



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Zerehannes

**Respondents:** Asda Stores Limited (1)

Mr S Gamble (2)

Mr C Tilley (3)

\*\*\* REMOVED \*\*\* (4)

\*\*\* REMOVED \*\*\* (5)

Ms E Knight (6)

\*\*\* REMOVED \*\*\* (7)

**Heard at:** Leicester Hearing Centre, Kings Court, 5A New Walk,  
Leicester, LE1 6TE

**On:** 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28 February 2020  
2 and 3 August 2021 (deliberations only, parties did not  
attend)

**Before:** Employment Judge Adkinson sitting with  
Ms J Barrowclough and  
Mr J D Hill

## Appearances

**For the Claimant:** Dr Ibabakombo, Lay Representative

**For the Respondents:** Ms R Kight, Counsel

## JUDGMENT

After hearing the evidence, and after considering the written submissions of the parties, and after taking time to consider its conclusions, the Tribunal unanimously concludes that:

1. All claims of direct discrimination because of race in claim 2600155/2018 that pre-date 13 September 2017 and in claim 2601886/2019 that pre-date 13 February 2019 are out of time and it is not just and equitable to extend time. Therefore they are dismissed;
2. All other claims of direct discrimination because of race are dismissed;

3. All claims of direct discrimination because of disability are dismissed;
4. All claims of victimisation in claim 2601886/2019 that pre-date 13 February 2019 are out of time and it is not just and equitable to extend time. Therefore they are dismissed;
5. All other claims of victimisation are dismissed;
6. The claimant's claim for unauthorised deduction from wages because of a failure to pay sick pay is dismissed; and
7. The deposit that the Claimant paid as a condition of continuing with his claims for direct discrimination because of disability shall be paid to the respondents under **rule 39(5)** because the claims failed for substantially the reasons given in that deposit order.

## REASONS

### Introduction

1. There are two claims before the Tribunal:
  - 1.1. 2600155/2018 (which is the claim of Mr Zerehannes v Asda Stores Ltd). Early conciliation took place between 12 December 2017 and 9 January 2018 and that claim was presented to the Tribunal on 24 January 2018.
  - 1.2. 2601886/2019 (which is Mr Zerehannes v Asda Stores Ltd, Mr S Gamble, Mr C Tilley and Ms E Knight). Early conciliation on that claim took place between 16 May 2019 and 31 May 2019 and it was presented to the Tribunal on 27 June 2019.
2. The claims were consolidated and heard together because they all relate to the same series of events. All of the complaints arise out of Mr Zerehannes' request in April 2017 to vary his shift pattern from working three weekends out of four to working two weekends out of four. It was, in essence, a flexible working request and one that Asda ("Asda", his employer) refused.
3. Rather than bring a claim that Asda had failed to reasonably consider his request for flexible working contrary to the **Employment Rights Act 1996 Part 8A**, Mr Zerehannes has framed his claim as sustained and repeated acts of direct race discrimination, direct disability discrimination because of his association with his wife who is disabled by reason of asthma, and because of victimisation. It is a notable feature of Mr Zerehannes' case that, for reasons that are not clear, he was so focused on discrimination and victimisation that that obvious claim relating the flexible working request was never mentioned in the original proceedings. In fact it was first eluded to by Mr Zerehannes himself in a letter to Asda dated 24 October 2017, but not again it seems until in these proceedings by Employment Judge Britton at a case management discussion on 25 September 2018. Mr Zerehannes then for some reason waited a month and then only sought to apply to amend his claim to add a complaint under **Part 8A** on 26 October 2018. That application was refused by Employment Judge Camp on 28 January 2019.

4. The respondent's position is simple. The Respondents deny all allegations of discrimination and victimisation. They admit that their procedures may not have been perfect, however that was nothing to do with race, disability or complaints of breaches of the **Equality Act 2010**.

### **The hearing**

5. Dr Ibabakombo, lay representative, represented Mr Zerehannes. Ms R Kight, Counsel, represented the respondents. The Tribunal would like to thank both of them for the help that they have provided to us and for their detailed written submissions which took the place of oral submissions.
6. Mr Zerehannes speaks Bilen as his first language. At the hearing Mr Tecele Walde Medin acted as court-appointed translator. We were not told of any communication difficulties and we did not notice anything that caused us concern about communication difficulties. We would like to thank Mr Medin for his assistance throughout the hearing.
7. The Tribunal has heard the following oral evidence:
  - 7.1. Mr Zerehannes (with the interpreter's assistance);
  - 7.2. Mr P Alexander, a Shift Manager at Asda's warehouse known as the Lutterworth Integrated Distribution Centre ("IDC"), which throughout the proceedings has been called the Depot and is where Mr Zerehannes worked;
  - 7.3. Mr P Statham, the Operations Manager at a site known as the Lutterworth Ambient Distribution Centre ("ADC");
  - 7.4. Mr C Small, the Shift Manager at the IDC;
  - 7.5. Mr S Wells, who was the Shift Manager of the late shifts at the IDC;
  - 7.6. Mr S Gamble, who had overall responsibility for transport and warehouse function at Asda;
  - 7.7. Ms E Knight, who is the HR Business Partner at the IDC; and
  - 7.8. Mr C Tilley, who is the General Manager at an Asda Chilled Distribution Centre in Bristol.

Each witness has been cross-examined and we have taken into account all of their oral evidence.

8. There was an agreed bundle before the Tribunal that consisted or approximately 850 pages. The 399 pages represent the claim, response and other documents relating to the Tribunal's procedure. The remainder relates to the substantive claims. We have taken into account those pages to which we have been referred.
9. During the course of the hearing, some supplementary documents had been produced and, with the parties' agreement, they have been put before us and we have taken those into account also.
10. The hearing took place between 17 and 28 February 2020, a period therefore of 10 days. It was listed to deal with liability only. Unfortunately,

all 10 days were required just to hear the evidence. The hearings each ran from about 10:00 to 16:00, with an hour's break for lunch. During the course of the hearing, we took a number of breaks during the morning and afternoon to accommodate the need for the interpreter to have a break from interpreting, and to allow the parties some moments of rest.

11. Because there was insufficient time to hear submissions, deliberate and to deliver judgment and then go on to deal with remedy or give directions in relation to it, the Tribunal adjourned the case at the conclusion of the hearing to a later date.
12. Unfortunately, in March 2020 the COVID-19 pandemic took hold in the UK and resulted in a significant impact on the Tribunal being able to hear cases. The Leicester Hearing Centre, for example, was closed to members of the public and, in the initial part of the pandemic, the Tribunal lacked the facilities to be able to conduct remote hearings. Even when that was resolved, it was not until about September 2020 that the Tribunal in the Midlands (East) region gained the capacity to hear remote hearings with lay members. Even that capacity grew cautiously because the system and process of remote hearings was new and the Tribunal wanted to test things before opening up all hearings to the possibility of fully remote hearings.
13. It was only much later that the Leicester Hearing Centre itself actually reopened to allow members of the public to attend. Even then, because of concerns about Covid safety, the number of attendees and available rooms was significantly reduced. Unsurprisingly this impacted on the workload of the Tribunal, reduced its resources and, specifically, has impacted on the Tribunal's ability to relist this case to a conclusion.
14. The Tribunal had initially relisted the case for 15 April 2021. However, due to an unfortunate administrative error, the Tribunal had not booked an interpreter for Mr Zerehannes. As mentioned, Mr Zerehannes speaks Bilen. This is a rare language spoken only in Eritrea and the Eastern part of Sudan and which has we understand about 91,000 speakers worldwide. Finding an interpreter for such a rare language at short notice in order to ensure that the hearing went ahead proved impossible. Therefore the Employment Judge issued a case management order that vacated that hearing and instead gave directions for the parties to send in written submissions instead.
15. Each party provided written submissions and the Tribunal is grateful for those and has taken those into account. We also recognise the effort of Ms Kight to prepare a refined list of issues, and we are grateful for that also.
16. Because of Covid-19 and the limited facilities of the Tribunal, the first date that the Tribunal was able to meet and deliberate were 2 and 3 August 2021. At that meeting, the Tribunal read the submissions, refreshed its memory as to what took place in the hearing from its own notes, from the bundles and the witness statements and then deliberated as to what its conclusions should be.
17. The Tribunal observes that no party during the course of the hearing had suggested that the hearing itself was unfair and the Tribunal is satisfied for its own part that the parties had a fair hearing.

18. In particular, no party has written to the Tribunal to complain that the significant delay between the end of the evidence and the Tribunal making its deliberations has resulted in unfairness to that party. The Tribunal is satisfied that the delay has not impacted on the fairness of the proceedings to the parties because we still have the full bundles, the full witness statements, detail written submissions and the full notes of the hearing and we thoroughly refreshed our memories from those documents before beginning our deliberations.
19. We would like to apologise to the parties for the delay in this case and thank them for their patience with the Tribunal.
20. The Tribunal has reached a unanimous decision, and this is that decision.

### Issues

21. As demonstrated by the proportion of the bundle that deals purely with procedure, the claims have a long and complicated procedural history, driven for the most part by Mr Zerehannes' continuous and repeated changes to his case and applications to amend. However, at a hearing on 30 September 2019, Employment Judge Camp finalised once and for all the issues in his Case Management Order at paragraph 13 and that Order was sent to the parties on 10 September 2019. Neither party suggested that he had incorrectly identified the issues either in response to his order or at the hearing before us. We have taken those issues verbatim lest we accidentally gloss over an allegation and set them out below. We have retained the numbering as used in the original documents. Therefore the issues are as follows:

### Jurisdiction

22. Does the Tribunal have jurisdiction to hear the entirety of Mr Zerehannes' claim, or are there parts of it which have been brought out of time, do not form part of a continuing act and were not presented within such further period as is just and equitable in all the circumstances?

- 22.1. The following allegations in claim 1 (2600155/2018) pre-date 13 September 2017 and are prima facie out of time:

No	Date	Allegation by Claimant	Type(s) of complaint
1	From 29/04/17	People Service Manager's failure to acknowledge receipt of the Claimant's Application for flexible working hours which was made on 29/04/2017 within the Company's policy timescale of 28 days of conclusion of the request, from the date of receiving the request.	Direct race discrimination
2	From 29/04/17	People Manager's failure to inform the claimant that Employee's Application for flexible working hours is to be dealt with or concluded within 28 days from the date of receiving the Application or request.	Direct race discrimination

3	From 29/04/17	People Manager's unreasonable delay in referring claimant's Application for flexible working hours (made on 29/04/2017) to relevant managers (Mr W Foster and/or Mr S Nagra).	Direct race discrimination,
4	From 29/04/17	People Manager, Mr W Foster and Mr S Nagra's failure to organise a meeting to discuss the claimant's Application for flexible working hours within 28 days from date when the claimant's Application was submitted on 29/04/17.	Direct race discrimination,
5	02/06/17	Mr S Nagra's lack of a proper preparation to the meeting to discuss claimant's Application on 02/06/2017 i.e. failure to prepare a note taker ahead of the meeting and failure to inform the claimant ahead of the meeting that his chosen Union Rep was not available for the meeting to go ahead 02/06/17 for the claimant to contact a fellow colleague.	Direct race discrimination
6	02/06/17	When Mr S Nagra informed the claimant that Mr W Foster will take over the claimant's Application on his return to work from Holiday on 08/06/2017 without initially agreeing it with Mr W Foster.	Direct race discrimination
7	Week commenced on 08/06/17	When Mr W Foster refused to have a discussion with the claimant about his application and sending the claimant back to Mr S Nagra if the claimant wanted to discuss about his Application despite the claimant informing him that Mr S Nagra referred the claimant to Mr Foster who was to take over his Application for flexible working hours.	Direct race discrimination
8	06/2017	When claimant was informed by Mr S Nagra that Mr W Foster is the one who will complete the flexible working hours process following him filling the "Colleague Flexible Working Self-Assessment forms" on 02/06/2017 without initially agreeing it with Mr W Foster.	Direct race discrimination
9	06/2017	When the claimant went to see Mr W Foster about the progress of his Application for the second time and Mr W Foster then asked the claimant to leave it with him and that he will have a discussion with Mr S Nagra about the	Direct race discrimination

		progress of his Application and will contact claimant as soon as possible after their meeting but he never come back to the claimant.	
10	From 02/06/17 to 09/09/17	Mr S Nagra's failure to re-organise a proper meeting to discuss the claimant's Application for flexible working hours.	Direct race discrimination
13	10/09/17	Mr S Nagra's failure to provide claimant with a formal Outcome letter including supporting reasons of the refusal of the claimant's Application for flexible working hours after the meeting on 10/09/2017.	Direct race discrimination

23. The following allegations in claim 2 (2601886/2019) pre-date 13 February 2019 and are prima facie out of time:

No	Date	Allegation by Claimant (What happened)	Type(s) of complaint	Which respondent(s)
4	05/02/2019	Failing to provide an interpreter English-Bilen, leading the initial stage 1 grievance listed on 05/02/2019 being postponed despite of informing the claimant that the Respondent is under duty to provide him with a professional because he has provided other colleagues with professional interpreter (refer to claimant letter dated 18/04/2019)	Direct race discrimination & Victimisation	Asda Mr S Gamble
17	05/02/2019	When during the grievance meeting (related to claimant's letter dated 15/11/2018) he was so upset and aggressive when talking to claimant and was so aggressive when questioning and assumed that claimant no longer require an interpreter.	Direct race discrimination & Victimisation	Asda Mr C Tilley

***Direct race discrimination***

24. Did any of the following amount to less favourable treatment by Asda of Mr Zerehannes (as compared to how others who are not from Eritrea-Bilen or not of the same skin colour but in not materially different circumstances were or would have been treated)?

## 24.1. Allegations 1 – 67 below:

No	Date	Allegation by Claimant	Type(s) of complaint
1	From 29/04/17	People Service Manager's failure to acknowledge receipt of the Claimant's Application for flexible working hours which was made on 29/04/2017 within the Company's policy timescale of 28 days of conclusion of the request, from the date of receiving the request.	Direct race discrimination
2	From 29/04/17	People Manager's failure to inform the claimant that Employee's Application for flexible working hours is to be dealt with or concluded within 28 days from the date of receiving the Application or request.	Direct race discrimination
3	From 29/04/17	People Manager's unreasonable delay in referring claimant's Application for flexible working hours (made on 29/04/2017) to relevant managers (Mr W Foster and/or Mr S Nagra).	Direct race discrimination
4	From 29/04/17	People Manager, Mr W Foster and Mr S Nagra's failure to organise a meeting to discuss the claimant's Application for flexible working hours within 28 days from date when the claimant's Application was submitted on 29/04/17.	Direct race discrimination
5	02/06/17	Mr S Nagra's lack of a proper preparation to the meeting to discuss claimant's application on 02/06/2017 i.e. failure to prepare a note taker ahead of the meeting and failure to inform the claimant ahead of the meeting that his chosen Union Rep was not available for the meeting to go ahead 02/06/17 for the claimant to contact a fellow colleague.	Direct race discrimination
6	02/06/17	When Mr S Nagra informed the claimant that Mr W Foster will take over the claimant's Application on his return to work from Holiday on 08/06/2017 without initially agreeing it with Mr W Foster.	Direct race discrimination
7	Week commenced on 08/06/17	When Mr Foster refused to have a discussion with the claimant about his Application and sending the claimant back to Mr S Nagra if the claimant wanted to discuss about his	Direct race discrimination



		Application despite the claimant informing him that Mr S Nagra referred the claimant to Mr Foster who was to take over his Application for flexible working hours.	
8	06/2017	When claimant was informed by Mr S Nagra that Mr W Foster is the one who will complete the flexible working hours process following him filling the "Colleague Flexible Working Self-Assessment forms" on 02/06/2017 without initially agreeing it with Mr W Foster.	Direct race discrimination
9	06/2017	When the claimant went to see Mr W Foster about the progress of his Application for the second time and Mr W Foster then asked the claimant to leave it with him and that he will have a discussion with Mr S Nagra about the progress of his Application and will contact claimant as soon as possible after their meeting but he never come back to the claimant.	Direct race discrimination
10	From 02/06/17 to 09/09/17	Mr S Nagra's failure to re-organise a proper meeting to discuss the claimant's Application for flexible working hours.	Direct race discrimination
11	14/09/17	When Mr A James verbally informed the claimant that his Application for flexible working hours has been rejected despite of not dealing with this Application.	Direct race discrimination
12	14/09/17 at about 8:00pm	When Mr S Nagra handed a letter to the claimant, invited him to attend a formality meeting to discuss the Outcome of his Application for flexible working hours on 18/10/2017 after Mr A James had verbally informed the claimant that his application has been rejected.	Direct race discrimination
13	10/09/17	Mr S Nagra's failure to provide claimant with a formal Outcome letter including supporting reasons of the refusal of the claimant's Application for flexible working hours after the meeting on 10/09/2017.	Direct race discrimination
14	14/09/17	Unreasonable delay by the Respondent (People Manager, Mr W Foster, Mr S Nagra and Mr A James) to conclude the claimant's Application for flexible working hours	Direct race discrimination

		submitted on 29/04/2017 and the written decision was not provided.	
15	14/09/17	When Mr A James verbal rejected the claimant's Application for a "rota change request for flexible working hours".	Direct race discrimination
16	14/09/17	Mr A James' failure to provide claimant with a formal Outcome letter including supporting reason of the refusal of the claimant's Application for flexible working hours following the meeting on 10/09/2017 at the time of the rejection.	Direct race discrimination
17	From 10/09/17 to 14/09/17	Rejection of the claimant's application for "a rota change request or flexible working hours" after the meeting on 10/09/2017 by Mr W Foster, Mr S Nagra and Mr A James.	Direct race discrimination
18	20/9/17-05/10/17	Mr A James and/or Mr D Binks' failure to send a confirmation letter, inviting claimant to attend an Appeal meeting on 5/10/2017 as promised by Mr A James during the adjourned Appeal meeting on 20/9 17 at 16:00.	Direct race discrimination
19	11/10/17	When Mr D Binks states that he planned a meeting in for 5/10/2017 and the claimant asked if they could leave it until the following week and the first the time he was available when claimant and Scott James, union rep are in Saturday (14/10/2017), hence the Appeal date being set for then, this.	Direct race discrimination
20	11/10/17	When Mr D Binks changed the date of appeal meeting from 11/10/2017 (the date the union Rep and the Claimant were at work) to 14/10/2017 (the date the union Rep was not at work) without contacting the claimant and /or Mr James, union Rep in advance of the change.	Direct race discrimination
21	16/11/17	Mr P Alexander's rejection of the claimant's formal grievance against the Respondent's handling of the claimant request for flexible working hours made 24/10/2017 (claimant complained of ongoing being discriminatory), with no supporting reason.	Direct race discrimination

