dispensers. The claimant told LSL that he should receive a higher salary. There was a discussion between IS, LSL and the claimant that LSL could provide some measure of assistance to the claimant to put together what we understand to be a retrospective claim for a bonus, notwithstanding the rules of the scheme required contemporaneous claims. At the relevant time, claims for bonuses made in respect of sales of lenses could not be checked by any simple or automatic means. Insofar as the respondent was able to undertake spot checks of claims, that was

a rudimentary manual process; the bonus scheme claims were based largely on trust. We, however, reject the suggestion made by the claimant that LSL had reneged on that offer in any way; it was for him to collate his own sales figures, by whatever means and however long that would take him.

27. He had a similar conversation with LSL in around January 2019 i.e. that he wanted a high salary and did not want to claim the sales bonus under the pre-existing scheme.

The Holbeach Store Incident

28. The Spalding store has a laboratory at which spectacles are assembled; the Holbeach store does not. Customers attending either store are offered the option of being examined at one store and collecting their spectacles at another store. There was in place a protocol to cater for such requests; where the customer seeks to collect from the Holbeach store, the dispensing staff member at the Spalding store must call the Holbeach store to arrange an appointment for the customer to attend the Holbeach store, for fitting of the spectacles at a time that is both suitable for the customer and that accords with the timescale required to assemble the spectacles at the Spalding store and transfer them to the Holbeach store.

29. On or around 15 February, Tracey Spalding ('TS'), the manager of the Holbeach store, received a customer who wished to collect her spectacles; TS could find neither the customer's appointment in the store diary or the spectacles. In the presence of the customer, TS telephoned the Spalding store; the receptionist did not attend to the call, but the claimant did. TS had met the claimant on 3 or 4 occasions in the past, when she happened to visit the store; neither party suggests that their relationship had been anything other than unremarkable.

30. When she made her call, TS was unaware of, and could not have been aware of without being in possession of the spectacles and the label it would bear, that it was the claimant who was the dispenser and who had failed to make the necessary arrangements. It is partly for this reason, although in large part because we found TS to be a nervous but credible witness, that we also reject the claimant's contention that another member of staff picked up the call and TS asked to speak to the claimant in order to reprimand him.

31. TS asked the claimant to go to the laboratory to check the whereabouts of the spectacles. The claimant refused, saying that it was not his job to do so. In her discussion with the claimant, TS recounted what she believed the process should have been, had the protocol been followed. The claimant became argumentative and began to raise his voice. TS decided to terminate the call: it was a short call, made in the presence of the customer.

32. To the extent that the claimant suggested that he was justified in his refusal to assist her because there was a separate line to the laboratory, we are satisfied that the telephone in the laboratory did not receive external calls. Neither do we consider it relevant that the claimant's view is that it should not be for the Spalding store to make appointments in the Holbeach diary; that was the respondent's process. In fact, we consider both explanations to be attempts on the part of the claimant to justify his own failure to follow established protocol as well as his conduct towards TS.

33. Insofar as TS was able recollect the specific details of the exchange, we are unsurprised; it was several months later that the complaint about this exchange was made. TS accepts that she said to the claimant during the call words to the effect of *"that may be your way of working, but it is not ours*". We accept that that was the extent of any reference TS made that day to *'a way of working'* and in making the finding, we reject the claimant's contention that TS actually referred to an *'Indian way of working'.*

34. We reject the claimant's case that TS made an explicit reference to nationality in the telephone call for the following reasons: firstly, it is for the claimant to discharge the burden of proof upon him and we did not find him to be a reliable witness of fact; secondly, he was unable to recount to the Tribunal any part of the conversation immediately prior to alleged comment so as to provide context to the exchange, and this despite Mr Singer putting to the claimant that part of his account to Jackie Bolton of Fairness Matters. The comment, of course, did not need to make logical sense, and we do not discount the real possibility that in a moment of unguarded frustration, someone in TS's position might make a reference to the claimant's nationality, whether perceived or known. But we consider that this event is significant because it forms the first of the claimant's allegations of race discrimination - and it is alleged to consist of an explicit reference to his race.

35. Given the number of subsequent occasions when he raised aspects of his employment with his employer, we consider it highly unlikely that he would have

failed to make any mention of it sooner if the comment was made as he alleges. We perceive the claimant as unafraid of raising matters with his employer, despite his claim to the contrary. We reject the claimant's contention that he was not amenable to playing 'the victim card' for reasons we come to in our conclusions.

36. By contrast, we were satisfied that in the context of a breakdown in the established protocol, it was the claimant's refusal to assist her was the *'way of working'* she was likely to be referring to.

37. Later that same day, TS informed IS of the exchange she had with the claimant, and told him that the claimant had refused to assist her and that she found him to be rude. IS did not take any action about it; in his experience, most altercations abated without inaction and tended to resolve themselves.

February 2019 - Unauthorised Absence

38. At around 10 a.m. on Monday, 18 February 2019, the claimant asked IS if he could take the following day as leave as he had an appointment that he described as '*important'* or '*urgent'*. IS checked the rota to discover that the maximum number of employees – two - were already on leave the following day. The following day was a Tuesday which is market day in Spalding, and is therefore the busiest day in the week. IS advised the claimant to check if he could swap his shift with one of the staff who were on leave. The claimant was irritated by this response and accused IS of being *'on an ego-trip';* the claimant agrees that that is how he addressed IS and relies on his own comment as evidence of the autocratic nature of IS.

39. The claimant approached IS again at around 4pm that same day to inform him that he had been unable to swap a shift with the colleagues that were already due to be on leave and that he would nevertheless be absent the following day. IS told the claimant that that was unacceptable, since his absence would leave the store inadequately staffed but the claimant repeated that he would not be attending work due to his appointment. The claimant was told to think carefully because his absence might amount to a disciplinary matter. IS told the claimant he could be take time off to attend his appointment, but the claimant insisted he wanted the full day off. The claimant told IS that he would be unable to continue working for the respondent as the relationship had broken down.