22	16/10/17	When during the review meeting, Shawn Wells said: this was not time for claimant to raise complaint about discrimination (race and disability) in replying the claimant's complained that the manner the managers were dealing with his request was discrimination act because he knew people who were granted flexible working hours and his wife is suffering from Asthma but the company is not given him flexible working hours to help his wife and children.	Direct race discrimination
23	16/10/17	When during the review meeting, Mr S Wells and Mr M Broadaway refused claimant's request for the postponement of the sick pay review meeting without a good reason; request made on grounds of his health conditions.	Direct race discrimination
24	16/10/17	When during the review meeting, the claimant said he was not mentally fit to answer questions but Mr M Broadaway, note taker wrongly recorded that claimant said: he was not mentally unfit to answer these questions and refusing to correct it without good reason despite the claimant's resistance to this and requested it to be amended.	Direct race discrimination
25	From 18/10/17 to 27 February 2018	When in her letter dated 18/10/2017, Ms S Hammond suspended claimant's Company sick pay without a good reason despite of having claimant's sick not (sic).	Direct race discrimination
26	16/11/17	[Mr P Alexander]'s rejection of the claimant's Appeal against the suspension of his sick pay, submitted on 24/10/2017 (claimant complained of ongoing being discriminatory), without good reason despite of having claimant's sick not (sic).	Direct race discrimination
27	16/11/17	When summarised the concerns raised within claimant's grievance as being his "flexible working request however, Mr P Alexander] has ignored the consequences of failing to deal with claimant's request which is a cause of his absence from work due to work related stress and it was also the claimant's Appeal against the suspension of his sick pay.	Direct race discrimination
28	16/11/17	When stated that Mr P Alexander] gave claimant a further opportunity when they met	Direct race discrimination

		on 02/11/2017 to hear this as an appeal rather than a grievance but claimant declined whilst the claimant wanted his grievance to be firstly heard and his appeal letter against the refusal of his flexible working hours being heard in second position.	
29	16/11/17	Mr P Alexander]'s failure to recommend the business to pay claimant's sickness absence entitlement, resulted from Mr W Foster and Mr S Nagra's failure to deal with claimant's request within the 28 days' timeline despite of Mr P Alexander] recognising that Mr W Foster and Mr S Nagra were responsible for failing to deal with claimant's request within the 28 days' timeline.	Direct race discrimination
30	16/11/17	When Mr P Alexander] stated that given the nature of the lengthy delay he believes this matter would have been dealt with sooner if the claimant had escalated his dissatisfaction to a Shift Manager earlier despite that the Flexible work request is to be sent to "People Service" who are to refer it to a relevant manager.	Direct race discrimination
31	16/11/17	When Mr P Alexander] stated that that claimant had an opportunity for appeal to be head (sic) on 20/09/17 and that claimant stated that this meeting did not go ahead due to his chose Rep, Scott James not being available even though an alternative GMB Rep could attend.	Direct race discrimination
32	16/11/17	When Paul accepted Mr A James' evidence without good reason and supporting evidence and rejected claimant's evidence with no supporting good reason and supporting evidence.	Direct race discrimination
33	16/11/17	When he accepted Mr S Wells' oral evidence that claimant refused to fully explain the reason for his absence from work during the meeting on 16/10/2017 despite of the claimant provided the business with sick notes which including reasons.	Direct race discrimination
34	16/11/17	When Mr P Alexander] accepted Mr S Wells' evidence that the claimant has even prevented his Rep from answering on his behalf whilst the notes of the meeting on 16/10/17 recorded that claimant said "could he please ask that Scott	Direct race discrimination

		James explain everything as he is too stressed out with situation at this moment in time to answer these questions clearly”.	
35	16/11/17	When Mr P Alexander accepted Mr S Wells’ evidence that claimant stated that he would await the withholding of his company sick pay and the reasons and go from there.	Direct race discrimination
36	16/11/17	Mr P Alexander’s conclusion that he understand claimant’s reason for his request the company also is obliged to balance this with the needs of the business and that in the claimant’s case this is around the increasing shortfall of colleagues weekend hours against volume which regularly requires additional overtime in the run up to most weekends in order to try to offset the weekend deficit. This has operational and cost consequences, in terms of company policy, this is categorised as burden of additional costs, detrimental effect on ability to meet customer demand with no supporting reason why his colleagues’ requests were granted.	Direct race discrimination
37	16/11/17	Mr P Alexander’s failure to respond to claimant’s question whether those managers who were dealing with his request were acting in breach of the Company policy time scale because they were incompetent, were not trained to deal with request of flexible work or were on discrimination motivation)	Direct race discrimination
38	16/11/17	Mr P Alexander’s conclusion that should claimant wish to appeal the decision to withhold his company sick pay then he should contact Sharon Hammond, in line with standard practice.	Direct race discrimination
39	16/11/17	Mr P Alexander’s failure to properly examine the final paragraph of claimant’s letter of 24/102017 which stating: <i>“finally the facts above or this grievance is also to be regarded as my appeal against the suspension of my sick pay which is due to the company’s handling of my request for flexible working hours and it is itself racial discrimination and associated disability discrimination on grounds of my wife disability”</i> .	Direct race discrimination

40	14/12/17-24/01/18	Mr C Small's failure to provide reasons or documents which supporting that employee's Application for flexible working hour on grounds of his wife disability is not to be allowed;	Direct race discrimination
41	14/12/17-24/01/18	Mr C Small's failure to provide reasons or company Absence policy stating that an employee who is off sick due to work related stress will have his company sick pay suspended despite of having his sick note.	Direct race discrimination
42	14/12/17-24/01/18	Mr C Small's failure to provide reasons or documents supporting that Employee has to sort his own transport to and from work in order to attend a sickness review meeting despite of not having money for transport.	Direct race discrimination
43	29/12/17-24/01/18	Mr M Turner's failure to proper examine and address the claimant's letter of 29/12/2017, with no good reason.	Direct race discrimination
44	29/12/17-24/01/18	Mr M Turner's failure to provide the claimant with the documents as requested by the claimant on 13/12/2017 and to give any reason of his failure.	Direct race discrimination
45	30/12/17	Mr A Swetman's statements – letter of 30/12/2017 with no supporting reasons and material evidence.	Direct race discrimination
46	30/12/17	When Mr A Swetman stated that he has not been able to make contact with claimants whilst the claimant despite of the claimant's continually replying to his letters and emails with no supporting reasons and material evidence.	Direct race discrimination
47	30/12/17	When Mr A Swetman ignored that the claimant has provided the business with his reasons why he reserves his right not to speak on the phones because he didn't properly understand what managers were saying on the phone or due to his understanding of English on the phone (see his email to Zoe Small on 11/12/2017 at 13:33 and his email to Matt Turner on 13/12/2017 at 17:28)	Direct race discrimination

48	30/12/17	When Mr A Swetman ignored the claimant's sick notes provided to the business which supported that he was not "absent without leave".	Direct race discrimination
49	30/12/17	When Mr A Swetman denied Claimant right to discuss the details of claimant's own Case with any colleague (or make more enquiries of the business) who can provide him with advice and/or in order for him to get factual information about comparators and to get reasons/grounds why other colleagues were allowed flexible work by 04/01/2018 at 2pm.	Direct race discrimination
50	30/12/17	Mr A Swetman's failure to provide the claimant with a copy of the business policy or guidance which supporting that "an employee is not to discuss the details of his/her own Case with any colleague (or to make more enquiries of the business) who can provide him with advice and/or in order form him to get factual information about comparators and to get reasons/grounds why other colleagues were allowed flexible work.	Direct race discrimination
51	From 11/01/18	Mr A Swetman's failure to address the claimant's letter of 11/01/2018 and to provide him with requested Statuary Sick Pay Form (SSP1); failure to up dated the claimant as to progress of the investigation process related to the Appeal meeting which took place on 05/12/2017 and Lack of consideration to the claimant's information that the delay with his grievance Appeal is causing him more stress and his health to deteriorate.	Direct race discrimination
52	27/03/18	Mr P Statham's rejection of the Claimant's Appeal against Mr P Alexander with no supporting good reason.	Direct race discrimination
53	27/03/18	Mr P Statham's failure to contact Claimant after the Stage 1 grievance Appeal meeting with him on 5 <sup>th</sup> December 2017.	Direct race discrimination
54	27/03/18	Mr P Statham's failure to provide Claimant with his Outcome of the Stage 1 grievance Appeal, within 5 days of the meeting on 5 <sup>th</sup> December 2017.	Direct race discrimination

55	27/03/18	Mr P Statham's failure to give explanation for the delay of providing Claimant with outcome letter from 5 <sup>th</sup> December 2017.	Direct race discrimination
56	27/03/18	Mr P Statham's failure to advise Claimant the date when a response (or outcome of the Stage 1 grievance Appeal) can be expected if the 5 days' timescale of providing the outcome was not possible, this from 5 <sup>th</sup> December 2017.	Direct race discrimination
57	27/03/18	Mr P Statham's failure to contact Claimant after Natalie Hersey's email to the claimant on 12 <sup>th</sup> January 2018 in which Natalie Hersey write that in relation to my outstanding grievance, she believes that this is being picked up externally by Mr P Statham and that she has contacted Mr P Statham today (12/01/2018) and Mr P Statham has advised he is still investigating claimant's concerns and is looking to have an outcome ready by next week.	Direct race discrimination
58	27/03/18	Mr P Statham's failure to provide Claimant with his Outcome of the Stage 1 grievance Appeal, within 5 days from 12 <sup>th</sup> January 2018.	Direct race discrimination
59	27/03/18	Mr P Statham's failure to give an explanation for the delay of providing Claimant with outcome letter from 12 <sup>th</sup> January 2018.	Direct race discrimination
60	27/03/18	Mr P Statham's failure to advise Claimant the date when a response (or outcome of the Stage 1 grievance Appeal) can be expected, this from 12 <sup>th</sup> January 2018.	Direct race discrimination
61	27/03/18	Unreasonable delay to provide claimant with his decision dated 27/03/2018 which was received on 05/04/2018; this breach of the Company policy and ACAS code of practice.	Direct race discrimination
62	27/03/18	Mr P Statham's conclusion that the claimant cannot claim that Mr P Alexander's decision was an act of victimisation allegedly because he said he has not submitted a previous grievance or complainant regarding discrimination.	Direct race discrimination



63	27/03/18	Mr P Statham's failure to properly examine medical evidence supported the reason of my absence;	Direct race discrimination
64	05/2018	Mr S Gamble's rejection of the claimant's Company Sick Pay-Appeal dated 27/03.2018 and failure to properly examine medical evidence supported the reason of the claimant's absence, with no supporting reason.	Direct race discrimination
65	07/05/18	Mr D Binks' rejection of the claimant's Appeal against the refusal for a change to his working arrangements-flexible work, with no supporting reason.	Direct race discrimination
66	From 06/02/18 up to 22/05/18	Ms N Hersey's continuous failure to arrange stage 1 grievance relating to the claimant's grievance letters dated 06/02/2018 and to inform the claimant the name of the manager who was supposed to deal with claimant's grievance letters dated 06/02/2018 and 14/02/2018.	Direct race discrimination
67	From 03/01/18 up to 22/05/18	Mr A Swetman's continuous failure to arrange stage 1 grievance relating to the claimant's grievance letter dated 03/01/2018 and to inform the claimant the name of the manager who was supposed to deal with claimant's grievance dated 03/01/2018.	Direct race discrimination

24.2. The following actions of Mr Tilley by letter of 16 July 2019:

- 24.2.1. the rejection of Mr Zerehannes's grievance appeal?
- 24.2.2. the alleged provision of inadequate reasons for the rejection of Mr Zerehannes's grievance appeal?
- 24.2.3. Asda and Mr Tilley's failure to provide with the grievance appeal decision letter all of the information and documentation C had been seeking.

24.3. Allegations 3-11 and 16-23 as set out below:

No	Date	Allegation by Claimant (What happened)	Type(s) of complaint	Which respondent(s)
3	12/12/2018 – 27/06/2019	Handling of claimant's grievance dated 12/12/2018 (see claimant's letter dated 26/02/2019 and note of the meeting on 26/02/2019) and/or delaying in concluding claimant's grievance dated	Direct race discrimination & Victimisation	Asda Mr S Gamble

		12/12/2018 with no supporting reason.		
4	05/02/2019	Failing to provide an interpreter English-Bilen, leading the initial stage 1 grievance listed on 05/02/2019 being postponed despite of informing the claimant that the Respondent is under duty to provide him with a professional because he has provided other colleagues with professional interpreter (refer to claimant letter dated 18/04/2019).	Direct race discrimination & Victimisation	Asda Mr S Gamble
5	26/02/2019	Failing to provide an interpreter English-Bilen, leading the initial stage 1 grievance listed on 26/02/2019, being postponed despite of requested the business to provide claimant with an interpreter;	Direct race discrimination & Victimisation	Asda Mr S Gamble
6	26/02/2019 – 27/06/2019	Failing to re-arrange the stage 1 grievance process with no supporting good reason.	Direct race discrimination & Victimisation	Asda Mr S Gamble
7	04/04/2019 – 27/06/2019	Failing to deal with the claimant's letter of 04/04/2019 with no supporting reason.	Direct race discrimination	Asda Ms E Knight
8	24/05/2019	Delay in referring claimant's letter dated 24/05/2019 to Mr C Tilley;	Direct race discrimination & Victimisation	Asda Ms E Knight
9	20/05/2019	Rejection of claimant's concerns and complaints ( <i>raised on 12/12/2018, 19/03/2019, 18/04/2019, 15/05/2019; 16/05/2019</i> ) with no supporting reason or with no evidence supporting any fully investigation being carried out as no grievance	Direct race discrimination & Victimisation	Asda Ms E Knight

		meetings were even arranged with the claimant.		
10	20/05/2019	Failure to provide evidence supporting that a fully investigation related to the claimant's concerns and complaints ( <i>raised on 12/12/2018, 19/03/2019, 18/04/2019, 15/05/2019; 16/05/2019</i> ) has been carried out prior her conclusion on 20 <sup>th</sup> May 2019.	Direct race discrimination & Victimisation	Asda Ms E Knight
11	20/05/2019	Ms E Knight's refusal to address claimant's concerns and complaints raised in his letter dated 30/05/2019/ (Refer concerns and complaints to ET1 claim-continuous sheet: points 13-34; 36-42; 44-53).	Direct race discrimination & Victimisation	Asda Ms E Knight
16	15/11/2018 - 27/06/2019	Handling of claimant's appeal letter dated 15/11/2018, against Umar Farooq's decision with no supporting reason. (Refer concerns and complaints to ET1 claim-continuation sheet: points 55.2, 55.3).	Direct race discrimination & Victimisation	Asda Mr C Tilley
17	05/02/2019	When during the grievance meeting (related to claimant's letter dated 15/11/2018) he was so upset and aggressive when talking to claimant and was so aggressive when questioning and assumed that claimant was no longer require an interpreter.	Direct race discrimination & Victimisation	Asda Mr C Tilley
18	14/03/2019	when during the meeting Mr T Kidane stated that when he was asked by Mr C Tilley to act as an interpreter for the grievance appeal meeting, Mr Kidane replied that his English was not good enough for him to interpret a	Direct race discrimination & Victimisation	Asda Mr C Tilley

		grievance meeting but Mr C Tilley insisted that Mr Kidane was a suitable person to interpret and consequently, during the meeting Mr Kidane would not properly interpret and leading the meeting being postponed again.		
19	14/03/2019	Mr C Tilley's failure to take reasonable steps for the appeal meeting to go ahead i.e. failure to arrange a qualified Bilen-English Interpreter to assist claimant with interpretation on 14/03/2019 with no supporting reasons.	Direct race discrimination & Victimisation	Asda Mr C Tilley
20	14/03/2019	Mr C Tilley has failed to properly consider the contents of claimant's letter dated 11/02/2019 with no supporting reasons particularly, when I stated " <i>I have organised Mr Tekleab to be present at the meeting however, for the reasons unknown by claimant he didn't attend the meeting so why I was to be blamed whilst all this could have been avoided by providing claimant with a qualified interpreter.</i> "	Direct race discrimination & Victimisation	Asda Mr C Tilley
21	14/03/2019	When during the meeting, after the adjournment of the appeal meeting, Mr C Tilley stated that "having had chance to look at what they are going to do is reschedule the meeting <i>until at the time when the interpreter (Mr Tekleab) who was in the meeting with UMAR is available; as clearly that worked really well and will be a way of ensuring that Mr C Tilley get every opportunity to put claimant's case across. The interpreter is currently off</i>	Direct race discrimination & Victimisation	Asda Mr C Tilley

		<i>sick but as soon as he returns and they will come back and conducted the appeal;</i>		
22	15/11/2018 – 27/06/2019	Delaying in conclusion of the stage 2 grievance process with no supporting good reason (refer to para.55.8 of ET1 continuation Sheet)	Direct race discrimination & Victimisation	Asda Mr C Tilley
23	24/05/2019 – 27/06/2019	Mr C Tilley's delay in dealing with contents of the claimant's letter dated 24/05/2019.	Direct race discrimination & Victimisation	Asda Mr C Tilley

24.4. If so, was that treatment because of any of the following:

24.4.1. Mr Zerehannes's national origin of Eritrean – Bilen?  
and/or

24.4.2. His dark skin colour?

**Direct disability discrimination (by association)**

25. Did any of allegations 1-6 below amount to less favourable treatment of Mr Zerehannes (as compared to how someone doing the same or similar work to him who made a request to do less weekend work but not because they need to provide support to a close relative who is a disabled asthma sufferer would have been treated) by Asda?

No	Date	Allegation by Claimant	Type(s) of complaint
1	14/09/17	Mr A James' verbal rejection of the claimant's Application for a "rota change request or flexible working hours" to care for his disable wife and/or to help her disable wife with housekeeping including children) with no supporting reason.	Associative direct disability discrimination
2	From 10/09/17 to 14/09/17	Mr W Foster, And Mr S Nagra's rejection of the claimant's Application for "a rota change request or flexible working hours" after the meeting on 10/09/2017	Associative direct disability discrimination
3	From 17/09/17	Complaints related to/including the Handling of the claimant's appeal against the decision to refuse the claimant's application for "a rota	Associative direct

		change request or flexible working hours”, appeal made on 17/09/17 against Mr A James <b>and/or</b> Mr D Binks.	disability discrimination
4	16/11/17	Mr P Alexander’s rejection of the claimant’s formal grievance against the Respondent’s handling of the claimant request for flexible working hours with no supporting reason on 16/11/2017	Associative direct disability discrimination
5	27/03/18	Mr P Statham’s Handling and Rejection of the Claimant’s Appeal against Mr P Alexander], with no good reason.	Associative direct disability discrimination
6	07/05/18	Dany Binks’ rejection of the claimant’s Appeal made on 17/09/2017 against the refusal for a change to his working arrangements, with no supporting reason and unreasonable delay or Procedural unfairness concluding appeal process on 07/05/2018 as the appeal letter was submitted on 17/09/17.	Associative direct disability discrimination

26. If so, was that treatment because of Mr Zerehannes’s wife’s asthma?

### **Victimisation**

27. Did any of the following amount to detrimental treatment of C by :

- 27.1. The allegations in paragraphs 24.2 as though they were separate acts of victimisation.
- 27.2. The allegations marked as “victimisation” in the table at paragraph 24.3 above;
- 27.3. The 21 allegations set out below which are against Asda only (albeit they name individuals):
  - 27.3.1. When on 27/03/2018, Mr P Statham rejects Claimant’s Appeal against Mr P Alexander
  - 27.3.2. Handling of the claimant’s Appeal against Mr P Alexander’s rejection of the claimant’s formal grievance against the Respondent’s handling of the claimant request for flexible working hours with no supporting reason as per Claimant’s letter dated 14/02/2018.

- 27.3.3. Mr P Statham's failure to contact Claimant after the Stage 1 grievance Appeal meeting with him on 5th December 2017.
- 27.3.4. Mr P Statham's failure to provide Claimant with his Outcome of the Stage 1 grievance Appeal, within 5 days of the meeting on 5th December 2017.
- 27.3.5. Mr P Statham's failure to give an explanation for the delay of providing Claimant with outcome letter from 5th December 2017.
- 27.3.6. Mr P Statham's failure to advise Claimant the date when a response (or outcome of the Stage 1 grievance Appeal) can be expected if the 5 days' timescale of providing the outcome was not possible, this from 5th December 2017.
- 27.3.7. Mr P Statham's failure to contact Claimant after Natalie Hersey's email to the claimant on 12th January 2018 in which Natalie Hersey write that in relation to my outstanding grievance, she believes that this is being picked up externally by Mr P Statham and that she has contacted Mr P Statham today (12/01/2018) and Mr P Statham has advised he is still investigating claimant's concerns and is looking to have an outcome ready by next week.
- 27.3.8. Mr P Statham's failure to provide Claimant with his Outcome of die Stage 1 grievance Appeal, within 5 days from 12th January 2018.
- 27.3.9. Mr P Statham's failure to give an explanation for the delay of providing Claimant with outcome letter from 12th January 2018.
- 27.3.10. Mr P Statham's failure to advise the Claimant the date when a response (or outcome of the Stage 1 grievance Appeal) can be expected, this from 12th January 2018.
- 27.3.11. Unreasonable delay to provide claimant with his decision dated 27/03/2018 which was received on 05/04/2018; this breach of the Company policy and ACAS code of practice.
- 27.3.12. When Mr P Statham concludes, claimant cannot claim that Mr P Alexander's decision was an act of victimisation allegedly because I said I have not submitted a previous grievance or complainant regarding discrimination.
- 27.3.13. Mr P Statham's failure to properly examine medical evidence supported the reason of my absence;

- 27.3.14. Reasoning and conclusions are simply to protect Mr P Alexander.
  - 27.3.15. When in May 2018, Mr S Gamble rejected Claimant's Company Sick Pay-Appeal dated 27/03/2018;
  - 27.3.16. Failure to properly examine medical evidence supported the reason of my absence.
  - 27.3.17. When on 7th May 2018, Mr D Binks rejects Claimant's Appeal against the refusal for a change to his working arrangements.
  - 27.3.18. Ms N Hersey's continuous failure to arrange stage 1 grievance relating to the claimant's grievance letters dated 06/02/2018 and 14/02/2018 up to the date 22/05/2018.
  - 27.3.19. Ms N Hersey's continuous failure to inform the claimant the name of the manager who was supposed to deal with claimant's grievance letters dated 06/02/2018 and 14/02/2018 up to the date 22/05/2018.
  - 27.3.20. Mr A Swetman's continuous failure to arrange stage 1 grievance relating to the claimant's grievance letter dated 03/01/2018 up to the date 22/05/2018.
  - 27.3.21. Mr A Swetman's continuous failure to inform the claimant the name of the manager who was supposed to deal with claimant's grievance dated 03/01/2018 up to the date 22/05/2018.
28. If so, was that detriment because the claimant did a protected act? The claimant relies upon any of the following protected acts:
- 28.1. Mr Zerehannes's grievance letter of 24 October 2017;
  - 28.2. Mr Zerehannes's letter of 29 December 2017;
  - 28.3. Mr Zerehannes's letter of 3 January 2018;
  - 28.4. Mr Zerehannes's issue of Tribunal proceedings on 24 January 2018;
  - 28.5. Mr Zerehannes's letter of 6 February 2018;
  - 28.6. Mr Zerehannes's letter of 18 April 2018;
  - 28.7. Mr Zerehannes's grievance appeal letter of 15 November 2018;
  - 28.8. Mr Zerehannes's letter of 19 March 2019;
  - 28.9. Mr Zerehannes's letter of 24 May 2019; and
  - 28.10. Mr Zerehannes's letter of 13 June 2019.

***Unauthorised deductions from wages***

29. Was Mr Zerehannes paid less in non-statutory sick pay than he was entitled to be paid, in the period 18 October 2017 – 28 February 2018?



30. If so, how much less was he paid?

### **Findings of fact**

#### ***Witnesses generally***

31. The Tribunal considers that the Respondents' witnesses have been honest and reliable in the evidence that they have given. They gave straight answers to straight questions.

31.1. For example, when Mr Alexander was asked about his investigation into grievances that Mr Zerehannes had raised, he readily and unhesitatingly conceded he did not ask about the motivation of the alleged perpetrators for acting as they did, that that question would have been relevant to determining whether or not there had been any racial elements or discrimination to their decision making process, and therefore he should in hindsight have asked. There was no attempt by him to cover it up and we think that is something that stands to his credit.

31.2. Similarly, Mr Statham, who carried out investigations into matters, admitted he did not actually understand the concept of a protected act in relation to victimisation. However, again, rather than play it down or seek to cover up his lack of understanding, he admitted it and was upfront about the omission.

31.3. We concluded that the other Respondents' witnesses were straightforward and answered the questions as put to them.

31.4. Generally speaking, the evidence of the respondent's witnesses was clear, appeared to be unreserved and was consistent not only with each other but also with the documentary evidence that had been put before the Tribunal and to which we were referred.

32. We take a different view, however, of Mr Zerehannes. In coming to this conclusion we have recognised the guidance in the Equal Treatment Benchbook that those whose first language is not English or who were raised in a different culture to Great Britain may well have difficulty communicating because of both linguistic and cultural barriers. However, at no point did the claimant raise any complaint about difficulty communicating and weighing everything up we do not accept that these potential difficulties are sufficient to explain the general lack of satisfaction with Mr Zerehannes' own evidence.

32.1. The first thing that concerned the Tribunal is the general thrust of Mr Zerehannes' evidence has been to label everything as discrimination or victimisation but, when asked both in cross-examination and by the Tribunal, he said he alleged discrimination simply because he felt it was. At no point in his evidence in chief, cross-examination or in answers to the Tribunal (despite being plenty of opportunity to do so) has he even tried to point the Tribunal to anything that might suggest his race, wife's asthma or his previous complaints of discrimination are connected to what happened. When asked specifically by

the Employment Judge: "Why do you believe that it is down to race, disability or victimisation", he simply replied: "I just believe that it is".

32.2. His approach has been simply to use the label and then take a step back. The tenor of his evidence was that so far as he was concerned everything was discrimination or victimisation because he had said so and the respondents had not shown otherwise. We noted above he relied just on his belief without being able to point to a single thing that led to that belief. We noted in evidence he would often point out his assertion that the respondents had not proven otherwise.

32.3. Specifically

32.3.1. the Tribunal was not impressed by Mr Zerehannes labelling every single little thing as being an act of race discrimination, victimisation or disability discrimination, as the case may be. We can understand how a person might say that a failure to carry out an adjustment to a working pattern was because of race or disability but it is very difficult to see how, for example, a meeting starting late could be down to discrimination or the failure for a note taker to attend was down to discrimination. Mr Zerehannes at no point was able to explain his beliefs or give any reasons for that. It all seemed inherently implausible and exaggerated. There was a complete absence of reality overall and he provided nothing to suggest to us otherwise.

32.3.2. it is notable that Mr Zerehannes produced a witness statement to the Tribunal that consisted of 96 pages and yet nowhere in that did he set out anything that he said showed what happened was down to discrimination or victimisation (as may be). It is quite remarkable, and in our view reflects badly on him, that he could say so much and yet not be able to provide any single detail on those key issues.

32.4. Mr Zerehannes also appeared to be reluctant, or unwilling, to accept the patently obvious when it went against him and that he would be prepared to focus on things that looked good for him while ignoring the unfavourable things or the overall circumstances. For example, one of the allegations that has arisen is that Mr Zerehannes was a worse performer than another employee whom we will call as AK. We were taken to statistics that compared Mr Zerehannes to AK over 26 weeks or thereabouts. The statistics show how many items each had been targeted to pick in their shift by the system, how many items they did pick and therefore recorded an efficiency, that being a percentage of those items picked compared to those which he should have picked during the course of his shift. If they cleared

their target, the system allocated more items to them to pick and recorded this as extras. Thus, if an employee picked more than the initial target during their shift, then their efficiency would be greater than 100%. Simple mathematics show that AK's performance over that 26 weeks was 100.8% and that Mr Zerehannes' performance over that same period was 97.9%. In spite of that, the Mr Zerehannes insisted that his performance was as good, if not better, than AK's based purely on the fact that in some weeks, his efficiency was greater than AK's even though that was highly selective and ignored the overall circumstances.

32.5. His inability to accept reality or to make appropriate concessions occurred in relation to other matters during the case as well. For example, he made a specific allegation that a Mr W Foster was involved in the decision not to grant Mr Zerehannes his request for flexible working. In cross-examination, he accepted that Mr Foster had not told him that he was going to refuse his flexible working request. He also accepted that Mr Foster did not in fact attend the meeting involving that request. When asked therefore if he agreed that Mr Foster was not the person making the decision, his immediate reply was simply to say:

"Well, how do I know".

32.6. He also refused to accept other obvious facts. For example, one of his comparators is a Mr D Binks. Mr Binks is a manager and not a warehouse colleague like Mr Zerehannes and yet he refused to accept that Mr Binks was on different terms or conditions of employment even though he is doing a different and more senior job. He later refused to accept that the fact that Mr Binks' request to work fewer hours during the week is a qualitatively different request to a request to work fewer weekend shifts.

32.7. Mr Zerehannes also has the habit of linking on to phrases to try and support his contention. He alleged, for example, that his trade union representative had commented that the Respondents would use the excuse of business needs in order to discriminate against "people like Mr Zerehannes]". Mr Zerehannes has instantly jumped to the conclusion that this must be a reference to race discrimination but there is absolutely no explanation as to why that must be so. It could for example as easily have been a reference to some other protected characteristic that Mr Zerehannes had; it could have been a reference to the fact that he was a warehouse operative and that that was considered a lowly post not worthy of proper support or it could have been a reference to anything else besides. It simply seems to us to be yet another example of Mr Zerehannes leaping to the conclusion that because he has not got his way, it must be discrimination.

32.8. We have also reflected upon Mr Zerehannes' language ability. Mr Zerehannes alleges one of the acts of discrimination made against the Respondents is that they failed to provide an interpreter at some of the later hearings, and that he has very limited ability in English. However, it has been quite apparent during the course of this hearing that Mr Zerehannes' ability to speak English is not so bad as that which he seeks to portray. We make no criticism of Mr Zerehannes requiring an interpreter for Tribunal proceedings, or that he used English from time to time even though he had an interpreter available. We recognise what is said in the Equal Treatment Benchbook, and what indeed is common sense, that appearing before a Tribunal and taking part in formal court proceedings is very different to taking part in life in the workplace or indeed elsewhere in the community. The respondents do not make that criticism either. However it seems to us we can reflect on his ability and use of English in the hearing when assessing the credibility of his allegation that Asda needed to provide an interpreter and that his language abilities limited his ability to take part in the various meetings with Asda. During the course of the hearing, the Tribunal was acutely aware of the fact that Mr Zerehannes appeared to have better grasp of English than that which he suggested.

32.8.1. Firstly, he responded to questions that were asked of him in English by both the Tribunal and respondents' barrister often before they had even been translated for him.

32.8.2. Secondly, he reacted quite physically to some of the things that were suggested by the Respondents' witnesses in answers to question put to them, even before those answers had been translated to him.

32.8.3. Thirdly the need for a translator appears never to have been an issue in the facts of this case until much later when he was obviously frustrated that he was not getting his way.

32.8.4. We noted that at times Mr Zerehannes was represented by a trade union representative. There is no suggestion that he needed an interpreter to communicate with that representative.

32.8.5. Finally we note that many of the letters he sent to Asda are lengthy, detailed and readily allege discrimination and victimisation. We recognise that reading and writing are often easier for a non-native speaker of a language to adapt to than speaking or listening. However the level of detail and length is remarkable and does not sit well with someone who says their English is so bad they need an interpreter at meetings with their employer. How they came to be written we do not know but Mr Zerehannes did not

suggest they were not his words and at no time did Mr Zerehannes suggest he was unable to understand the words or language used in the letters he sent to Asda. It must be the case therefore he has sufficient fluency to understand them and stand by their contents. In our minds this too implies greater fluency in English than he was prepared to concede.

32.9. Overall, it appeared to us that the general thrust of Mr Zerehannes' evidence throughout has been that he perceives that he has not got his way and jumped to the conclusion that it must be down to discrimination or victimisation as alleged. He has throughout his evidence always adopted the approach that even though he cannot provide an explanation as to why it might be discrimination, it is that the Respondents have not shown it is not discrimination and therefore he thinks that he must win by default simply by making the assertion. As we explain in the section law, we do not believe that represents the state of the law of England and Wales. In any event, it is contrary to common sense that someone can simply assert a fact and then expect everybody else to disprove it, rather than having to at least adduce some evidence to show that there is some credibility behind the assertion that is being made.

32.10. The Tribunal has scepticism that Mr Zerehannes actually genuinely believes that he was the victim of discrimination or victimisation as he alleged because there is simply nothing that Mr Zerehannes has been able to give by way of explanation as to why he believes it is discrimination or victimisation other than an unsubstantiated belief. Rather it seems that he has latched onto the idea that it must be discrimination or victimisation either by himself or by someone else or other people persuading him that must be the case. The way things escalate so that every minor thing is discriminatory or victimisation as Asda's refusal to allow him to reduce his weekend shifts clearly frustrates him, looks more like a device to get his own way than genuine belief in discrimination. However, we have concluded that we should give the benefit of the quite serious doubts to Mr Zerehannes on what he believes without reaching a final decision. However, we are quite clear there is absolutely nothing to support his allegations. Because he has refused to see the inherent weakness, instead simply throwing the case back at the Respondents, we have concluded that we cannot accept that Mr Zerehannes's evidence as being an accurate recollection of what has occurred. Where there are doubts in the evidence about what has actually happened, we prefer the evidence of the Respondents rather than the evidence of Mr Zerehannes.

33. One other matter that we would add about Mr Zerehannes is that his behaviour is generally petulant, and that also undermines his credibility. As will be seen, he did not get his own way with flexible working. From that point it is repeated and, in our view, spurious complaints about

discrimination and victimisation, complaints that the refusal of flexible working caused him stress yet he then refused to attend meetings that might have resolved the issue he had raised, or occupational health meetings that may have got him back to work (or supported his flexible working request) and what appears to be the deliberate throwing up of obstacles such as refusing to attend occupational health appointments unless Asda provided him with transport (which ignores the fact it is his responsibility to get to work). Whether that is because it is in his character to behave like that or because someone influential behind the scenes gave him what we would consider misguided and unhelpful advice to conduct himself like that we do not know. However, we think that it would make no difference, since ultimately how he behaved was his decision.