40. Although he would not normally involve himself in such matters IS could see that the claimant was upset at the prospect of not meeting his appointment; he made enquiries of one of the employees who was due to be on leave, Ronnie Everett. Ronnie informed IS that he was content to attend work the following day but required a short period in the morning to attend to his own appointment. IS returned to the claimant and informed him of the possibility of arriving at a mutually agreeable arrangement with Ronnie Everett; he told the claimant he would need to discuss and finalise arrangements with Ronnie himself and complete the relevant document recording the swapping of shifts.

41. Later that evening, IS received two texts. One was from Ronnie Everett to say that he had offered to swap his shift with the claimant, but the claimant did not wish to swap. The second was from the claimant thanking him for the efforts that IS made to adjust the rota and apologising for his earlier conduct. IS expected the following day that Ronnie Everett would be on leave and the claimant would attend work. In fact, neither attended work.

42. On 22 February 2019, the claimant was invited to a disciplinary hearing to answer the allegation that he had failed to abide by the shift swap procedure and that his absence on 19 February 2019 was unauthorised. The hearing proceeded on 28 February 2019 and was conducted by NS; the notetaker was IS. The claimant apologised for his absence and stated, for the first time, that he had required the entire day off because he was having furniture delivered and that that would take the whole day. The claimant again referred to IS's ego and told NS that he had *'offered to leave the job'*. The claimant told NS he would like to *'keep working peacefully'.*

43. At the hearing, the claimant also raised two other matters, one of which was the Holbeach store incident and which he described his own actions as *'because it was busy I didn't make time'* and that he *'didn't realise [he] was breaking protocol'.* He said that he felt 'humiliated' by way he had been spoken to by TS.

44. NS offered to speak to the claimant separately, mindful of the possibility that IS's presence may hinder the claimant from speaking openly about an incident involving IS's wife. The claimant said he was happy not to speak to NS.

45. On 2 March 2019, the claimant was informed that NS had made a finding that the claimant had been absent without authority, and in respect of which he imposed a

sanction of a first written warning, to remain live for 12 months. The claimant was reissued with a copy of the respondent's holiday policy.

46. The claimant was advised of his right to appeal but decided not to appeal the disciplinary outcome. On the claimant's own account to the Tribunal, he wanted to *'move on'.* He wrote to NS on 4 March 2019 thanking him for the *'unfortunate incident. I look forward to work together to achieve desired goals'.*

47. Following a text sent by the claimant seeking a meeting with IS and LSL to discuss his bonus, there was a meeting on 18 April 2019. They offered him a new sales-based bonus, as he had not been claiming his bonus as discussed in previous meetings. He sought an extra payment to compensate for previous claims that he could have submitted but had not. The request was declined, and the claimant was reminded that he had to claim monthly *'like the rest of the team'*. The claimant was not particularly keen on the new proposal as it was no better and might possibly place him in a worse financial position than the current bonus, but they agreed to allow the claimant to reflect on it further. The claimant was reminded that claim forms for the bonus were left in the staff room.

First Grievance - July 2019

48. On 14 July 2019, the claimant emailed a grievance to IS; he copied in two managers at Fairness Matters, the HR advisory service for Specsavers franchises. The first respondent had not used the services of Fairness Matters before.

49. In his grievance the claimant stated that he had made several verbal reminders to settle a shortfall in his salary between 15 April 2018 and June 2018, which had been overlooked. Secondly, the claimant also stated that it had come as a shock to him in their meeting in April to learn that he had forfeited his entire bonus entitlement. This assertion is in stark contrast to the claimant's suggestion, made for the first time in his closing submissions, that IS had instructed him not to submit bonus claims. He continued in his grievance to point out that he had generated *'outstanding business'* and referred to his problem solving and customer care skills. He said the decision was *'explicitly unjustified and unlawful'*. He sought payment of his *'entitlement'* together with interest at the prevailing bank rate.

50. On 24 July 2019, IS responded to the grievance. He rejected the first complaint, saying that he was unsure what was meant by a difference in salary being overlooked' and that he believed the claimant was being paid at the appropriate

rate. As to the second aspect of the grievance, IS replied that they had spoken on 27 February 2019, 18 April 2019, and 8 May 2019 and that on each occasion he had been reminded of the bonus scheme rules and how to claim, and that the claimant had been seeking that his bonus entitlement be consolidated with his salary. He reminded the claimant of the exchange they had on 18 April 2019, when he had sought a new scheme based on sales, and when he was again reminded of the bonus scheme rules, as well as how to claim for bonuses. IS concluded *'the simple reason you have not been paid any bonus is because you have not made any claim for the bonus. However, even after several reminders and a different bonus structure was [offered] to accommodate you personally you still chose to state that you were not going to claim this'.* The claimant was once again reminded of the rules of the scheme.

Annual leave request – September 2019

51. Leave requests were made in writing by completing a leave request form and submitting them to LSL. The form requires the employee to state the dates period of time requested, the reason for their absence and to sign and date the form. LSL, on receipt, would consider whether to grant or deny leave requests, taking into account such matters including whether, and if so how many, staff had already been granted leave. Her practice of the time was to insert on the form her response, including where appropriate, the reason why the request was declined, before signing and dating the form and returning the original document to the employee. At the relevant time, it was not her practice to make or retain a copy of the form.

52. Until his request relating to September 2019, LSL had granted all the claimant's request to leave, including a period of 5 consecutive weeks between November 2018 and January 2019, despite an apparent rule against full time staff taking leave over Christmas. We had sight of the claimant's leave request form in respect of leave authorised and taken from 22 May 2019 to 2 June 2019. It was during this period of leave, the claimant told us, that he travelled to the United States and made plans for his own wedding, to take place in the United States, in September 2019. On his own case, he did not notify employer of his wedding plans at the time he made them or immediately on his return to work; he was unable to recall when he booked his flights for his wedding.

53. We find that the first time the claimant sought leave in respect of September was by submitting a leave request form 2 days or so before 28 July 2019. The form was completed in the claimant's own handwriting and he sought leave from 13

September to 30 September 2019 citing the reason for his request as *'Holidays please'.*

54. For the avoidance of doubt, in making the findings of fact above, we reject the claimant's case that he submitted a leave request form on 9 June 2019 in the form that appears at page 239 of the bundle and on which the stated reason for leave is *'Wedding Holidays please'*. Our reasons for doing so are as follows. First, we find LSL to be a compelling and fundamentally truthful witness and we accept her evidence that when IS first brought to her attention an email to him from the claimant dated 28 July 2019, she recalled telling him that she had *'just rejected it'* i.e. for the first time, a matter of days before. We also agree with her that the relevant leave request form, which appears at page 239 of the bundle appears to have been amended, particularly when compared with his earlier leave request form at page 238 of the bundle. Furthermore, we find the claimant's contention inherently improbable that, with such high stakes at risk, he would do no more than verbally chase LSL for a response every other day or so for some 6 weeks without taking further steps. Finally, we note that had he in fact been chasing LSL for a response to his request for leave as he describes, the claimant would have made some reference to that, if not a complaint about the effect of her alleged delay, in his email of 28 July 2018 to IS; the claimant failed to provide the Tribunal with a reason as to why he had omitted to make any refence at all.

55. LSL considered the claimant's request, and she noted that another employee, Beth, was on leave from 11 to 19 September and that Ben was on leave for the whole of the period sought by the claimant; they had made their requests on dates between 20 May and 24 June 2019. She declined the claimant's request and stated the reason as: *'already someone has requested this off'*. On this occasion, LSL did not sign or date the form before returning the original to the claimant. We accept the evidence of LSL the words she used in her response to the claimant were intended to convey not only that employees had requested the leave, but also that she had authorised that leave; later, on 10 August 2019, LSL refused to authorise a leave request made by Claudia, who is of Polish origin, in respect of the period 8 – 11 September for the same reason stating *'already have 2 team members on annual leave'*.

56. The claimant did not seek to discuss the refusal with LSL; instead on 28 July he emailed IS. In his email, which bore the subject line *'Request for wedding holiday'*, the claimant said simply *'I would like to make a request vacation time off from 13th to 30th September 2018. I am getting married and would need this time to make*

wedding arrangements'. The claimant made no mention of his request having already been considered and declined by LSL, much less did he mention that she had caused a significant delay in responding to his request. Later the same morning, IS replied to the claimant informing him that the was forwarding the email to LSL *'as she is in charge of holidays'.*

57. This email was the first time that LSL was aware of the reason the claimant said he sought leave. She emailed him on 4 August to stating in terms that two employees were already on leave on 13-21 September, but that she could authorise the second week i.e. 22-30 September. She asked him to confirm whether he would be taking the second week as leave.

Second grievance – August 2019

58. The claimant emailed IS on 5 August again, copying in the same two managers at Fairness Matters in his July grievance, repeating his earlier claims to a salary at a higher rate from 15 April 2018 as well as his bonus entitlement throughout his employment. He stated *'the claim is very much within the legal limit and is in no way time barred'.* The claimant was aware of his right to present a claim and time limits because he had researched his rights by using the internet. He added *'additionally you have repeatedly denied my entitled leave even for my marriage'*. He ended the email *'whether or not I have claimed as you say or you have not paid is immaterial. The fact now is that my claims are not time barred. Please note that this matter can be amicably settled amongst us without the interference of any external legal agency'.*

59. The following day on 6 August 2019, the claimant emailed LSL stating *'Hi Laura I am getting married on 19/09/2019 and I need time to travel and preparation. Thanks'*.

60. At around 4pm on 7 August 2019, the claimant went to see LSL. LSL explained that other employees were on leave and suggested he the approach one or the other see if they would be willing to move their holiday to assist him. The claimant told her that he was to get married and that his personal life was more important work; he told her she did not understand religion. He told LSL that he would hand in his notice; she responded that that would be a shame but that if he wanted to resign he should do so in writing. The claimant was angry; he addressed LSL with gritted teeth. He left, threatening to post on Twitter that she was bullying him. A few minutes later the claimant returned and stated again that she did not know

about religion and that she was bullying him about his religion. LSL reminded the claim that she had allowed him a month off over Christmas, accommodated this preferred day off on the new rota and allowed him time off when he moved into his new house in order to counter the accusation that she was bullying him.

61. LSL was upset and shaken by the claimant's behaviour. She made a note of the exchange immediately after the conversation. She called IS for moral support because she was very upset by the comments the claimant made.

62. That evening, LSL emailed the claimant *stating 'Hi Bobby, unfortunately I am unable to prove his whole a request to mention we have too many team members already on holiday. As previously discussed we operate a holiday on a first-come first served basis to ensure fairness amongst our team. This is to ensure that we have enough team members on duty at any one time to enable customers to receive the level of service which they deserve. However, to make sure everything is fair, Specsavers has a Fairness Matters department who are responsible for mediating in disputes. They have been informed of this and we will listen to their advice.'* This was the first time that LSL had contacted Fairness Matters for assistance.

63. The claimant did not reply to LSL. Instead, early the next morning on 8 August 2019 he emailed IS. He said that LSL's behaviour *'provoked'* him into getting into a *'heated argument'*. He enquired as to why he could not get married *'only because there will be one less person on the shop floor'*.