### ***Factual findings***

34. With that in mind, we turn then to make the following findings of fact and on the balance of probabilities.

### ***Mr Yusif's case***

35. Prior to the index events of this claim, there was a claim by Mr S Yousif against Asda which Mr Zerehannes relied upon. It was not clear why it might be relevant. The Tribunal notes that it was a claim for disability discrimination that was ultimately struck out by the Tribunal. We believe that it does not therefore help our deliberations to consider that case any further, and therefore ignore it.

### ***About Mr Zerehannes***

36. Mr Zerehannes is employed by Asda working in the IDC as a Warehouse Colleague. His job is to work on various shifts to which he has been allocated, picking items from the stock so they can be sent out to supermarkets as needed.
37. Mr Zerehannes identifies his race for the purposes of this claim as "Eritrean-Bilen" nationality and/or "dark skin colour" (see paragraph 13 of the case management summary of Employment Judge Camp for the hearing on 28 January 2019". Mr Zerehannes's wife is disabled within the meaning of the **Equality Act 2010** because of asthma.

### ***About Asda and the other respondents***

38. The First Respondent is a large supermarket chain that operates throughout the United Kingdom. It has approximately 300 stores and employs approximately 170,000 employees, described as "colleagues" across Great Britain.
39. The other respondents are employees within Asda. Their exact roles are set out in paragraph 7 above.

### ***About the IDC***

40. The IDC is one of many distribution centres that Asda has. The IDC which these claims concern is located at Magna Park, Lutterworth, South Leicestershire. It operates 24 hours a day, every day of the week. The warehouse staff operate in shifts.

41. Within the IDC there are various departments that cover different categories of products that Asda sells in its stores.
42. The departments are headed up by a departmental manager, whose job is to make sure that sufficient stock is available in their department. The operations are divided into shifts which are headed up by shift managers, who are responsible for making sure that their shifts work efficiently.
43. As Asda's stores run low on various products, requests for new stock are automatically relayed by the logistics computer system to the relevant IDC for that store. Thus requests for fresh stock are coming into the IDC all the time. The products are stored on various shelves or locations. Each location has a label with data (like a postcode) so that someone can locate it. The warehouse operatives like Mr Zerehannes have an electronic device. It tells them to go to a particular location and collect a specified number of units of whatever product. Once done, it directs him to another location for different items, and so forth. Some departments have heavy items and some have lighter items. The system sets a target for how many items a warehouse operative must collect (called picking) in their shift. The closer the number of items to the target allocated the greater their efficiency. The target is different for each department to reflect the differences in weight, manoeuvrability and the like that would affect how easy it would be to pick an item. The targets for an operative are set automatically by the system and not manually by members of staff. If a warehouse operative hits the target then the system will allocate more tasks but calculate an efficiency that will exceed 100%.
44. The goods are moved to the loading bay and loaded onto the lorry. That then delivers the goods to the relevant stores so they can then be sold to members of the public.
45. The warehouse operatives are also responsible for moving the deliveries of products coming into the IDC to their relevant departments ready for picking later.
46. In what might be a statement of the obvious – albeit the Claimant did not accept this – the IDC becomes extremely busy in the run up to Christmas because stores themselves are incredibly busy. This is both inherently plausible and accords with general experience of the Tribunal that shops are busier in the approach to Christmas. Therefore as requests come in from the stores during this busy period, there is a requirement for extra work to be able to make sure that lorries can be despatched with efficiency with goods to the stores as they run out. It is very much a “just in time” operation.

### ***Mr Zerehannes's employment commences***

47. Mr Zerehannes' contract of employment identifies his start date as 14 September 2014 and that he is to work 40 hours per week. It further says he may be required to work any 5 from 7 shifts on such days and such times as Asda may require.

### ***Sick pay terms***

48. In relation to sick pay, his contract says as follows:  
“Sick pay

“Details about sick pay are contained in your Asda Logistics Services Absence & Sickness Policy Booklet.

“Subject to you following absence notification procedures, as detailed in the Asda Logistics Services Absence & Sickness Policy, you may be eligible for the following occupational sick pay at basic rate plus shift allowance if applicable.

“The procedure for notification of absence is detailed in the Asda Logistics Services Absence & Sickness Policy, which is available from the People Team, and does not form part of your contract of employment. ...”

The People Team is Asda’s euphemistic term for human resources (HR).

49. The said absence and sickness policy was agreed between the trade union and Asda in 2014 and, so far as relevant, reads as follows:

“MANAGING SICKNESS ABSENCE – NOTIFICATION

“Notification of Sickness absence / Contract during Sickness absence Procedures

“ \* If a colleague is absence from work, for whatever reason, they should inform the depot, ideally one hour before the start of their shift. In exceptional circumstances, such as hospitalisation or an accident, contact should be made as soon as possible.

“ \* Colleagues should, where possible, speak to their own Manager. If they cannot contact their Manager, then they should try to contact an alternative i.e. Shift Manager or Ops Manager. The colleague’s Manager should later return the call and speak to the colleague personally to confirm details of the sickness absence.

“ \* The self-certificate form should then be completed by the Manager and retained securely until the colleague returns. If a colleague’s sickness absence lasts longer than seven days and a Fit Note is submitted, the self-certification will be processed for SSP/CSP [SSP is Statutory Sick Pay, CSP is Company Sick Pay] purposes and signed retrospectively at the RTWI [RTWI is the Return To Work Interview].

“Colleagues must give notice of their return to work; ideally during the shift prior to their return. If they do not, and their hours have been covered, they may be sent home.

“Self-Certification and Medical Certificates

“ \* Colleagues are able to self-certify themselves for the first seven calendar days of any sickness absence.

“ \* RTWI acts as the Self Certification process for the purposes of processing a Sick Pay claim for the first seven days.

“ \* Asda Distribution will not normally request a Fit Note for sickness absences of less than seven days, unless there is reason to believe the sickness absence is not genuine. If this is requested, Asda Distribution will pay for any GP charges incurred.

“Non-Notification of Sickness absence (AWOL) [Absent without leave]



“ \* Failure to notify sickness absence to the depot is a conduct issue. Please refer to the Disciplinary Policy for further detail.

“ \* If a colleague fails to attend work or to notify the depot on their first day of sickness absence, the depot will try to make contact with them to understand the reasons for sickness absence and to establish that they do not need immediate assistance. They will continue trying to make contact over the next 72 hours, by phone, letter or visit, as appropriate. ...”

50. Later on in the policy, it deals with the question of withholding or extending CSP and it reads as follows:

“Withholding / Extending Company Sick Pay

“Sick Pay can also be extended in exceptional circumstances.

“Under normal circumstances, a Fit Note will be accepted for the purpose of CSP. If there is a question over the validity of any period of sickness, the Manager must demonstrate reasonable grounds for this. The Manager will fully investigate the circumstances.

“Managers must not withhold CSP, except in these circumstances:

“ \* Failure to comply with the notification procedures without any reasonable explanation.

“ \* Unreasonably refusing to attend an OHS [Occupational Health Service] or depot / home visit appointment or failure to keep a pre-arranged appointment.

“ ... \* Reasonable belief of abuse of the CSP Scheme.

“Process to withhold:

“The following points should be adhered to:

“ \* Discuss the circumstances with the Colleague, and, if appropriate:

“ \* Seek medical advice from a qualified health professional,

“ \* Seek advice from the General Manager and People Manager.

“Asda Distribution also reserves the right to withhold CSP if there is genuine belief that the colleague was not sick. This is subject to proper notification to the colleague and does not affect the colleague’s right of appeal. Colleagues suspected of claiming CSP fraudulently may be subject to gross misconduct, which will be dealt with in the company disciplinary policy. The Local Management will discuss such cases with the site member of the RJC/NJC.

“The General Manager is responsible for any authorisation of either a further extension to CSP or a decision to withhold CSP. ...”

***Flexible working policy***

51. Mr Zerehannes’s employment also had the benefit of Asda’s flexible working policy. There are two versions of the policy in the bundle but there is no material difference between them for the purposes of these claims. The policy confirms that those who have worked with 26 weeks’ continuous

service and who have not made a flexible request in the last 12 months have to write to make a flexible working request. It adds

“However applications from all colleagues will be considered” even if they do not meet those requirements.

52. The policy provides that the employee must complete the Colleague Flexible Working Request Form and submit it with the Self-Assessment to the colleague’s line manager or to HR. The purpose of these forms is in order to capture all the relevant information to enable Asda’s managers to be able to make an informed decision. It then provides that the flexible working meeting must be held within 28 days of receiving the application form, unless otherwise agreed between the parties in writing.
53. The policy itself shows that once the request is submitted , the line manager has 28 days to hold a meeting. If the information is sufficient, the line manager can confirm the decision for flexible working and send out a confirmation letter. If not, then there is to be a further 14 days to consider the matter further followed by a meeting to confirm the decision. If the decision is unsuccessful, then there is a right of appeal and the appeal must be held within 14 days of receiving the appeal letter. Any outcome will be communicated 14 days thereafter.
54. The policy provides that a request can be refused for a number of reasons:  
 “Refusing the request:  
 “If the business is not able to accommodate the request, its grounds for refusal must fall within a range of justifiable business grounds:  
 “ \* Burden of additional costs  
 “ \* Detrimental effect on ability to meet customer demand  
 “ \* Inability to re-organise work amongst existing colleagues  
 “ \* Inability to recruit additional colleagues  
 “ \* Detrimental impact on quality  
 “ \* Detrimental impact on performance  
 “ \* Insufficient work during the periods the colleague proposes to work  
 “ \* Planned structural changes ...”

### ***Other policies***

55. Asda also has diversity and inclusion policies that make it clear that discriminatory conduct is unacceptable. We were not taken by the parties to these policies in detail. We can see nothing in them that helps us either way to determine the facts of this case.

### ***Reorganisation of shifts***

56. When he started, like other Warehouse Operatives Mr Zerehannes worked a shift pattern where he was required to work 3 weekends out of every 4. Many colleagues were unhappy with this arrangement and, after an agreement with the trade union, in October 2016 or thereabouts there was

a decision to move some people who applied to a pattern of working 2 weekends out of every 4.

57. There was more interest in the scheme than was possible to accommodate. In order to assess who should be moved, Asda undertook a comparison between the various employees and moved those who were the most efficient. The scheme also measured absences and service. The criteria and assessment models were agreed in consultation with and by the trade union. We discussed the comparison of AK's efficiency to Mr Zerehannes's above. That comparison was done as part of this exercise. As noted, AK was more efficient than Mr Zerehannes.
58. Mr Zerehannes suggested that this is an unfair comparison, though no claim has arisen from this and Mr Zerehannes did not complain at the time. However the Tribunal can see no unfairness in it, and believes it is simply an attempt by Mr Zerehannes to cast around for things to support the unsubstantiated belief he has been discriminated against or victimised. AK worked in a different department with different types of items to pick. We also think that the 26 -week period, which is the equivalent of course to half a year, was a perfectly reasonable period over which to measure performance. Given the volume of complaints now and his belief he has been the victim of discrimination and victimisation, we are quite sure he would not have let it lie were he to believe that this was a discriminatory act or simply unfair or flawed.

#### ***Events until April 2017***

59. Between the commencement of his employment and 29 April 2017, nothing of any note happened, even on Mr Zerehannes' case. That in our view is significant in undermining Mr Zerehannes' suggestion that there was racism, let alone institutional racism, at Asda. If it were the case, then one would expect to see complaints and claims from before this date. The only change at this time is Mr Zerehannes applies to change his shifts.

#### ***Mr Zerehannes's application for flexible working***

60. On 29 April 2017, Mr Zerehannes wrote a letter addressed to the HR Manager and this reads as follows:
- "I ... would like to request a rota change from 3/4 weekends to go on to a 50/50 rota, I am requesting this as a childcare request. My wife is struggling to cope with caring for our children at weekends when they are not at school. This issue is being caused by her stress/anxiety condition, which causes acid reflux and affects her asthma which is documented on my file, I hope you are able to consider my reason for this request and I look forward to your response. ...". It was not on the form that the policy required. He was asked to submit it on the proper form.
61. Mr Zerehannes eventually did make his request in the appropriate form under the "Right to Request Informal Request Form" where under "Details of Request" he said:
- "CHILD CARE  
WIFE'S ILL HEALTH STRUGGLING TO LOOK AFTER 3 CHILDREN  
WHEN I WORK 3 WEEKENDS."

62. One of the forms that an employee also has to complete is the Colleague Flexible Working Self-Assessment. This is to enable the colleague to assess for themselves the merits of their flexible working request and also to enable Asda to understand what has already been considered and why it would not work. In this form, Mr Zerehannes again emphasises the struggle that his wife is having to look after the children for 3 weekends out of 4. He confirmed that he is flexible to work any weekdays, he just requires alternate days off at the weekend. He says that it will not affect his pay or benefits because he still proposes to work 40 hours per week.
63. Under the question: "Should your request be declined, what other options would you consider?" he wrote:  
"I probably would consider if the request is available on other shifts or consider lifestyle or career break till my 13-month baby is older."
64. Under the question "What is the reason for your request? he wrote:  
"Family reason as my wife was diagnosed with asthma on last October 2016 and also she have acid reflux and stress most of the time she is not feeling well when she stayed with children specially on weekends."  
Under the question "When would you like the proposed change to start and why?":  
"If it is possible I would be happy to start as soon as possible."
65. Mr Zerehannes then went on to confirm that he sought to work 2 weekends out of 4. He signed but did not date the form.
66. It is not entirely clear when Mr Zerehannes actually submitted this to Asda. In late April when he suggested he submitted it, Mr Zerehannes' line manager was changing from Ms S Day to Mr W Foster. However, Mr S Nagra, the Department Manager, wrote to the Mr Zerehannes an undated letter that confirmed that the application was received on 28 May 2017. This is the only date that we have got and is reasonably proximate to when Mr Zerehannes first sought to raise the issue. There is no reason to doubt it. We find as a fact that the application was not actually formally submitted to Asda until 28 May 2017.

### ***Hearing of the application***

67. Mr S Nagra told Mr Zerehannes that he had arranged a meeting for 2 June 2017 to take place and that there would be someone else there to take notes. He emphasised that Mr Zerehannes was entitled to be accompanied.
68. However, for whatever reason that meeting did not proceed. It seems and we find as a fact that what was going on at the time was a confusion behind the scenes between Mr Foster (Mr Zerehannes's Shift Manager) and Mr S Nagra (the Department Manager) as to who was actually responsible for progressing this request. There is no evidence to suggest race or disability played any part in what happened. Instead we find as a fact that there was a delay in progressing his application and holding a hearing was down entirely to innocent, genuine errors on their part and a misunderstanding of

their responsibilities. They unfortunately did not keep Mr Zerehannes informed.

69. Eventually the meeting did take place on 10 September 2017. Mr Zerehannes attended. Mr Zerehannes was represented by Mr S James, who is a trade union representative. Mr S Nagra had been allocated as the decision maker. During the course of the meeting, Mr Zerehannes repeated and stood very much by the things that he had put in his application form.

70. Mr S Nagra was not able at the meeting to decide in Mr Zerehannes's favour. Therefore he postponed the meeting in line with Asda's flexible working policy to allow time for reflection. Mr S Nagra thus wrote to Mr Zerehannes on 14 September 2017 to fix a further meeting for 18 September 2017 to discuss the outcome of his flexible working request.

### ***Appeal even though decision not made***

71. In what became typical of Mr Zerehannes's approach, rather than await the outcome, he lodged an appeal

"against the decision made on 13 September to decline his request for flexible working..."

We note that no decision was made on 13 September 2017.

72. In his letter of appeal he:

72.1. complained about the process that had been followed and said it was totally outside the policy, and

72.2. wanted an explanation of why the management team had  
"no duty of care for himself and his family, leaving him and his family stressed and upset."

73. He added:

"This whole ordeal has been so upsetting for me and my family, I feel that I have been discriminated and victimised throughout the process and I wish to elaborate in more detail within the meeting."

74. That letter was not delivered to Asda until 18 September 2017 and the meeting was then fixed to take place on 20 September 2017, to be conducted by Mr A James, a shift manager, with a notetaker present. He was reminded of his right to representation. The meeting on 20 September did not go ahead because Mr Zerehannes's preferred union representative was not available. In fact another representative from the same union was available but Mr Zerehannes refused to proceed.

### ***Outcome of flexible working request***

75. On 20 September 2017, Mr S Nagra wrote to Mr Zerehannes in the following terms:

"I am sorry to say that your request has been declined from changing your working rota as we are not looking at losing head counts on weekends and also that this will have a detrimental effect on ability to meet customer demand as weekend working is the most busiest period of the week."

76. We accept the respondents' evidence and find as a fact that weekends represent one of the busiest periods for the IDC. Shopping is carried out significantly at weekends by customers in Asda stores and therefore requests for products to go out to these various stores are coming in constantly, in significant numbers, and the stores must be supplied quickly.
77. A decrease in the headcount of warehouse operatives on the weekend shift therefore would have a significant impact on the efficiency of the IDC at the weekend. The IDC's shifts had been reorganised in 2014 to accommodate staff desire not to work as many weekends balanced against the demands of the Asda stores. At that time the company assessed that some a limited number of operatives could be allowed to work fewer weekends without detriment to the efficiency of their operations. That was not the case at the time Mr Zerehannes made his request. There is no suggestion even from the claimant that there was a surfeit of staff to the work actually available at weekends meaning a reduction in headcount is of no consequence to operations. It is therefore more likely than not that if Mr Zerehannes were to reduce his working rota from 3 out of 4 weekends to 2 out of 4 weekends, that would have an adverse impact on the IDC.
78. We find as a fact that there is no evidence that race, his wife's asthma or indeed anything other than the business requirements played any role in the decision.
79. As an aside we struggle in any event to understand Mr Zerehannes's reasons for the application. If he were successful, his wife would still have to cope with the children on 2 weekends out of 4, and there is no real explanation of how she coped in the week when he was at work. There is no real explanation why coping with 2 out of 4 is acceptable whereas 3 out of 4 are not.

***Conspiracy against "people like [the Claimant]"***

80. We note that Mr Zerehannes says he was told at this point by his trade union representative that business needs was used as a reason to discriminate against

"people like [the Claimant]".

There is no direct evidence that this was said, other than Mr Zerehannes' assertion. We cannot make any sensible finding of fact as to whether or not it was said but, in any event, we do not believe its prima facie evidence of Mr Zerehannes' nationality or skin colour playing any role whatsoever in this case. Instead, it could mean a whole host of things, as we eluded to earlier. In any case, we have no evidence from Mr James as to what his motive was behind saying those words. His trade union representative was an obvious person to call and his absence suggests to us that either it was not said or was clearly not referring to discrimination or victimisation as alleged. We find that nothing in there supports Mr Zerehannes' contention that there is anything other than Asda's view that there would be an adverse impact if they granted the flexible working request that motivated them to decline it.

***Mr Foster's alleged involvement in deciding the request***

81. Mr Zerehannes alleged that Mr Foster was involved in the decision-making process not to grant Mr Zerehannes' request for flexible working. However, Mr Zerehannes eventually conceded in cross-examination that was not the case. We therefore find as a fact Mr Foster had no involvement whatsoever.

***People to whom Mr Zerehannes compared himself regarding the request for flexible working***

82. It is as good a point as any to deal with the people to whom Mr Zerehannes compared himself when it came to the refusal of his flexible working request.
83. Mr Zerehannes identified 4 other people whose requests were successful and whose circumstances he says are comparable.
- 83.1. The first person to whom he compares himself is AK, who was a Kurdish employee. Mr Zerehannes says that AK was changed from 3 weekends out of 4 pattern to a 2 weekends out of 4 pattern in October 2016. We have already alluded to AK and as we explain he moved in an exercise arising from a shift reorganisation. That exercise was endorsed by the trade union and was based on length of service, attendance record and performance. AK was notably more efficient than Mr Zerehannes was. In our view his circumstances are materially different from Mr Zerehannes. The fact Mr Zerehannes did not complain at the time supports our conclusion because it seems even then Mr Zerehannes thought there was nothing wrong with the decision.
- 83.2. A second person to whom Mr Zerehannes compares himself is Mr Binks, to whom we have already alluded. Mr Binks was not a Warehouse Operative like Mr Zerehannes: he was a Manager. His position therefore was clearly materially different by that very fact. In any case, Mr Binks' request was to work fewer hours rather than to work fewer weekends. We consider that also to be a significantly different arrangement. Mr Zerehannes was not asking to work fewer hours and therefore we do not consider that Mr Binks could be described as a person whose circumstances are not materially different to those of Mr Zerehannes in any event.
- 83.3. The third person to whom Mr Zerehannes compared himself with was OR. OR made an application to vary his work pattern and at the time he made his application, he was on a different rota to that of Mr Zerehannes. He worked 1 weekend day each week and his request was not to reduce the weekend work but to reduce the hours that he was working within the week itself. He is clearly not comparable to Mr Zerehannes' situation because he was not asking to vary his weekend work, he is simply asking to vary the time he worked during the week.

We observe at this point that Mr Zerehannes refused to accept that OR was not comparable. We find that is something that

again gave us concern as to Mr Zerehannes' credibility or a preparation to accept reality. Our view is that OR's situation is not in any way comparable to that of Mr Zerehannes.

- 83.4. The fourth comparator was ST. ST was a Manager and sought to reduce the hours that he worked. His shift was to work 2 weekends out of 4 and he sought reducing his hours but to continue to work 2 weekends out of 4 still. Therefore, he was not asking for the same adjustment that Mr Zerehannes was asking for and therefore in our view he was not materially in the same situation as Mr Zerehannes.

### ***Appeal against outcome***

84. Mr Zerehannes maintained his appeal against the outcome.
85. Mr Binks invited him to an appeal meeting to take place on 14 October 2017. He acknowledged in that letter that the meeting was originally set for 20 September, but that Mr Zerehannes had asked for a second invite and that then he was on holiday. He also said that it had been planned thereafter for 5 October and that Mr Zerehannes had asked if it could be left until the following week when both he and his union representative were available.
86. Therefore, the fact that there was a delay it seems to us to be something for which Asda cannot be criticised.

### ***Absence and suspension of sick pay***

87. On 13 October 2017 Mr Zerehannes was away from work. In the self-declaration he said his absence was because of "stress". He was away until 14 October 2017. In a call that day, he told Mr Foster that his stress was work related and family related and connected to the delays determining his application. He was reminded that he was supposed to be attending an appeal hearing that day.
88. It was agreed that Mr Zerehannes would talk with Mr Foster the next day to discuss his absences. Mr Binks offered to conduct the appeal hearing that day too, though Mr Zerehannes declined.
89. On 14 October 2017, Mr Foster telephoned Mr Zerehannes to talk to him about his absence. He summarised the discussion as follows:  
 "[Mr Zerehannes] states stress is work regard to family issues and the rota request he has put in that he is awaiting outcome and length and delays was causing stress. Reminded [Mr Zerehannes] outcome was today with [Mr Binks] which he states he was aware."
90. On 15 October 2017, Mr Zerehannes and Mr Foster met at the IDC to discuss his absence. Mr Zerehannes signed a note of what was discussed at the meeting. It records as follows:  
 "[Mr Zerehannes] visited walk in centre Friday due to work related stress. No medication and advised to see GP. Advised to take paracetamol for headaches. [Mr Zerehannes] states he is only sleeping 3 hrs a night and not eating due to stress. The cause of stress is due to the right to request and ongoing health issues with wife and care for child. Offered to complete



right to request. [Mr Zerehannes] declined due to high level of stress. And will when feeling better. Plans to call GP tomorrow as advised.”

91. Given the stress was work-related and connected to the flexible working request which Mr Binks was looking into, we find it odd that Mr Zerehannes refused to meet with Mr Binks on 15 October 2017 to resolve it. We can appreciate stress is unpleasant (to say the least) but would have thought that as he was at the IDC and there appeared to be no real reason why that appeal meeting could not go ahead, and it related to the source of what he said made him too unwell to attend work, it is something he should have agreed to.

92. On 16 October 2017, Mr Zerehannes attended a meeting with Mr Wells. He was represented by his trade union representative, Mr James. There was a notetaker and Mr M Broadway there. It is notable that no interpreter was provided for Mr Zerehannes but the meeting proceeded without apparent linguistic difficulty. In the meeting, Mr Wells asked:

“Could you explain the situation around your current absence”.

Mr Zerehannes replied:

“Could I please ask that Scott James explain everything as I am too stressed out with situation at the moment in time to answer these questions clearly. I am not mentally fit to answer these questions and I will happily await the request of your CSP withholding and the reasons and go from there.”

93. In the note itself, someone has written the word

“un”

in front of the word

“fit”

but it is quite clear that that is an addition that has been made afterwards and what is meant to convey is that:

“I am not mentally fit to answer these questions”.

It would seem somewhat odd if he said:

“I am not mentally unfit”.

because he would be speaking with a double negative (which seems unlikely given English is not his first language), it seems inherently implausible thing to say and he would be saying something opposite to his clear position.

We therefore believe that the “un” has been inserted as an attempt by someone to provide a correction to what was said but in fact is merely introducing an error into something that was correct in the first place. While misguided, we have no reason to doubt the addition was made innocently because no-one would or could reasonably conclude that Mr Zerehannes was saying he was fit to attend work.

94. Mr Zerehannes refused to sign those notes saying he was not in the right frame of mind. However, they were signed off by his representative as being

an accurate record and we have therefore no reason to believe they are not.

95. Mr Wells concluded that he should stop Mr Zerehannes's CSP. Therefore, Mr Wells completed a form requesting the stoppage of CSP. He said under the reasons for stoppage request:

"We have offered to conduct meeting asap as this a factor to his stress. However the colleague is unreasonable refused to attend, why the colleague is refusing to complete meeting we will always struggle to facilitate to return colleague to work."

Under "Outcome summary of meeting" he recorded (Page 473 of the bundle):

"Colleague refused to explain the reason for being absence I explain that if he would not explain I could not help and would need to ask the [General Manager] to withhold pay. He stated his is not mentally fit to answer and would want CSP reasons and go from there."

96. On 18 October 2017, the General Manager, Ms S Hammond, reviewed Mr Well's form and decided that Mr Zerehannes would have his CSP withheld. She noted in the letter setting out her conclusions as follows

"The meeting was to discuss the specific reasons for recommending the suspension of your Company Sick Pay. To clarify the reason for the suspension of your CSP was:

" \* Reasonable belief of abusing the CSP Scheme."

97. Mr Zerehannes provided a sick note dated 20 October 2017 citing that Mr Zerehannes would be unfit to attend work because of stress at work until 17 November 2017. That note was submitted to the Respondent at the time, as required by the sickness and absence policy.

### **Grievance**

98. On 24 October 2017, Mr Zerehannes lodged a formal grievance with Ms N Hersey, who is an HR Manager, saying as follows:

"I have decided today to bring forth a formal grievance against the ongoing discriminatory treatment that I am experiencing at work and which is a cause of my current health condition (stress), to invoke the Company policy and ACAS Code of practice.

"The business is aware that my wife is suffering from Acid reflux which affecting her Asthma and she was put under medication therefore the need of my presence at home to help her and to take care of my children consequently, I have requested flexible working hours under **Section 80F Employment Rights Act 1996** and also the request was made in relation to the **Equality Act 2010** on ground of my wife disability."

It is quite apparent he was aware of the existence of and rights under the **Equality Act 2010** as of this date.

99. Mr Zerehannes set out in that letter the history of the case in great detail. He ended the letter by saying:

“Finally, the facts above or this grievance is also to be regarded as my appeal against the suspension of my sick pay which is due to the company’s handling of my request for flexible working hours and it is itself racial discrimination and associated disability discrimination on grounds of my wife disability.”

***Failure to attend occupational health appointment on 25 October 2017***

100. Meanwhile, Mr Foster arranged for Mr Zerehannes to attend an occupational health appointment to see what Asda might do to accommodate his illness. This was fixed for 25 October 2017 to take place at the IDC. This was going to be a face-to-face appointment. Mr Zerehannes did not attend. The occupational health nurse rang his mobile twice and he answered on neither occasion. There was no voicemail facility for leaving a message.
101. Mr Zerehannes complains to us that the Respondent failed to agree to provide him with transport to the IDC to enable him to undertake the occupational health assessment. The Tribunal finds that Mr Zerehannes’s failure to attend is his fault alone. He is employed to work at the IDC. It is reasonable he attends there for appointments related to work (such as occupational health appointments). If he were so ill, he could not leave the home, that might be a different matter. That is not what is alleged. As a general rule, the lay members advised it is not reasonable to expect an employer to lay on transport for the employee to attend their place of work. The expectation is that the employee is responsible for getting themselves there. The Employment Judge agrees. We observe that demonstrates further evidence that Mr Zerehannes continued to expect that if he was not going to get his own way, he was going to be as obstructive as possible. It is petulant behaviour.

***Progression of the grievance***

102. Simultaneously, the grievance was progressed. On 30 October 2017 Mr P Alexander invited Mr Zerehannes to a grievance meeting on 2 November 2017. Mr Alexander was the superior to both Mr Foster and Mr S Nagra who should have dealt with the flexible working request promptly in the first place. We note that he had “remedial action” taken against them to ensure that they did not prevaricate like they had done in Mr Zerehannes’ case. The remedial action to was to remind them of their obligations and duties when dealing with a request for flexible working. We accept their failures were innocent. We think therefore Mr Alexander’s actions were proportionate and reasonable.
103. At the meeting Mr Zerehannes was represented. The meeting itself lasted for 2 hours and 35 minutes. From both the duration and notes it is apparent it was a thorough explanation of what happened.
104. Mr Zerehannes explained the nature of his wife’s disability and, when asked how that disability affected Mr Zerehannes’s day to day life, he said that it affected him because his wife was struggling with her day to day life; she was not sleeping at night; she stayed on the balcony to get fresh air and she was struggling to cope with the children and that impacted upon him. He explained that the struggles were both physical and mental.

105. The grievance meeting then went into detail about the various events that had happened up until that point. It is notable on reading through the grievance meeting notes that although Mr Zerehannes raised many complaints about what he perceives to be failures on the management's part, there is very little that suggested any belief in discrimination. There is nothing we can detect (and it was not suggested) that he was dissuaded, discouraged or prevented from mentioning discrimination if he thought it relevant.
106. It is only towards the end that he raised discrimination. Mr Alexander said:  
"You went home sick on the day before your appeal was meant to take place on 14-10-17 even though presumably the reason for your stress was the delays in having that meeting."  
Mr Zerehannes replied:  
"Yes the delay impacting me in my life and the management failed and they know the policy has breached and I just feel discriminated and victimised all this process I did not request any illegal thing as asked colleague I have right to request they did not deal with my special circumstances They are really failed on duty of care I wanted them to take this responsibility."  
Later on, Mr Alexander asked at page 497:  
"What was the reason of work-related stress."  
Mr Zerehannes replied:  
"The whole process, discrimination failure of duty of care victimisation."
107. However we note that at no point does Mr Zerehannes give any detailed evidence to Mr Alexander that shows that his race, his wife's asthma or the fact that he had raised an allegation of discrimination had any bearing on what had happened to him. The lack of detail on those issues is in contrast to the significant references instead to Mr Zerehannes alleging that he was suffering from stress.
108. Later on, Mr Zerehannes said  
"... I feel I was not like them if I was like them they would show respect and listen."  
The conversation continued  
Mr Alexander: "What you mean not like them"  
Mr Zerehannes: "Because of my skin"  
Mr Alexander: "If your implying racism have you any proof"  
Mr Zerehannes: "I said I feel that's why"  
Mr Alexander: "You know people who are granted flexible working hours, are they people who are asking for the same as you, 3 out of 4 weekends to alternate weekends"  
Mr Zerehannes: "I mention flexible working hours. I know people requested & granted"

Mr Alexander: Do you have any names of colleagues who have been granted like for like request like yours”

Mr Zerehannes: “Last year there was some due to family issues but in general plenty.”

109. Again, it is notable that Mr Zerehannes simply alleged racism and victimisation based purely upon feeling . We noted that when he was asked the direct question of who has been treated in the way you would like to be treated, he was unable to provide any details, other than to make general assertions that there are colleagues who have been treated more favourably.

### ***Mr Alexander's investigation***

110. Mr Alexander commenced an investigation and during the investigation he spoke to Mr A James, Mr S Wells, Mr W Forster, Mr S Nagra and Mr D Binks. Their explanations accorded with the documents we have seen, and that the failure to deal properly with the application in the first place was an innocent and genuine error. None of them said anything that even hinted that there might have been a discriminatory factor in play or any factor that could amount to a protected act in play. The Tribunal is quite satisfied that Mr Alexander has spoken to all the relevant people and has conducted proper and thorough grievance interviews. Although we have not quoted the grievance interviews in detail, it is quite apparent from reading them that he has covered the issues that Mr Zerehannes raised in his grievance, namely the failure to allow Mr Zerehannes to work flexibly; the fact that meetings did not appear to have gone ahead and the delay in dealing with his request.
111. One area Mr Alexander did not ask about but which Mr Zerehannes had raised was whether race, Mr Zerehannes's wife's asthma or complaints of discrimination played a role. Mr Alexander accepted that he should have asked. We agree he is right to concede this. However given the detail he went into about what happened with the witnesses, it is apparent Mr Alexander was not seeking to cover events up. That is demonstrated by the action he took with Mr Foster and Mr S Nagra over their errors. He was genuinely trying to understand what had occurred. The omission of this important topic was a big, but innocent mistake, in that it was not motivated by malice, race, disability or previous claims of discrimination.

### ***Outcome of grievance hearing***

112. The grievance meeting resumed on 15 November 2017 to provide the outcome.
113. At that meeting, Mr Zerehannes was told that his grievance had not been upheld.
114. Mr Alexander had prepared a document from which he read his conclusions to Mr Zerehannes. Mr Zerehannes signed that document to confirm that that is what was said to him. The adjournment note sets out the history of the case and the details of Mr Zerehannes' complaint.
115. In his conclusions, Mr Alexander accepted that there had been issues up until 10 September 2017 but found that since Mr Zerehannes had lodged

his appeal on 17 September 2017, Asda had done everything possible to hear his case. Mr Alexander noted that Mr Zerehannes had refused to explain his reasons for absence at the meeting on 6 November 2017 with Mr Wells and had even prevented his representative from answering those questions in his behalf.

116. In particular, Mr Alexander recorded as follows at page 527:

"I believe that with regard to the period between the date of your initial letter requesting flexible working on 29/4/17 until the date of the initial meeting to hear your request on 10/9/17 that [Mr W Foster and Mr S Nagra] were responsible for failing to deal with your request within the correct timeline which you correctly stipulate as 28 days, although this is 28 days from application from not initial request letter. I would like to apologise on behalf of the company for this and any impact on your family and health that this may have caused. I believe this to be totally unacceptable and as a result, I shall be recommending the matter be followed up with the necessary action and coaching as deemed necessary. I would also like to add though that during this period, given the nature of the lengthy delay I believe this matter would have been dealt with sooner if you had escalated your dissatisfaction to a Shift Manager earlier, especially given that you stated that you felt the matter was impacting your health as early as July. I would also add that any delays or frustrations caused by your dealings with the GMB reps involved are a matter between yourself and the GMB.