64. The claimant said that the refusal to allow him the was causing mental trauma, that it was ruining his personal life and he felt that he was working in a hostile work environment. He finished by stating that LSL's refusal *'clearly indicates that another disciplinary action can be planted on me'.*

65. Later that same day IS replied to the claimant. He apologised that the situation was causing the claimant stress, reminded him of the first come first served basis on which leave requests processed, directed him to the holiday policy, reminded him of the various places it was made accessible to staff and reminded him that it was discussed during the disciplinary hearing in respect of his unauthorised absence in February. He told the claimant the second week's leave had been authorised and that if one of the employees whose time of had already been authorised was agreeable to cancelling their leave then he would authorise the first

week also *'I will let you ask them and inform me of their decisions. Hopefully we can come to an amicable solution'.*

Fairness Matters

66. The claimant was interviewed on 21 August 2019 by Jackie Bolton ('JB') of Fairness Matters; Sophie Hickling ('SH') was the notetaker. We heard Fairness Matters being described as being a mediation service. JB did not make it plain to the claimant that her role was to investigate and make recommendations only and that her opinion was not binding on the first respondent. The claimant confirmed JB's understanding that there were two aspects to his grievance, one in relation to his bonus and the other being about his request for annual leave.

67. The claimant discussed the alleged shortfall in his salary between 15 April 2018 and, he said, July 2018. He pointed to his Pay Review letter as evidence of his contention that his pay rise should have been effective on the date he successfully completed his probationary period.

68. The claimant told JB he was performing 3 times better than the second best performing employee and that although he had not kept track of the value of any bonus he claimed should have been paid £2000 was *'the minimum amount I want'.*

69. During the discussion about his bonus, the claimant mentioned the call he received from TS in which he said that TS humiliated him for 10 minutes. He said that he protested his ability to make an appointment at the Holbeach store, to which TS retorted *'that's how it works here'* and to which the claimant said he *replied 'if I have broken the protocol I said it's because I'm so busy here' and to which TS replied 'is that your Indian way of working?'.* The claimant said he had not spoken to IS about the incident.

70. The claimant mentioned the unauthorised leave in February 2019. He said that IS told him that he could leave the job, to which the claimant retorted *'fine I will have to go through ET'*. He said he apologised at the disciplinary. As for the request for leave in September, the claimant told JB that he had requested leave in June and that *'this was well before 90 days'.* He told JB that he was getting married on 19 September 2019 and that all his siblings had *'already booked'.*

71. JB also interviewed IS and LSL:

a. IS told JB that there had been no discussion about an increase in pay and that claimant had asked for a pay rise and so one was agreed since he was *'doing a good job'* and so his pay rise was effective from 6 June 2018.

b. Of the bonus, both IS and LSL told JB that the claimant had in early summer of 2018 sought 1% of the company's profits; IS said the claimant's sales performance was on par with his colleague, Ashley. IS denied that the claimant had volunteered to come into work on his day off to work on his bonuses; both he and LSL told JB that the claimant wanted them to do the calculations but that they had refused. LSL told JB that they had discussed a number of options with the claimant to appease him.

c. LSL told JB that the claimant had submitted a leave request in *'late July / early August' but* that Beth and Ben had already submitted leave requests which she had approved. She described the level of upset in the store that she believed the claimant had been responsible for;

d. JB told IS that the claimant was of Indian origin; this was the first he was aware of the claimant's country of origin.

e. JB also interviewed Beth Chapel and Matt Leavey. Neither had any issues with TS.

72. In her report to the First Respondent, JB dismissed the whole of the claimant's grievance for the following reasons:

a. In respect of a shortfall in in salary, having concluded that there had been no discussion about an increase in pay upon successful completion of the probationary period but that there had been a discussion subsequent to his completing his probationary period which was undertaken at the claimant's request. JB noted that the letter dated 23 May 2018 in which the claimant had been informed of his salary increase did not stipulate the date on which the higher rate would be effective but that he was paid at the higher rate from the next payroll date, being 9 June 2018;

b. She concluded, the claimant was aware at all times how to claim for his bonus, but had failed to do so. However, JB nevertheless recommended making a

goodwill payment of £960, being an equivalent amount to that received by Ashley between April 2018 and October 2018; on the claimant's own account he had been told in explicit terms by IS in October 2018 that he must claim his bonus in the same way as other employees;

c. She rejected the claimant's grievance about the refusal to give him leave in February 2019, since that had already been dealt with in disciplinary proceedings. Of his grievance about his September leave request, she found that it was more likely that he had submitted his request much later than he claimed;

d. In relation to the allegation about TS, JB had not interviewed TS and on that basis was unable to draw a conclusion.

e. JB made various recommendations to the First Respondent's practices.

73. The issuing of JB's report was delayed because of events in her personal life.

74. On 10 September 2019, JB forwarded her report to the First Respondent, who approved its contents.

75. In the meantime, the claimant at 21.49 on 12 September 2019, emailed SH, copying in IS, to state that his grievance regarding his September annual leave request had not been rejected and as a result, he intended to be on leave from 13 September 2019 and return to work on 1 October 2019.

76. At 07.22 on 13 September 2019, LSL emailed the claimant to state that the first week of leave was not authorised and that Fairness Matters *'agreed with this'* so that his absence would be investigated on his return and treated as a disciplinary matter.

77. At 11.01 on 13 September 2019, JB sent an outcome letter to the claimant, the contents of which were based on her report to the first respondent, containing her investigation, findings and conclusions. In relation to the allegation involving TS, JB stated that she was unable to uphold the allegation *'given the lack of evidence'.*

78. JB interviewed Beth Chapel and Matt Leavey about TS but had not interviewed TS herself, because she had no employment relationship with the first respondent;

that, was, we were told, the practice of Fairness Matters. Quite aside from the inherent improbability of employees criticising the spouse of their employer, the problem of who to interview is unlikely to be an unusual one, since we understand that the Stradling family is not unusual in holding more than one franchise. We would be surprised if, as JB suggested, the reason for the practice is unconnected to legal or insurance considerations. Whatever the reason for the practice, it is the motivation of the alleged perpetrator that we are required to consider. JB was unable to give the Tribunal a rationale for the practice, and she appeared confused that her inaction was being explored by the Tribunal at all. We regarded her demeanour as evidence of how settled and uncontroversial the practice was in her mind and therefore why she did not even seek permission of IS to interview to TS. It was plain from JB's responses that she based her own practice on that of Fairness Matters and had not questioned or considered in any detail the possible rationale of either.