"In addition to the timeline during this stage of your request I also am concerned about other issues raised such as the undated self-assessment form, the undated invite letter to a meeting for the 2/6/17 which incorrectly states your request was received on 28/5/17 and the brief nature of the adjournment note outcome for which there is no evidence to confirm was ever formally delivered. Again, I believe this is totally unacceptable and will be recommending that action & coaching takes place. Mr A James consulted his diary and confirmed he met with you on 14/9/17 but could not recall the exact nature of the conversation....

" ...

"You also asked me to respond to the following questions

" ...

"3) Can you provide to me the circumstances which permitted the company to grant many colleagues flexible working hours.

"The company dealt with many flexible working requests for many different reasons. Decisions will depend on what is requested and what the circumstances are. In terms of your specific request of moving from 3 out of 4 weekends to 2 from 4, I can confirm that whilst some of these requests have been granted in the past, the demands of the business has dictated that none of these requests have been granted for over a year.

" ...

"I would also caution you with regard to making serious allegations, such a racial discrimination, without any evidence at all other than to say this is how you felt. I find that whatever errors were made, they had absolutely

no bearing on the colour of your skin as you allege. I also believe there is no evidence to support allegations made of discrimination or victimisation.

“I would like to remind you that you still have an outstanding appeal regarding your flexible working request and would urge you to liaise with your [Shift Managers] to arrange this as soon as possible....”

**Further signed off work**

117. On 17 November 2017, Mr Zerehannes was signed off by his doctor as unfit to attend work because of stress at work.

**Appeal against grievance outcome**

118. On 23 November 2017, Mr Zerehannes wrote to Ms N Hersey lodging an appeal against Mr Alexander’s grievance outcome.

119. So far as is relevant to this case, Mr Zerehannes alleged

“5. It is discriminatory for Mr P Alexander to state that I had an opportunity for appeal to be held (sic) on 20/09/17 and that I stated that this meeting did not go ahead to my choice (sic) Rep, Ms S James not being available even though an alternative GMB Rep could attend as my case was that:

“... ”

“6. It is discriminatory for Mr P Alexander to accept [Mr A James’] evidence that he recalled that I advised him that I did not wish for the appeal to be heard prior to my holiday particularly; [Mr P Alexander] has failed to properly examine my evidence that Mr A James initially rearranged the meeting on 04/10/2017 and after checking his Computer, he realised that I was supposed to be on annual leave ... and secondly, as no reason was given to his acceptance of Mr A James’ evidence.

“7. It is discriminatory for [Mr P Alexander] to accept Mr A James’ evidence that when he was arranging the appeal with me, I was talking about my upcoming holiday and that Mr A James gave me the option of hearing my appeal prior to my holiday ...

“8. It is discriminatory for [Mr P Alexander] to accept [Mr D Binks’] evidence that he believes he verbally offered to hear my appeal to which I replied that I would prefer the following week. ...

“9. It is discriminatory for [Mr P Alexander] to state that [Mr D Binks] added that he offered to hear my Appeal at a subsequent depot visit because my only depot visit meeting on 15/10/17, was conducted by Mr W Foster and not Mr D Binks and secondly; even if Mr D Binks was the manager who conducted that wellbeing meeting; the purpose of the wellbeing meeting was not to deal with my Appeal.

“10. It is discriminatory for [Mr P Alexander] to state that Mr S Wells has stated that I refused to fully explain the reason for my absence from work as my case is that :...

“11. It is discriminatory for [Mr P Alexander] to state that Mr S Wells has stated that I even prevented my Rep from answering on my behalf however, the notes of the meeting on 16/10/17 recorded that I said “could I please ask that Scott James to explain everything as I am too stressed out with the

situation at this moment in time to answer these questions clearly". I would like to know which version of events is correct or wrong.

"12. It is discriminatory for [Mr P Alexander] not to deal with my complaint that the minutes alleged from the meeting on 16/10/2017 are not accurate of what happened.

" ...

"14. It is discriminatory for [Mr P Alexander] to accept Mr S Wells' statement that I stated that I would await the withholding of my company sick pay and the reasons and go from there because my English is not good enough to say this and I do not understand that sentence.

"15. It is unreasonable and discriminatory for [Mr P Alexander] not to properly respond to my question (by yes or not):

" ...

"22. It unreasonable for [Mr P Alexander] to conclude that should I wish to appeal the decision to withhold my company sick pay then I should contact Sharon Hammond, General Manager in line with standard practice however, I was not provided with a copy of the company's document related to the standard practice and secondly, he has failed to properly examine the final paragraph of my grievance letter of 24/10/2017 which stating: "finally the facts above or this grievance is also to be regarded as my appeal against the suspension of my sick pay which is due to the company's handling of my request for flexible working hours and it is itself racial discrimination and associated disability discrimination on grounds of my wife's disability".

"23. It is unreasonable for [Mr P Alexander] to caution me that regard to making serious allegations, such as racial discrimination and/or victimisation, without any evidence and that he finds that whatever errors were made, they had absolutely no bearing on the colour of my skin. My case is that:

" 23.1 It is rare to have open evidence of discrimination;

" 23.2 He failed to give my explanation why, circumstances in which many of colleagues requested were approved but without good reason my request was not approved.

" 23.3 He did not provide me with those managers' explanation for their failure to deal with my request within 28 days.

" 23.4 He did not provide me with good reason why my company sickness pay was withheld despite of providing sick notes.

" 23.5 Those managers' explanation for their failure to deal with my request within 28 days.

" ...

"I reserve my right to submit a Claim to the tribunal as the Company continuously failing to deal with my grievance in accordance to the fair treatment at work, diversity and equal treatment for all employees."



120. There are 3 observations:
- 120.1. Firstly it confirms that by 23 November 2017 at the latest he knew of his right to take a claim to the Employment Tribunal for (at least) discrimination and victimisation;
- 120.2. Secondly, this letter presents a flavour how events were about to take a turn. Mr Zerehannes was making numerous allegations of discrimination based primarily on the fact that something has gone against him. At nowhere in this letter did he ever set out why he believed that the acts themselves were discriminatory. It is premised only on his subjective belief, and belief that is somehow enough to prove his case. This pattern is endemic in all the subsequent correspondence that follows.
- 120.3. Thirdly, the liberal allegations that simply because someone has decided against him is itself prima facie discriminatory is in our opinion unreasonable. We note he does not even try to provide detail of why the fact the conclusion went against him is prima facie discriminatory. We note that sadly this pattern of the liberal use of allegations of discrimination or victimisation but without any attempt to set out why that allegation is justified beyond the fact that Asda or its managers disagree with him is typical of Mr Zerehannes' conduct both before and after this letter.

### ***The grievance appeal meeting***

121. The grievance appeal hearing took place on 5 December 2017 and lasted for approximately 2½ hours and the meeting was conducted by Mr P Statham. Mr Statham [PS in the notes] asked Mr Zerehannes [SZ]:
- “PS Can you explain what victimisation is, what does the word mean.
- “SZ: I was the victim.
- “PS: The employment law for victimisation is that you are treated less favourably as you have raised a grievance in the past.
- “SZ: I explained to him from April I was victimised by the management and the way he handled my grievance that was victimisation that was my view.
- “...
- “PS: On what grounds do you feel you are being discriminated against.
- “SZ: Because I applied 28/4/17, it was never done. Open the system and see who got it after I applied, the proof is there, then to grant someone who requested same as me and decline mine is discrimination, why did it take so long to hear mine.
- “PS On what basis do you feel you are discriminated against.
- “SZ: Due to my skin, brought up 16/10/17 with Mr S Wells, CSP review.

“PS: Prior to that time, do you believe you have been discriminated against.

“SZ: Yes, due to my race.

“ ...

122. Mr Statham later asked Mr Zerehannes if he had any examples of colleagues who have changed their shifts after he made his request to change shifts. Mr Zerehannes then gives the following examples:

“Ali, don’t know last name, works on late shift he does battery change sometimes. Take up generally, flexible workup request don’t take that long. LKa was granted before my request, another one is DSW, he was given flexible working hours. H, late shift, SS, SJ, Abdulla. All these colleagues changed from 3 weekends to 2. AM, SBq, TuGm, those people granted flexible working, all got a response within 28 days. My circumstances were exceptional and didn’t get a response for 5 months. I work here for 5 years 2 years agency, 3 years full time. I did not request this before, circumstances changed due to my wife’s health I requested this, I was not given a reason why it has refused and why it took so long did and now the sick pay is suspended to shift their failure on me.”

123. The Tribunal notes that on Mr Zerehannes’s own admission, some of these people were granted flexible working before his request, and some after. We note he did not identify all of these as comparators for the purposes of this claim. While we have amended the names to initials (because these are fellow employees only tangentially involved in the case) the Tribunal notes that the names suggest a range of different ethnicities of people who have been granted flexible working requests. The Tribunal also notes that Mr Zerehannes gave no regard in his answer to the restructuring exercise that took place which we described earlier in these proceedings, or that he did not complain about the outcome at the time.

***Failure to attend occupational health appointment and meeting on 11 December 2017***

124. Mr M Turner asked Mr Zerehannes to attend the IDC on 11 December 2017 for a meeting about his CSP and for an occupational health assessment. Mr Zerehannes sent an email to [Ms Z] Small, People and Community Administrator at the IDC to saying

“I can’t attend the depot visit because I could not find a colleague to give me a lift and because I am not feeling well.”

125. He could easily have contacted Mr Turner but, in what seems to be part of the pattern of petulance, he did not.

***Events 12 to 14 December 2017***

126. On 12 December 2017, Mr Turner emailed Mr Zerehannes and said (page 565):

“Due to the confusion on the telephone call that took place on the 09/12/2017. I would like to invite you to a further company sick pay review for failing to attend an OHA appointment on the 05/12/2017. The meeting will be conducted by [Mr C Small], shift manager on the 14/12/2017 at 18:00.

If you could please confirm that you will be attending that would be appreciated.”

Mr Zerehannes replied that day:

“I have not received any notification to attend an Occupational Health appointment on the 05/12/2017, unless you will refer me to the date of the text message or email being sent to me in this regards.

“It is unfair for you to invite me to a company sick pay review meeting when the company has stopped or suspended my company sickness pay leading me to struggle with my transport, bills etc... which is aggravated my health conditions.

“I am willing to attend the arranged meeting on the 14/12/2017 at 18:00 **provided** [Mr Zerehannes’ emphasis] that I will receive an email or text message from you, confirming that the business will provide me a return transport (taxi) and [GK] will be in to accompany me to that meeting.”

127. The same day, Mr Turner replied:

“As per our Absence policy you will have to sort your own transport to and from work.”

128. The next day, Mr Zerehannes replied:

“Further to your second email ... in which you referred to company policy, I write to request the following information or documents.

“1. An employee (A’s) Application for flexible working hour on grounds of his wife’s disability is not to be allowed.

“2. A copy of the company Absence policy stating that an employee (A) who is off sick due to work related stress will have his company sick pay suspended.

“3. Employee (A) has to sort his own transport to and from work in order to attend a sickness review meeting despite not having money for his transport.

“4. Right now I don’t have money to travel to [the IDC] therefore, I request the meeting being arranged in my flat after providing me with copies of all requested documents above. ...

“6. I would like to invite you to firstly arrange an appeal meeting in relation to the suspension of my company sick pay before the sick pay review meeting. Please, can you arrange it in Coventry.

“7. Thank you for providing me with your telephone number so we can discuss however, I would prefer to reply to your email by emailing you due to my understanding of English....”

129. We think it would have been clear to Mr Zerehannes that Asda does not have a policy that says an application for flexible working hour on grounds of a wife’s disability is not to be allowed, an employee who is off sick due to work related stress will have his CSP was suspended, or an employee has to sort his own transport to and from work in order to attend a sickness review meeting despite not having money for his transport. His request

showed us that Mr Zerehannes ignored the reason his flexible working application had been dismissed, why his CSP was suspended or overlooks the reality it was his responsibility to get himself to work at the IDC. It showed us that Mr Zerehannes is prepared to twist things, or even create a “straw man” to seek to get his way, and is further evidence of his unreliability as a witness.

130. On 14 December 2017 Mr Turner replied:

“I will look into the points that have be raised however I must inform you that failure to attend this CSP review today will mean that no mitigation will be given and this may affect the outcome.

“As previously stated this meeting will be carried out By [C] Small, shift manager at 18:00 today. (14/12/2017).”

131. On 14 December 2017 at 16:24, Mr Zerehannes emailed Ms Z Small (who we note is not related to Mr C Small) saying

“For attention of [C] Small

“Dear [C] Small,

“I write to request a postponement of the review meeting on 14.12.2017 at 18:00 because right now my wife has respiration problems caused by her disability therefore, I have to take care of my children secondly, also request you provide me with documents and information which requested to [Mr Turner] on 13.12.16 to help me to prepare that meeting.

“It is unfair for [Mr Turner] to say that you will look into the points that I have raised during the meeting because I have right to have company police before that meeting....”

132. The Tribunal notes that there are plenty of previous emails in the bundle that show Mr Zerehannes had Mr Small’s email address and that he knew Mr Small would be conducting the meeting. He could very easily have emailed Mr Small directly. There is absolutely no explanation therefore as to why Mr Zerehannes decided to send this email requesting the postponement to Ms Z Small. We conclude this is yet another example of petulant behaviour trying to frustrate a process because he was not getting his own way.

### ***Further signed off work***

133. On 15 December 2017, Mr Zerehannes’ doctor said that he was unfit to attend work due to stress at work. He was signed off until 2 January 2018.

### ***Mr Turner’s chasing of Mr Zerehannes to make contact***

134. On 27 December 2017, Mr Turner wrote to Mr Zerehannes:

“I note that we have attempted to call you on 18/12/2017 and 27/12/2017 however have been unable to make contact.

“You should be aware that not being contactable is a serious breach of our absence procedures and therefore could result in the withholding of all or part of your entitlement to company sick pay and could also result in disciplinary action being taken against you.

“It is therefore important that you contact me on [telephone number] to explain the reason for your absence. ...”

135. On 29 December 2017, Mr Zerehannes replied to Mr Turner. Although he says that he emailed it to Mr Turner, the only email we have shows that again he sent it to Ms Z Small instead. There was no sensible reason for doing that. In that letter he alleges as follows:

“...Secondly, the Company’s ongoing handling of my case is itself racial discrimination and/or victimisation.

Thirdly, the Company’s handling of my case including your conducts towards me which is itself victimisation: ...

136. Although he then goes on to set out the history of the case again in lengthy detail, at no point in that letter does he set out in what way he believes that anything about which he complaints was connected to his race or to the fact that he had raised a grievance alleging discrimination. It is simply made as a bare assertion.

***Launch of investigation to Mr Zerehannes being absent without leave [AWOL]***

137. On 30 December 2017, Mr Swetman, the Department Manager, wrote to Mr Zerehannes asking him to attend an investigatory meeting because it appears that he was AWOL. That meeting was fixed for 5 January 2018 at the IDC.

***Mr Turner’s reply after investigating the matters Mr Zerehannes raised.***

138. On 2 January 2018, Mr Turner replied to Mr Zerehannes’ email of 29 December 2017:

“... In relation to your points raised below and in your letter to me related to flexible working I am aware that you have an outstanding grievance in relation to these points which is currently being heard by [Mr... and I will therefore allow for him to continue in his investigations into this matter.

In relation to your points raised regarding your current absence I can confirm that all of Asda’s policies are accessible through Wal-Mart One which you have access to, you can log on using the following link ...

It is my belief that you failed to attend an occupational health appointment [5 December 2017] and therefore your company sick pay has been suspended until we can meet to talk this through, this is in line with our current policies. I am happy to arrange for the appropriate manager to meet off site to discuss your points raised in relation to your CSP can you please advise. ...”

139. Mr Zerehannes replied on 2 January 2018 saying he was unable to access the online facilities. Mr Turner confirmed that he would then send the policies out to him.

***Mr Zerehannes’s reply to Mr Swetman on 3 January 2018***

140. On 3 January 2018, Mr Zerehannes wrote to Mr Swetman alleging, amongst other things:

“I would like to complain that the contents of your letter is itself acts of victimisation because of my previous complaints about race discrimination.”

141. However at no point in what followed did he set out any information why he believed Mr Swetman’s act was one of victimisation. It was, again, a bare assertion.

***Mr Turner and Mr Zerehannes’s further communications over CSP***

142. On 3 January 2018, Mr Turner invited Mr Zerehannes to a meeting at Asda Abbey Park in Coventry (one of Asda’s superstores in Coventry) on 17 January 2018 to discuss his ongoing absence and any support that was required. Asda Abbey Park is one of the Asda stores that is closest to Mr Zerehannes’ address and therefore was accommodating Mr Zerehannes’s request not to have to make his own way to the IDC. We think this is to Asda’s credit and somewhat undermines allegations of discrimination and victimisation because it contrasts with the picture Mr Zerehannes wants to paint.

***Further signed off work***

143. On 4 January 2018, Mr Zerehannes’ doctor said that Mr Zerehannes was unfit to return to work due to stress at work until 2 February 2018.

***Mr Zerehannes request to move meeting with Mr Swetman***

144. On 5 January 2018, Mr Zerehannes wrote to Mr Swetman (via Ms Z Small) saying it was impossible to find a colleague or someone who could give him a lift at 18:00 to the meeting and therefore asked if the meeting could start at 15:00 or on another day. He confirmed he wanted Mr G N’Kshama to represent him.