79. The claimant did not attend work on 13-21 September 2019, the period of leave he had requested, but was not authorised. He appealed the outcome of his grievance by email on 16 September 2019.

80. SH emailed the claimant on 18 September and invited him to an appeal meeting; he was interviewed on 7 October 2019. SH produced a report dated 17 October 2019. She found as follows:

    a. Of the grievance about the salary differential, SH found that the claimant had acquired the title of assistant manager in order to justify the salary differential and that this had caused several conversations to be had about how the claimant should be paid. She agreed with JB's findings, but recommended, as a gesture of good will, that the first respondent pay the claimant the differential between the two rates of pay between the date of the letter i.e. 23 May 2018 and the date on which the higher rate had been implemented i.e. 9 June 2018;

    b. SH found that the claimant had numerous conversations with the directors regarding his bonus, but that he himself wished to be remunerated in a different way to his colleagues and did not wish to be treated the same as them. She did not disturb JB's recommendation but observed that since the claimant himself did not know how much his bonus should be, that the figure and its rationale were fair;

c. Regarding his request for annual leave in September 2019, SH stated that the claimant told her: that he did not tell anyone the reason for his request since it was personal information; that when he submitted his leave request on 9 June 2019 his request was rejected *'within 5 minutes'*; he was so *'emotionally shaken'* that he *'did not bother to speak about it again'* and that was said to account for the gap in communication between 9 June and 28 July 2019. SH considered the claimant's lack of communication for 7 weeks, in light of the reason for his leave request to be *'highly unusual'* especially given the fact that he had been in regular contact about other matters raised in his appeal. SH preferred LSL's account of the timing of the request and the refusal for it. She noted that the claimant felt *'deeply'* that he should be entitled to leave in preference to other employees.

Disciplinary Hearing

81. On 20 October 2019, NS invited the claimant to a disciplinary hearing to consider the allegation that he took unauthorised leave between 13 and 21 September 2019 and the allegation that he had behaved in an insubordinate manner when dealing with LSL about the absence. An investigation report prepared by IS together with exhibits, and including the note made by LSL of the claimant's conduct towards her on 8 August 2019 was forwarded to the claimant.

82. The disciplinary hearing was postponed until 6 November 2019 because there was a delay in the claimant receiving the outcome of his grievance appeal from SH. The notes of that meeting are consistent with the evidence of NS as well as our own impression of the claimant when giving evidence on this point, that although he was maintaining that he had authority to be on leave on 13 to 21 September 2019, he was evasive about the source of that permission. The claimant did accept to NS that Fairness Matters did not give him authority to go on leave, and that he had read the first respondent's holiday policy.

83. NS took the view that the claimant behaved in an obstinate manner in the hearing; that the decision to be on holiday a matter for him and that he should not be at a disciplinary hearing at all. This attitude, he observed, was markedly different to the claimant's response at the first disciplinary hearing, when he appeared to be genuinely apologetic. We accept the evidence of NS that had the claimant showed contrition about a decision that, according to the claimant was made under force of circumstance, the outcome may have been different, but instead, NS's

overwhelming impression of the claimant was that going forward, the claimant would not be accepting of management control of his actions.

84. The notes of that hearing are not detailed but we agree with the claimant, that NS did not explore in any, or any significant, detail the allegation about insubordination. We accept that, notwithstanding the lack of questioning about the latter allegation, it was a factor in NS's decision to dismiss the claimant because we accept NS's evidence on the issue, he had the appropriate evidence before him and because the reason featured in the letter of dismissal.

85. In a letter dated 7 November 2019, NS informed the claimant that he had decided to uphold the allegation get the claimant had being guilty of an act of gross misconduct, consisting of being on unauthorised absence and behaving in an insubordinate manner. NS decided to summarily dismiss the claimant, stating that his decision had included the following factors: the claimant's insistence that he was '*entitled'* to take holiday and that the first respondent had no right to refuse him, the fact that he had being advised of the consequences of taking unauthorised holiday; his previous final written warning for taking unauthorised absence.

86. The letter included a breakdown of payments made to the claimant (including those recommended by Fairness Matters as payments of goodwill) as well as those deducted (including a deduction in respect of his unauthorised absence between 13 and 21 September 2019).

87. The claimant appealed his dismissal. It was dealt with by Joanne Curtis, a director of a Specsavers store in Boston and wholly unconnected to this matter. She wrote to0 the claimant on 15 November 2019 thanking him for attending an appeal hearing on the same day and dismissing his appeal. She found that the store had followed its own policy, that he had been warned of consequences of taking leave without authority, but that he had decided to absent himself, nonetheless. Having reviewed the original disciplinary hearing, she agreed with the decision to dismiss and considered it fair. She added that the claimant had misconstrued the remit of Fairness Matters as being an investigation conducted by a *'higher authority'* and that it had been invited to mediate as a result of accusations of mistreatment by them.

88. The claimant presented his claim to the Tribunal on 8 January 2020. He pursued claims of unfair dismissal, and a claim for his wages / breach of contract.

The Law

89. Section 13 of the Equality Act 2015 directs as follows: *"(1) a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".*

90. Section 23 of the Equality Act 2010 provides that there must be no material difference between circumstances relating to the claimant and those relating to the comparator.

91. Section 136 of the Equality provides *"(1) this section applies to the contravention of this Act. (2) if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravene the provisions 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."*

92. Guidance on the burden of proof is to be found in the Court of Appeal case of Igen Ltd v Wong [2005] ICR 931, as approved by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054. The first stage requires the claimant to discharge the burden of establishing facts from which an inference of discrimination could be drawn, before at the second stage requiring the employer to provide an explanation that excludes the proscribed ground – here gender.

93. It may sometimes be appropriate to proceed directly to the second stage of the analysis where the claimant relies upon a hypothetical comparator. In such circumstances, the first question, the 'less favourable treatment' issue cannot be resolved without at the same time deciding the second question i.e. 'the reason why' issue: Shamoon v Chief Constable of the RUC [2003] ICR 337.

94. Section 26(1)(b) of the Equality Act provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for B. In deciding whether the conduct complained of has the effect refer set out at section (1)(b), the tribunal must take into account those matters set out at section 26(4).

95. Section 109(2) of the Equality Act 2010 provides that a principal has liability for anything done by its agent with the authority of the principal and that it does not matter whether that thing is done with the principals knowledge or approval.

96. The effect of s.109(2) is to render the principal liable for the acts of its agents done in the course of the performance of their authorised functions: Unite the Union v Nailard [2018] EWCA Civ 1203.

97. Following repeal of s.40(2)-(4), there is now no explicit liability of an employer for third party harassment: Bessong v Pennine Care NHS Foundation Trust [2020] IRLR 4.

98. Section 123 of the Equality Act 2010 provides for time limits within which complaints must be presented in order for the Tribunal to consider them. It provides that complaints must be made within three months of the act complained of, or the end of conduct extending over a period, or within such further period as the Tribunal considers just and equitable.

99. Section 13(3) Employment Rights Act 1996 provides that where the total amount of wages paid by an employer on any occasion is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiencies shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. The term 'wages' includes bonuses: section 27(1)(a).

100. A complaint that an employer has contravened s.13(3) must be presented before the end of three months beginning with the date of payment of the wages from which the deduction was made, or where there is a series of deductions, the last of that series of deductions or where the Tribunal is satisfied that it was not reasonably practicable to be presented within that period, such further period as the Tribunal considers reasonable: s.23(2), (4).

101. A claim for the recovery of damages or any other sum arising out of or outstanding on the termination of employment must be presented within the period of three months beginning with the effective date of termination or where it was not reasonably practicable to do so, within such further period as the tribunal considers reasonable: arts 4 and 7 of the ET Extension of Jurisdiction (England & Wales) Order 1994.

Discussion and Conclusions

102. We deal with the pay claims first, for reasons that we will return to.

Salary Differential: April 2018 – June 2018

103. The claimant contends that the first respondent was obliged to meet with him on completion of his probationary period and that it is only because of its own inaction that his pay was not increased sooner. There was no obligation to hold a probationary review meeting and no contractual obligation to confirm the same in writing: clause 3.5 of the contract. The purpose of the meeting on 23 May 2018, which was arranged at the claimant's request, was to discuss his salary, rather than to establish whether he had passed his probation review. Although there was a contractual requirement to hold a salary review in April each year, there was no obligation to increase pay following it: clause 6.3 of the contract.

104. There was no evidence before us of any agreement between the parties to pay the claimant at an increased rate of pay from 15 April 2018 - the parties had simply not addressed their minds to the date of implementation of the higher rate of pay when they met on 23 May 2018 at which they agreed the higher salary rate. The salary review letter states: *'following your probationary review and as discussed, we are increasing your basic salary. . . please sign both copies and return one for the increase to be implemented'* (emphasis applied). At best the words are silent as to the implementation date; if anything, they evince an intention to increase pay in the future. The claimant was paid at the higher rate from 9 June 2018 and as a result of SH's recommendations, he received sums representing the higher rate of pay for the period 23 May 2018 until 9 June 2018 in his final salary.

105. We have little doubt that in the claimant's mind, his salary and his bonus were interlinked, so that he was prepared to 'tolerate' a lower salary for as long as he believed he was capable of obtaining a favourable review of his bonus entitlement and vice versa. It was only when his efforts to renegotiate either his salary or his bonus appeared to be doomed to failure that he submitted his first grievance in which he complained about both an alleged shortfall in his basic salary and a '*shock'* that he had forfeited his bonus '*entitlement'*; that we find, was the

true reason for his delay in raising his complaint about his basic salary or, for that matter bonus, sooner.

106. In summary, the claimant does not contend that the parties arrived at an express agreement to pay the higher rate of pay and we are not satisfied that there is any other evidence from which we can conclude that the salary at the higher rate was properly payable to the claimant from 15 April 2018; the claimant's claim for breach of contract and/or unauthorised deduction from wages are not well founded.

Bonus

107. There is no evidence, other than the claimant's contention, that the nature of the bonus scheme was anything other than that reflected in the contract of employment i.e. discretionary. We draw further support for our finding from the notice in the staff room *"As from the 1 October 2017 a new bonus structure will replace our current bonus…*' which suggests that the first respondent did unilaterally change the scheme in the recent past.

108. It cannot be said that the first respondent, in failing to pay the claimant any sums in respect of bonus, conducted its discretion in a manner that was perverse in circumstances where the rules of the scheme required an employee submit claims on a monthly and the claimant throughout the entirety of his employment steadfastly refused to do so, despite knowing how to, and the many prompts to so from IS and LSL as well as an offer of assistance.

109. We adopt the short explanation of IS in his email of 24 July 2019 when he told the claimant in terms, and insofar as he needed reminding that he was not being paid a bonus *'for the simple reason'* that he had not claimed it.

110. The claims of unauthorised deduction from wages and breach of contract in respect of the claimant's claim for bonus payments are not well founded.

Salary in respect of the period 13-21 September 2019

111. The claimant accepts that it was open to the first respondent to discipline him for taking unauthorised leave, and that it was open to it to withhold his pay for

that period, but not both; that, he contends, would amount to being punished twice for the same misdemeanor.

112. The first respondent had agreed to only one of the two weeks' leave sought by the claimant and refused to authorise his request for leave in respect of 13-21 September 2019. We have elsewhere stated that it was unfortunate that Fairness Matters did not state in clear terms its role and remit to the claimant, but the fact remains that the claimant chose to absent himself in circumstances where he had not secured authority to be on leave. In those circumstances, the claimant was contractually entitled to his wage only if he attended work that week, and he did not.

113. The claims of unauthorised deduction from wages and breach of contract in respect of the claimant's claim for wages during 13-21 September 2019 are not well founded.