***Continuation of the CSP enquiries***

145. On 11 January 2018, Mr Turner sent the relevant policies to Mr Zerehannes by email.
146. On 11 January 2018, Mr Zerehannes sent a letter to Ms N Hersey via Ms Z Small and Mr C Small requesting Statutory Sick Pay Form number 1 in order to claim Employment Support Benefit and requesting to be updated as to progress in the investigation related to the appeal meeting that took place on 5 December 2017. He set a deadline of 7 days for Ms Hersey to reply. It is not clear why he did not contact Ms Hersey directly.
147. Ms Hersey replied on the next day confirming the SSP1 would be addressed through one of the absence process visits, and that Mr Statham was still carrying out investigations into Mr Zerehannes’ concerns.
148. It turns out that Mr Turner’s attachments of the policies did not get through to Mr Zerehannes and, by request, he sent them on 12 January 2018.
149. On 12 January 2018, Mr Turner telephoned Mr Zerehannes to speak to him about his continued absence. The ‘phone call was summarised by Mr Turner as follows:
- “I called [Mr Zerehannes] today at 18:05 to discuss his case of absence, he immediately responded it was very bad. I asked to chat however he said whatever we did ...he doesn’t want to and needs to be sent through email.

I responded to him whatever we did discuss can be sent through email, but he didn't want to put the phone down on me."

We accept this is accurate because it reflects the timbre of Mr Zerehannes's emails and his attitude in general.

150. On 14 January 2018, Mr Zerehannes confirmed that he would attend Asda Abbey Park for the meeting on 17 January at 23:00. Mr Turner confirmed to Mr Zerehannes that he had arranged for Mr G N'Kshama to be his representative and confirmed that he would be picking him from home that day.

151. Unfortunately there had been a mistake made organising the meeting and it could not proceed. We are satisfied the mistake was not motivated by race, disability or the existence of complaints about discrimination because there is no evidence that links to the same or any reason we can think of that might suggest a link. On 17 January 2018 Mr Turner emailed Mr Zerehannes saying:

"Sincere apologies however as mentioned on the phone to yourself there seems to have been an administrative error around the time of your meeting that was due to be held with myself.

"Moving forward I would like to invite you to attend depot on 18/01/2017 at 15:00pm to discuss your absence and any support you require. In this meeting you are also entitled to representation.

"We can discuss providing a lift to and from work if required.

"If you could please confirm whether you will be able to attend this meeting and if required we can begin to look arranging any travel requirements...."

152. The meeting did take place on 18 January 2018 albeit at 6:23. In the note of that meeting Mr Zerehannes said that he was not doing very well; that he had been to see his general practitioner and that he had had to take up counselling. He said that his stress was impacting on his sleep. He confirmed that he would be happy to attend future occupational health appointments and he was willing to attend IDC visits and that future meetings that take place at the IDC. A note was added to the record that Mr Zerehannes asserted he had never refused to attend occupational health appointments.

153. On 23 January 2018, Mr Turner wrote to Mr Zerehannes confirming that he does not need a form SSP1 because he was being paid statutory sick pay through his wage slips. He also noted that it appears that Mr Zerehannes was missing one week statutory sick pay for December and undertook to look into the reason for that.

154. At the end of January, Mr Zerehannes and Mr Turner agreed that Mr Zerehannes would attend an occupational health assessment on 7 February 2018 and that Mr N'Kshama would provide transport to and from the depot for Mr Zerehannes.

#### ***Further signed off work***

155. On 2 February 2018, Mr Zerehannes' doctor declared that Mr Zerehannes was unfit to attend work because of stress at work for a period of one month.

Unfortunately, the doctor did not include any actual dates on the form and therefore it could not be processed, and he was asked to provide a second sick note properly completed by the doctor this time instead. He provided it on 15 February 2018.

***Further grievance of 6 February 2018***

156. On 6 February 2018, Mr Zerehannes lodged another grievance, this time sending it to Ms Z Small. His complaint related to the way that he felt Mr Turner had improperly treated him in relation to CSP. He set out the history of the case pretty much quoting the emails word for word. He also said:

“15. On 18/01/18 I attended a depot visit and meeting started with [Mr Turner] by asking me how do you feeling? I replied, “I am feeling very bad due to your stressful treatment towards me.” However, [Mr Turner] wrote [Mr Zerehannes] is doing is doing very fine which means it is not acceptable to change my words on his own interpretation. The way he treats me is a racial discrimination through all his time.

Finally, the managements are failed to deal with my case, due to this it impacted my current health condition (stress related work) to the worst level. Management and the company have a duty of care towards employees, but in my case it is all breached.”

157. Again, although this freely makes the allegation of discrimination against a company employee, at no point does Mr Zerehannes even set out the basic foundations of how he says that there is any evidence that what happened was because of his race. We can see no reason to justify Mr Zerehannes’s conclusion that what Mr Turner was alleged to have done (and we assume for present purposes without deciding it happened as Mr Zerehannes described) was motivated in any way by race.

***Missed occupational health appointment of 7 February 2018 because of traffic***

158. Mr Zerehannes did not attend his occupational health appointment on 7 February 2018. It appears that he missed it because of problems with traffic. Mr Turner agreed that he would seek to get a new date for Mr Zerehannes. This was confirmed by the occupational health report itself, which noted that when they telephoned Mr Zerehannes, there were issues with traffic.

***Identification of who was to conduct the grievance meeting***

159. On 12 February 2018, Mr James, a Shift Manager, invited the Claimant to a grievance meeting to take place on 26 February 2018.

160. On 14 February 2018, Mr Zerehannes emailed Ms N Hersey, Ms K Hallam and Ms Z Small a letter in which he requested that somebody else be appointed to deal with his grievance other than Mr James because he had the grievance already outstanding against Mr James. He also asked that the matter be rearranged so that he could be supported by George N’Kshama.

***Further grievance***

161. In the same letter of 14 February 2018 Mr Zerehannes raised a grievance against



- 161.1. Mr Statham regarding the grievance appeal meeting on 5 December 2017, and
- 161.2. Ms N Hersey's email on 12 January 2018, the gist of which is that Mr Statham failed to provide the grievance outcome in a timely manner because he was investigating matters still.
162. Again, he requested transport to the IDC if meetings were to take place there or, alternatively, that the meetings take place at the Asda store at Abbey Park, Coventry.

***Confirmation of occupation health attendance if travel provided***

163. On 15 February 2018, Mr Zerehannes provided the correct sick note confirming that he was away from work from 2 February 2018 until 2 March 2018 due to stress at work. He also confirmed in the covering email that he could attend an occupational health appointment on 28 February at a 15:15 but that return travel would be arranged for him.

***Ms N Hersey confirmed change of person hearing grievance and tried to tidy up proceedings***

164. On 19 February 2018, Ms Hersey emailed Mr Zerehannes confirming that the Respondent was happy to change the manager allocated to hear the grievance. She wrote as follows:

"I hope you are well, apologies that it has taken me some time to reply to you, I have been looking at your queries raised in your letter dated 14<sup>th</sup> February 2018.

"I am happy to change the manager allocated to hear your grievance raised on 6<sup>th</sup> February 2018, I will be speaking with the operations manager this week and we will ensure we find an appropriate manager to hear this. I have however noticed that there seems to be a lot of points raised on this grievance that are duplicated from your previous grievance raised on 29<sup>th</sup> December 2017 which Mr P Statham is currently investigating, I will therefore ensure that we hear this grievance (6<sup>th</sup> February) following the outcome of your outstanding grievance (29<sup>th</sup> Dec) to ensure we do not get things confused.

"In relation to your formal complaint dated 14<sup>th</sup> February 2018, I would please ask that this is raised as part of either your appeal if you choose to appeal the outcome of your grievance raised on 29<sup>th</sup> December or raise this as part of your new grievance raised on 6<sup>th</sup> February to save things getting confusing by having loads of open processes running simultaneously.

"Having looked into this grievance (14<sup>th</sup> February), although not an ideal time delay, I am comfortable with a delay due to the nature of your grievance points raised, some of your allegations are very serious and therefore we need to ensure that they are investigated thoroughly, as Mr P Statham does not work for the IDC and is completely independent it may take more time than usual as he will not be aware of our processes in full and further investigation may be required. I have remained in contact with Paul weekly to check progress and I can assure you that we will be hoping to finalize this week.

“I can only apologise that we haven’t kept you updated as we have worked this through, we should have done so and I can assure you that should we need further time to investigate we will keep in contact going forward.

“Finally, given your circumstances we will be happy to provide you with transport to and from depot where we can, alternatively we can arrange to meet at a local store – I will ensure your managers are aware of this for future meeting invites.”

In our opinion everything raised was reasonable and sensible. No proper objection could be taken to her reply.

**Occupational health report from interview on 28 February 2018**

165. On 28 February 2018, Mr N’Kshama was supposed to have picked up Mr Zerehannes to take him to his occupational health appointment at the IDC. At 14:11 Mr Zerehannes emailed Mr Turner saying:

“Dear [Mr Turner],

“The driver has not arrived yet

“And I will not take any allegation against me.

“I didn’t know why you doing this to me

“Regards...”

We can see nothing to suggest Mr N’Kshama’s non-attendance was Asda’s fault, yet alone something they deliberately arranged.

166. To progress matters, on 28 February 2018, a Dr A Modhaadija who was conducting the occupational health assessment instead spoke to Mr Zerehannes by telephone. He relayed his findings to Mr Turner who recorded as follows:

“[Mr Zerehannes] just had a telephone consultation with OHA [occupational health assessor] and I was present with [Mr Zerehannes] and his rep Georges N’Kshama [at the IDC]. OHA has stated that [Mr Zerehannes] is not fit to [return to work]. Once we receive full OHA report we will discuss further with [Mr Zerehannes]. [Mr Zerehannes] has ran out his depression tablets yesterday same tablets ...”

It then goes on to confirm he has got further medical appointments coming up.

167. Mr Turner spoke to Mr Zerehannes and the note of the conversation records:

“[Mr Turner] also asked if we pay your CSP and sort your flexible request rota, then would you be able to come back to work? [Mr Zerehannes] stated that [Mr Turner] asked him for any support but he didn’t come back regarding any support. [Mr Zerehannes] stated that his answer was regarding support was he does not know yet regarding [return to work] if he can sort out CSP and my request then I can be able to answer that question. ...”

The Tribunal is struck that Asda appears to be constructive and cooperative in progressing matters. This somewhat undermines any suggestions of discrimination and victimisation.

168. The occupational health report arising from this was sent to Asda and recorded, so far as relevant:

“ ...

“OH Opinion

“Stress is the adverse reaction people have to any perceived excessive pressures or other types of demand placed on them, it is not an illness – it is a state. However, if stress becomes too excessive and prolonged, mental and physical illness may develop.

“[Mr Zerehannes] engaged well in clinic today, giving a good history and answering questions. Questions did have to be repeated a few times owing to English being his second language. It would appear that his currently symptoms are impacting his activities of daily living as his sleep and appetite are reduced and his has little interest or motivation in leaving the house.

“Having completed a well validated mental health evaluation his scores would indicate severe depression and anxiety. He is on medication that would be appropriate for those symptoms and is currently receiving counselling support....

“[Mr Zerehannes] is currently unfit to return to work. ....

“It is difficult to provide management advice on a return to work date as [Mr Zerehannes] has psychological barriers about returning to work, due to his perceived workplace stressors. ...”

***Further signed off work***

169. On 5 March 2018, Mr Zerehannes’ doctor confirmed he was unfit to attend work due to stress at work from 3 March to 2 April.

***Further complaint of 22 March 2018***

170. On 22 March 2018, Mr Zerehannes emailed Ms N Hersey, Ms C Hallam and Ms Zoe Small (by this point, now known as Ms Z Avers) as follows:

“I write to complaint that the manner you are dealing with my grievances and letters (with unreasonable delay) which itself racially discriminatory act and victimisation; I would also like to inform that this is also seriously impacting on my health condition. I would like to be updated as to the progress of investigation into my letter dated 5<sup>th</sup> December 2017; 29<sup>th</sup> December 2017, 6 February 2018 and 14<sup>th</sup> February 2018....”

171. Again, the Tribunal notes that although Mr Zerehannes freely alleges that the acts are those of racial discrimination and victimisation, he provides absolutely no detail about why he thinks it is his race or previous discriminatory complaints that are the cause of “unreasonable” delay as opposed to, say, his sex, age, marital status, religious or philosophical beliefs, sexual orientation or for that matter excess work faced by Asda’s managers, mistake or that maybe the time taken was not actually

unreasonable. We have read the email. Like all the others it is simply bare assertion without any attempt to set out what facts led him to that conclusion.

***Outcome to grievance appeal***

172. On 27 March 2018, Mr P Statham provided the outcome to the grievance appeal. The grievance appeal outcome letter is 11 pages in length. The Tribunal has read it in detail and is quite satisfied that Mr Statham has given full and proper consideration to the allegations that Mr Zerehannes has raised. This is demonstrated by the fact that he has gone through Mr Zerehannes' lengthy grievance letter in detail and set out his responses under each particular section. We could detect nothing that led us to conclude it was dealt with by him superficially.
173. The Tribunal notes in particular the following sections (Mr Zerehannes's allegations are underlined)
- "c. [Mr P Alexander] has failed to refer to my case that [Mr W Foster] and [Mr S Nagra] were trained to deal with all employees equally and not to discriminate certain in dealing with requests made by certain employees.
- "When I asked you under what basis you feel that you have been discriminated against you informed me that it was due to the colour of your skin. There has been no evidence supplied by yourself in either the grievance hearing or the grievance appeal hearing that would suggest that the length of time taken to complete your flexible working request was down to the colour of your skin, suggesting discrimination. This has been a mistake made by two Department Managers and the corrective action required has been taken with them.
- "5. It is discriminatory for [Mr P Alexander] to state that I had an opportunity for appeal to be heard on 20/09/2017 and that I stated that this meeting did not go ahead due to my chose Rep, Scott James not being available even though an alternative Rep could attend as my case was that..."
- "The flexible review appeal meeting was planned for 20/09/17, your chosen representative ... was not available [however] [Mr GR] who was also a GMB representative was available. This is a fact that has been confirmed by you. I can see no evidence why [Mr P Alexander]'s statement is wrong or any evidence why it was made due to the colour of your skin, suggesting discrimination...."
174. Thus Mr Statham concluded that the fact that a trade union representative was available on 20 September 2017 meant that the meeting could indeed have gone ahead. However moreover, there was (and is) no evidence to suggest that Mr Alexander's conclusions were reached because of discrimination or victimisation.
175. Mr Zerehannes had complained that Mr A James had acted in a discriminatory manner, did not consider discrimination and asked what training Asda had given to Mr James about discrimination. Mr Statham however noted that Mr Zerehannes did not even raise allegations of discrimination until after the meeting with Mr James had taken place and therefore Mr James never had any discrimination allegations to deal with.

176. Overall Mr Statham concluded that there was no evidence that the Mr Zerehannes's skill colour in Mr Alexander reaching his conclusions, nor did the fact Mr Zerehannes had raised allegations of discrimination before. The Tribunal has considered the complaints and agrees that no such evidence existed apart from Mr Zerehannes's bare allegations.
177. In response to the question as to why Mr Zerehannes was not granted flexible working, Mr Statham says:  
"You were not granted flexible working hours to assist your wife because of the reasons that [Mr P Alexander] has highlighted. Whilst we have to consider your request we do not have to grant the request. Whilst requests from other colleagues in the past have been granted, none have been granted after your request. The last request that was granted was also refused at the initial meeting and his decision was changed at the appeal stage. Each flexible working request is judged on its own merits. [Mr] Alexander's response to the request is correct, by allowing you a further weekend off incurs additional overtime and weekends to cover it. I also refer you to my earlier answers, if your wife can look after the children for 2 out of 3 weekends I can see no evidence to suggest why she couldn't look after them for 3 out of 4 weekends."
178. He continued  
"It is clear from the timelines highlighted that the managers involved could have resolved your flexible working request quicker and the appropriate action has been taken in accordance with your [disciplinary and grievance] policy. I do not see any evidence that suggests that this delay was due to discrimination, in that it was due to the colour of your skin. You have provided me with no evidence to suggest that this is the case. I have answered each of your points in turn and I believe [Mr] Alexander carried out a thorough grievance hearing and his answers are reasonable. I can find no evidence of discrimination throughout his grievance hearing or decision. Based on the fact that you have not submitted a previous grievance or complaint of discrimination means your claims of victimisation are unfounded."
179. The Tribunal has been shown nothing that undermines this conclusion and nothing emerged in oral evidence to undermine it either.

***Further signed off work***

180. On 3 April 2018, Mr Zerehannes submitted a further sick note confirming that he was unfit to attend work until 1 May 2018 due to stress at work.

***Appeal against refusal of flexible working request***

181. Mr Zerehannes did appeal his flexible working request. The appeal was fixed to take place on 16 April 2018 and to be heard by Mr Binks. Unfortunately, the letter did not contain a time for the meeting and Mr Zerehannes did not receive the invite in time anyway. That meeting was then rearranged for 25 April 2018 at 20:00.

**Further grievance**

182. On 19 April 2018, Mr Zerehannes submitted a letter to Ms S Hammond but sent instead to Ms K Hallam, Ms Z Avern and Ms N Hersey. There is no explanation why he did not send it to the intended recipient. It seems again that Mr Zerehannes was simply wishing to be awkward. In the letter he wrote:

“Further to [Mr P] Statham, Operation Manager’s Outcome letter dated 27/03/2018, I write to complain of being racially victimised for raising grievances about race discrimination because the contents of his outcome letter is itself constitute an act of victimisation.