Discrimination Claims

Holbeach Store Incident

114. We have found as a fact that the words alleged to have been used *'your Indian way of working'* were not in fact used. For that reason alone, the claim must fail. We have further observations about this allegation and the significance of the lack of contemporaneous complaint made by the claimant, below.

115. Further and in any event, TS was not acting as an agent on behalf of the Spalding store when she made the call; her role was more akin to a customer making enquiries of or complaining about an order; neither can the first respondent be liable for harassment by a third party.

116. The claims of harassment and direct discrimination against the first respondent are not well founded.

Refusal to grant leave - 19 February 2019

117. The claimant has adduced no evidence at all to support his contention that the refusal was because of his race. The evidence to the contrary is significant. IS was unaware of the claimant's country of origin until August 2019. In addition,

the first respondent operates a 'first come first served' policy in respect of granting annual leave. The claimant's request for leave was made with a day's notice and on a day when two staff were already due to be on leave; the day sought by the claimant was the busiest day of the week, being a market day. IS did make enquiries on behalf of the claimant, despite having been insulted by him. The claimant had told IS he had an appointment to meet; IS made tentative arrangements on his behalf of the claimant and told the claimant it was for him to finalise those arrangements; the claimant did not.

118. We cannot reasonably conclude that IS would have treated a hypothetical comparator more favorably. The reason why the claimant's request was refused was because he made it at the eleventh hour, two staff were already due to be on leave and the claimant failed to help himself by concluding arrangements with Ronnie Everett.

119. The allegation of direct discrimination against the first and second respondent is not well founded.

Refusal to grant leave - 13-21 September 2019

120. In summary, we find that the reason why the claimant was refused leave for this period was: the maximum of two staff members had already been granted leave for that week in circumstances where the first respondent operates a 'first come first served' system of approving leave.

121. Our broader reasoning is as follows. It was the claimant's responsibility to arrange his personal affairs around his work commitments. By the time he submitted his leave request at the end of July 2019, he gave his employer 6 weeks' notice, when on his case he could have, and given his claimed circumstances we would have expected him to have, checked with his employer when making wedding arrangements. It is nothing to the claimant's point that he gave the 'minimum notice' that the policy requires of him (4 weeks) since the policy also stipulates that the first respondent operates a first come first served system and explicitly warns employees not to commit to any expenditure until leave has been formally approved.

122. The request for leave was in respect of 13 – 30 September 2019. Two employees, Beth and Ben were on leave for the first half of that period and only Ben was on leave for the second half of the period sought.

123. It was open to LSL to partially approve the request by authorising 22 – 30 September 2019 when she first considered the request, since only one employee, Ben, was absent during that period. But to the extent that that may have been remiss of her, we also bear in mind that the claimant had failed to provide any reason as to why he sought the leave; there was no basis upon which LSL was to understand that the claimant had a specific reason other than, for example, exhausting his annual leave allowance. Furthermore, as soon as she became aware, via IS, of the reason advanced, she did grant the claimant the leave for the second half of the period sought. In addition, IS made it clear to the claimant that it was open to him to approach either Beth and/or Ben to see if he could arrive at an agreement with them directly in respect of 13-21 September 2019. As in February, he did not do so. We have been given no reason to doubt LSL's evidence that had he arrived at a mutually agreeable arrangement with either Beth and/or Ben, she would have approved further, or all, of the outstanding dates; that is precisely how IS attempted to assist the claimant in February 2019.

124. It was LSL's role to approve requests for leave and she had approved all the claimant's previous requests for leave, without exception, including the extended period of leave of 5 weeks from November 2018 – January 2019 and over the usually prohibited Christmas period. This was the first occasion that LSL had refused his request. The claimant understood that she had refused his request; whilst it was open to him to seek to challenge her decision he did not, in our view, truly accept that LSL's decision was conclusive unless and until overturned.

125. We have some sympathy for the claimant in that Fairness Matters had failed to clarify its role and the extent of its remit. However, that confusion was ultimately irrelevant since the claimant had always understood that LSL had refused his request – he had after all sought to go behind it by approaching IS instead. He may have had difficulty accepting that the decision of LSL was conclusive, but he knew what her decision was. The outcome letter of JB may have arrived at a time when he said he was on his way to the airport, but that does not detract from the fact that the set off knowing he did not have authority to be absent.

126. In evidence that tended to support NS's rationale for concluding that the claimant was unable to accept management direction, the claimant advanced to the Tribunal bases upon which he contended his employer behaved unreasonably by refusing him his leave, including failing to appreciate that his needs were greater than any that Beth and Ben could conceivably have, suggesting that the store

could do without his presence, and contending that the first respondent could or should have paid for a locum to remedy his absence.

127. We have little doubt that the high regard and goodwill between the parties that prevailed at the outset of the claimant's employment had significantly waned by this time and, further, the claimant was aware of this – his threats or 'offers' to leave employment was by August 2019 falling on deaf ears - but we cannot find any basis to accept that LSL did not have legitimate reasons to refuse the claimant's request for leave.

128. On 7 August 2019 the claimant repeated to LSL in anger that she did not understand his religion. He told us that that reference to religion was intended to be, on his part, a reference to LSL's failure to appreciate that Hindu weddings are elaborate and lengthy. That may be so, but we do not accept that the comment amounts to a 'racially loaded' allegation; there may be a degree of overlap between race and religion, but they are not synonymous. It was open to him to at that juncture to accuse her of being racially motivated because of his country of origin, and on his case he was aware at all times after the Holbeach store incident that the family were motivated by his country of origin, but he did not.

129. Furthermore, given that the very reason for calling for assistance from Fairness Matters was the claimant's response to LSL's refusal to allow him leave, we consider it a particularly troubling omission on the claimant's part to fail to mention in his written grievance or in his interview with JB, of his belief, that LSL's refusal (or for that matter the refusal by IS) was racially motivated.

130. The material circumstances must include that the maximum number of employees had leave approved for the week in question before the claimant sought leave and where the first respondent operates a 'first come first served' system. Aside from the fact that LSL was aware that the claimant was of Indian origin we have found no evidential basis upon which we could reasonably conclude that a hypothetical comparator would be treated more favourably.

131. The allegation that LSL's refusal to grant him leave for the period 13 – 21 September 2019 was because of his race is not well founded.

<u>Dismissal</u>

132. NS did not know that the claimant was of Indian origin; it follows that he cannot have dismissed because of it.

133. The reason why the claimant was dismissed was because he had on file a live written warning, given only 7 months before, for precisely the same behaviour i.e. being absent from work without authority and because he had behaved inappropriately towards LSL.

134. The claimant was warned by IS on 18 February 2019 that an unauthorised absence was likely to lead to a disciplinary hearing. The possibility of disciplinary proceedings was therefore something that he was not only on notice of as a result of events that took place earlier in the year, but something that he himself acknowledged when emailing IS on 8 August 2019, when he stated that LSL's refusal to authorise his leave request *'clearly indicates that another disciplinary can be planted on me'.*

135. At the disciplinary hearing, the claimant was unapologetic and attempted to maintain the unmaintainable i.e. that he had authority to take leave. The claimant had a live written warning for an identical transgression. The sanction of dismissal was entirely consistent with those facts as well as the reasons given in the outcome letter.

136. The claimant complains that NS failed to ask any or any adequate questions of him about the second aspect of the disciplinary hearing i.e. the allegation that he had behaved in an insubordinate manner towards LSL. NS plainly had the evidence on this matter before him, the reason featured in his outcome letter, and we have accepted that it was in his mind when he decided to dismiss. The failure to ask questions about it would have been relevant to an analysis of whether the disciplinary process and outcome was fair or unfair; it does shed any light on whether it was discriminatory.

137. The allegation that the claimant's dismissal was an act of direct discrimination on the part of the first and fourth respondents is not well founded.

<u>Rejecting an allegation of race discrimination against TS</u>

138. The first respondent accepts that JB and SH of Fairness Matters were acting as its agents when investigating the grievance. The claimant contends that by not upholding his complaint of racial harassment by TS, Fairness Matters had

rejected his allegation; the first respondent contends that Fairness Matters had not in fact rejected the allegation - it had simply had no grounds to uphold it given the lack of evidence and lack of contemporaneous complaint.

139. The distinction is one of form, rather than substance. It arises in large part, we consider, because of the lack of clarity in the role of Fairness Matters. We are unclear of what experience or knowledge the claimant already had of Fairness Matters already, since it was he who sought to involve them, but he was not told explicitly of its role or remit on this occasion. LSL's comment in her email of 13 September 2019 to the effect that she *'agreed with'* Fairness Matters and that the outcome was to be sent directly by JB to the claimant suggests that significantly more clarity was desirable.

140. JB had interviewed Beth Chapel and Matt Leavy, but not sought to interview TS. TS was not in an employment relationship with the first respondent, but there were several other factors that might lead a grieving employee to expect her to be interviewed. It was unfortunate in those circumstances that when writing to the claimant about this matter, JB did not state in terms that she had not interviewed TS, or why she had not interviewed TS. Instead, and somewhat ambiguously, JB stated that there was *'insufficient evidence'* to uphold his grievance in relation to this matter.

141. We have accepted that the reason Fairness Matters did not investigate the allegation by interviewing, or seeking to interview, TS is because it is not the practice of Fairness Matters to do so in respect of people who are not employees of the franchise appointing it.

142. JB's belief of a settled practice on the part of Fairness Matters is the complete explanation for her not interviewing TS, and it is both the complete and non-discriminatory. That explanation may not answer why Fairness Matters has in place that practice, but that is not the question for the Tribunal; JB's explanation for why she did not uphold the grievance of racial harassment was not tainted by the claimant's race.

143. We have also considered the position of the first respondent, for the avoidance of doubt. We note that it adopted, without demur, each and every recommendation made by Fairness Matters, however generous some of those recommendations were e.g. the £960 good will payment. SB set out in her report to the first respondent what steps she had taken in relation to this allegation before

concluding that she had been *'unable to draw a conclusion'.* There is nothing to suggest that the first respondent adopted the recommendation of Fairness Matters in respect of this allegation for discriminatory reasons.

144. The allegation that the first respondent rejected the claimant's grievance against TS because of his race is not well founded.

Discrimination Claims Generally

145. Finally, we consider it highly unusual that the claimant had not raised any of his concerns about discriminatory conduct sooner than he did, given (a) the confidence with which he evidently conducted himself during his employment including his propensity to raise financial matters freely with the respondents and (b) the number of opportunities presented to him.

146. Those omissions are inconsistent, in our view, with a claimant who having been subjected to explicit racial harassment goes on to suffer subsequent acts which on his own account, he knew when they occurred to be racially motivated.

147. By way of example only, the claimant, having raised the Holbeach store incident with NS, declined an offer to discuss it further; he thanked did not appeal his written warning but instead thanked him for what he described to be 'an unfortunate event'; he had a general proclivity to raise financial matters with IS and LSL including seeking an agreement based on company wide sales; he approached Fairness Matters directly; he raised two written grievances; he made no mention of any of his allegations to JB, save for the complaint, made during a discussion about his bonus, about the Holbeach store incident; he appealed JB's letter on grounds unrelated to his race allegations; he appealed his dismissal without reference to them also. Finally, we note that when he issued proceedings, he did not indicate that he was pursuing a claim of race discrimination.

148. We reject the claimant's explanation that he was generally reluctant to raise these matters; he did just that in his interview with JB. We were mindful of the fact the claimant's first language is not English, and so whilst we were slow to attribute any particular meaning to the several occasions when the claimant described his claims of race discrimination as being *'an afterthought'.* We have rejected the claimant's claims of race discrimination on the evidence before us, but we consider that his inaction suggest that his claims of race discrimination were indeed an afterthought.

149. The claimant's claims are not well founded and are dismissed.

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Employment Judge Jeram

Date: 17 September 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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