[Mr P] Statham’s Outcome letter or decision on 27/03/2018 is final therefore, there are no further stages to the Appeal process however; I was shocked to read his statement that: ...*[Mr S] Wells recommended to you to withhold my CSP which to date I haven’t appealed against. Whilst I am out of time to appeal against this decision you would still hear the Appeal if I submit the Appeal in writing to [Ms S] Hammond.*”

I would like to know the reason why my letter to [Ms N] Hersey, People Manager dated 24/10/2017 is not regarded as a written Appeal against the suspension of my sick pay particularly; the last paragraph of that letter is read “Finally, the facts above or this grievance is also to be regarded as my appeal against the suspension of my sick pay which is due to the company’s handling of my request for flexible working hours and it is itself racial discrimination and associated disability discrimination on grounds of my wife disability”.

If you do not consider that last paragraph as my written Appeal against the suspension of my sick pay therefore, I would like to know the reason why and second, I invite you to consider this current letter and the contents of my letter to [Ms N] Hersey, People Manager dated 24/10/2017 as my written Appeal against the suspension of my sick pay.”

183. The Tribunal notes that yet again, Mr Zerehannes has freely made allegations of being subjected to discrimination and victimisation but provided no detail or evidence to show that his race or previous complaints have played any part.

**Arrangements for the grievance meeting with Mr Binks**

184. On 19 April 2018, Mr Zerehannes emailed Mr Binks. He was concerned that Mr Statham had made the observation that if his wife could look after the children for 2 out of 3 weekends, he could not see why his wife could not look after the children for 3 out of 4 weekends and was therefore concerned that the appeal meeting was going to be a formality because Mr Statham is senior to Mr Binks.
185. On 24 April 2018, Mr Binks said to Mr Zerehannes in an email that it was for him to make arrangements for the representative to be present and confirmed that they would not be providing transport to the IDC because it is his responsibility to provide his own transport for an appeal that he has requested.
186. Mr Zerehannes replied in the following terms:

“... I write to confirm that I will attend that meeting provided:

“1. [Mr G] N’Kshama will be at work so he can be my witness;

“2. The Company will provide me with an English-Bilen interpreter or if the Company cannot find a professional interpreter therefore, my fellow colleague: [Mr T] Tekleab can be in assistance.

“3. The Company is to assist me with my transport from my home to the lieu of the meeting as previously because I cannot afford the transport expensive as I am financially struggled due to the Company’s failure to pay me.

“4. If the company cannot provide me with transport therefore; I request a meeting to be arranged at one of the ASDA in Coventry.”

187. This is the first time Mr Zerehannes indicated the need for an interpreter. As we noted above, he has before now attended meetings with his union, with Asda’s managers and written (or approved) lengthy letters in English without difficulty. We also noted his abilities in English above in our introductions. It fits with a pattern of simply seeking to be obstructive unless he got his way.

***Confirmation of appeal against withholding CSP and organisation of the same***

188. On 24 April 2018, Ms Hersey confirmed that Mr Zerehannes’ appeal against the decision taken to withhold his Company sick pay would be heard on 2 May at 10 am at Lutterworth IDC. She confirmed that Asda was no longer in a position to arrange transport for him and it was for Mr Zerehannes to make his own arrangements to attend the IDC.

189. On 25 April 2018, Mr Zerehannes emailed Ms Hersey saying he did not understand the statement that Asda are no longer in a position to arrange someone to come and collect him from his home despite being aware he cannot afford transport and therefore asked as follows:

“...I request a meeting to be arranged at one of the ASDA in Coventry which is a reasonable, fair and non-discriminatory option.”

190. The Tribunal concludes this is another example of the liberal use of “discrimination” to try to get his own way. There is no explanation, nor is it obvious, why being asked to attend a meeting at his place of work is race discrimination but attending a meeting elsewhere nullifies the race discrimination. Mr Zerehannes provided no explanation of this.

191. On 26 April 2018, Ms Hersey decided to compromise on transport and replied Mr Zerehannes by email (so far as relevant):

“I can see that you currently have 2 processes outstanding, an appeal for a flexible working request and a CSP appeal, as we have collected you previously I would advise that we hear both of these on the same day as this will be the last occasion we will arrange to collect you and return you home.

“I therefore advise that you attend your CSP appeal with [Mr S] Gamble on 2<sup>nd</sup> May at 10am and we will have someone arrange for your flexible working appeal to be heard directly after. We will arrange transport to and

from depot however you will be expected to arrange your own representation.

“This will be the last time the depot collects you to attend a meeting and any further meetings following these you will be expected to arrange travel yourself.”

192. Mr Zerehannes response was:

“1. It is very difficult for me to have two meetings ... the day or date due to my ongoing mental health ... however, I have no choose at this Stage to accept that you will hear both of these meetings on the same day ... provided that I will have at least an hour or two hour break between the two meetings; as this is to avoid further unnecessary delay which itself is impacting on my ongoing mental health.

“2. I feel being offended by your comment that this will be the last occasion you will arrange to collect me and return me home and that any further meetings following these I will be expected to arrange travel myself.

“3. I feel being offended because you are well aware that I cannot travel to the site because I am financially struggled due to Company’s failure to pay me during my sickness absence period which is itself due to stress caused by the racial discrimination (including disability discrimination due to my wife disability) conducts committed by the Managers.

“4. you advise me to attend my CSP appeal with [Mr S] Gamble on 2<sup>nd</sup> May at 10am and you add you will have someone arrange for my flexible working appeal to be heard directly after my CSP appeal with [Mr S] Gamble I will be expected to arrange by own representation therefore, I would like you to consider the following:

“4.1 Mr G N’Kshama is the only colleague who is willing to accompany me and can only do it during his Shift therefore, as previously I invite you to arrange the two meetings within his Shift.

“4.2 I would like to know the person who will deal with my flexible working appeal.

“4.3 To be provided with Bilen-English interpreter as requested previously.””

193. The Tribunal concludes that again Mr Zerehannes is seeking to try to frustrate the process. We can see nothing in the occupational health reports or in the emails previously that suggests it would be inappropriate for him to have two meetings back to back. Whilst it might be reasonable to have a break between the two meetings, we have seen nothing that suggests that he would require a break of at least an hour or more between the two meetings. Although Mr Zerehannes says he is offended by the fact that it will be the last time that Asda would provide transportation, we can see nothing that suggests that it was reasonable to expect Asda to provide transportation to and from his place of work. He is still an employee of Asda; he is still located at the IDC; that is still his place of work and therefore as far as we can see, it is to Asda’s credit that thus far they have been seeking to make arrangements for him to travel to and from the place and we can see nothing that justifies him taking offence at the suggestion that it is up to him to get to his place of work if he seeks to continue to work



there. There is nothing in the occupational health reports or elsewhere that justifies the need to provide transport.

194. We again note that he makes an allegation that his stress all results from racial discrimination, including disability discrimination from his wife's disability but, again, provides absolutely no evidence that this is the case. We also note that now he appears to be insisting on a Bilen-English interpreter as requested previously. We can see no justification in that request. At danger of repeating ourselves, we note he has communicated perfectly well with everyone beforehand in meetings as the notes have disclosed and in his own lengthy letters.

***Appeal against refusal of flexible working on 2 May 2018***

195. The appeal against the refusal for flexible working was heard on 2 May 2018 by Mr Binks at the IDC. In that meeting the Tribunal notes that Mr Zerehannes was represented by Mr N'Kshama and that Asda had agreed that Mr Tekleab could act as the translator. Mr Zerehannes had nominated Mr Tekleab. We think it is further evidence of Asda's attempts to be reasonable, cooperative and resolve the real issues that they compromised on this issue, even though it seems the request was not justified.
196. Although Mr Zerehannes raised concerns about whether Mr Binks would be fair and impartial, after discussions Mr Zerehannes confirmed he was happy for the meeting to continue.
197. The appeal meeting went into the details of the flexible request and Mr Zerehannes said as follows:  
 "... The way they handled it was victimisation and it is racial discrimination, they should let me know in writing my refusal reason.  
 It continued  
 "Mr Binks: Tell me what the initial request was for?  
 "Mr Zerehannes: To go from 3 weekends in and request to go to out of 4 weekends to support my wife with the kids rather than working 3 weeks. She was struggling. Asda have a duty of care towards the colleague but my application was overlooked by the company management."
198. Mr Binks then enquired as to the age of the children, the length of Mr Zerehannes's wife's illness, that his wife looked after the children, who were at school during the weekday.
199. Mr Binks asked: "Your wife will still have 2 weekends to cope so it is not an impossible situation to cope with?"  
 Mr Zerehannes replied: "The problem is 3 consecutive weekends, but if I can try 1 weekend in and 1 weekend off to see how the condition improves or not. If it becomes worse then I may have to do Monday to Friday, you never know."
200. Mr Binks then went on to enquire into Mr Zerehannes' wife's condition.
201. Mr Binks then asked: "Did you ever consider changing shift to facilitate your needs?"

“Mr Zerehannes: I clearly stated on page 4 of the [flexible working request] form I have given many options but never seriously considered my application by the company and the management and this is victimisation and disability discrimination due to my wife’s disability.

“Mr Binks: Is she classed as disabled officially?

“Mr Zerehannes: “According to the law she is.

“Mr Binks: What law is that?

“Mr Zerehannes: Under the Equality Act 2010.

“Mr Binks: Are you saying asthma is classed as a disability or your wife has been classed a disabled by a medical professional?

“Mr Zerehannes: If somebody is physically or mentally impaired more than 12 month’s then the law states this is disability which is her sickness is permanent and she will be struggling forever. Everyone knows asthma is a dangerous condition and a killer.

“Mr Binks: Have you considered whether another shift would be more in line with your needs? “

“Mr Zerehannes: The morning shift all the time, I have to wake up with my children, dress them, breakfast and take them to school. This would be key to help her with this. On the night shift, I wouldn’t prefer night shift because I have seen my wife struggling during the night. But on late shift, this is the only one I can accept. And if this request was offered it would be very nice.

“Mr Binks: Is there anything else you wish to add before I adjourn?

“Mr Zerehannes: No.”

202. The Tribunal was struck by the juxtaposition of someone who was now saying they required an interpreter being able to refer to the **Equality Act 2010** and give a good description of the test of disability under that Act including the reference to physical and mental impairments, which are not normal English. It again tends to support the fact his linguistic abilities are not as bad as he seeks to imply. Moreover though it reaffirms that on 2 May 2018 he was aware of the **Equality Act 2010** and by implication rights that arose from it or that he ought at least to investigate it further.

***Appeal against withholding CSP on 2 May 2018***

203. The Company sick pay appeal also took place on 2 May 2018 and again at that meeting, Mr Zerehannes was represented by Mr N’Kshama and Mr Tekleab acted as the interpreter. Mr Gamble noted that in the appeal there were allegations of direct discrimination and harassment and said that they were being investigated separately so he was not going to deal with those but leave those to a separate grievance.

204. Although Ms N Hersey was taking notes and was herself the subject of grievances, Mr Zerehannes confirmed that he was happy for her to attend and take notes at this meeting. In short, Mr Gamble allowed the appeal against the stoppage of CSP to a limited extent. He noted that the occupational health report on 28 February 2018 confirmed that Mr Zerehannes was ill and unable to attend work. He noted it accorded with

Mr Zerehannes' doctor's fit note. He therefore decided CSP would be reinstated from 28 February.

205. He came to the conclusion that any delays until that point however, such as non-attendance at occupational health assessments or meetings were entirely the fault of Mr Zerehannes. He therefore had failed to follow the policy and Asda should not exercise its discretion to pay CSP.

***Outcome of flexible working appeal***

206. On 7 May 2018, Mr Binks replied to Mr Zerehannes' appeal against refusal of his flexible working request and, so far as is relevant, he wrote as follows (page 665):

"I have reviewed your appeal in full and these are my findings:-

"I fail to see how increasing the amount of weekdays improves your situation as your wife would still need to care for the children between 15:00 and 19:00 on the extra weekdays you would have to work if you worked less weekends. You also have all the school holidays to consider as your children would be at home all day. So this would be no different than a weekend day in that respect.

"I cannot get too involved or judgmental regarding your wife's condition as I am not in a medical position to do so but you have confirmed you have not sought any external assistance and the situation you describe does not indicate that your wife cannot look after the children with regards to the duties required, you describe to me a more desirable position to be in if the opportunity arose.

"You go on to say that you cannot confirm your position would change even if you did work less weekends and that you might need to request working weekdays only and no weekends and this demonstrates to me that changing your current rota would also not resolve anything for sure.

" ...

"You signed your contract and were employed to work 3 weekends from 4 for the specific reasons to cover the depots needs to support our weekend workloads and this demand has not changed. it is very often that we are in a position to allow extra holidays during the weekdays but very rarely if ever at all at weekends so this also supports the requirement to adhere to your current rota as we do not require more colleagues in on week days and less on weekends.

"We are currently employing for our other depots nearby at ADC and CDC and the vacancies are all offering 3 weekends from 4. This also supports the business as a whole is working toward the same goals, which is to secure our service to stores by having the workforce available at the time of when we need them.

"So with this in mind, my decision is to uphold the original decision to refuse your request and inform you that you will need to remain on your current rota for which you were initially employed, which was made to support the company's business needs....

“It may be the case that we have some vacancies on the rota that would suit you better within our retain department? If you would like to pursue this avenue, please let me know and I can follow it up with you....”

207. It is not our role to decide if the decision fails to comply with the **Employment Rights Act 1996 Part 8A**. However the Tribunal notes that the reasons are logical, reasonable and coherent. We also note moreover that Mr Binks indicates Asda is prepared to see if Mr Zerehannes could work elsewhere. He could have simply told Mr Zerehannes that the appeal was dismissed. This appeared to be an extra step to help Mr Zerehannes and resolve the problems. We think it seriously undermines any suggestion that Asda or the other respondents were behaving in a discriminatory way or victimising him. This is all more so because, as we note, Mr Zerehannes agreed to seeing if he could work elsewhere, suggesting that Mr Zerehannes himself did not see it as anything other than a positive suggestion.

***Further signed off work***

208. On 11 May 2018, Mr Zerehannes' doctor confirm that he was unable to attend work until 31 May 2018 because of stress related problems with effect from the 2<sup>nd</sup>. That certificate was extended because of stress at work until 30 June 2018.

***Query about union dues***

209. On 13 June 2018, Mr Zerehannes enquired as to why Asda were still deducting membership money for his membership of the GMB even though he had terminated it and enquired why he had been paid an extra £3,141.51 on 25 May 2018.
210. Mr Turner responded to the query saying he was unable to provide this information by email because of how he understood the GDPR regulations worked (i.e. email is not secure) and offered instead to sit down in a meeting the next day and go through the query with him.
211. On 14 June 2018, Mr Zerehannes replied as follows:  
“I am willing to sit down with yourself and to go through my query only after providing me with a letter or written document in which the Company is addressing the two points above, therefore, I would like to receive a confirmation that you will be provided me with the requested letter or document....”
212. The Tribunal observes there is absolutely no reason for the letter to have been provided in advance and that it was a perfectly reasonable offer made by Asda to sit down and discuss it with him. Even if Mr Zerehannes is right that it does not amount to a breach of the GDPR Regulations, to simply insist on it in writing first before having the meeting seems to be another unreasonable obstacle Mr Zerehannes is putting in the way of this matter being formally resolved.

***Grievance meeting with Mr A James on 20 June 2018***

213. On 20 June 2018, Mr Zerehannes had a grievance hearing with Mr A James. He was represented by Mr N’Kshama with a Mr Yohanes acting as an interpreter. The meeting lasted for just over an hour.
214. In the meeting, Mr Zerehannes went through the history of the case and made a number of allegations that things had been done because of racial discrimination or victimisation or because of the colour of his skin. However, like all other complaints at no point did he provide any evidence or detail to point to anything that showed that his grievance his race or his wife’s disability was in any way a motivator for what happened.
215. The meeting was adjourned for Mr James to consider matters.

***Further signed off work***

216. On 30 June 2018, Mr Zerehannes’ doctor declared that he was unfit for work due to stress at work. The certificate was issued on 3 July and expired on 3 August 2018.

***First stage review for non-attendance due to illness under the capability procedure and consequent career break***

217. Mr Binks invited Mr Zerehannes to a first stage review regarding his inability to undertake his duties due to ill health pursuant to Asda’s capability procedure. The meeting invite was sent out on 7 July 2018 with the meeting to take place on 10 July 2018 at 22:15.
218. Mr Zerehannes replied on 9 July 2018 saying that he would be able to attend but asked for the time to be changed so he could get a lift from a colleague and provided that Mr N’Kshama could be there to act as an interpreter.
219. As a result of that meeting on 11 July 2018, Mr Zerehannes applied for a career break. He wrote in his email:
- “Further to our meeting on 10 July 2018, I write to apply for a career break from 26 July 2018 to 24 July 2019. This application is made on the following grounds:
- “1. Due to my health condition which is work related stress.
- “2. To prepare my tribunal claim
- “I would like to have a flexible career break, i.e. can resume working at any time prior to 24 July 2019.”
220. That request was approved.

***Arrangement of continuation of the grievance from June 2018***

221. There were communications between Mr Farooq and Mr Zerehannes to arrange the resumption of the grievance hearing. Mr Farooq was to take over from Mr James. There was no objection to that change. From the emails there was clearly some difficulty in the arrangement of that meeting. We think nothing particularly turns on that except to say that we see no evidence that Asda’ position was connected to Mr Zerehannes’ race, the

fact that he had raised allegations of discrimination or his wife's disability. The meeting was fixed for 28 September 2018.

***Complaint about restriction on working elsewhere during career break***

222. It is a term of Asda's career-break scheme that if an employee wishes to work elsewhere, they require Asda's written consent. This makes sense to us. We can see why, for example Asda might not be impressed with one of their workers working for a rival business. We think this is fair. If an employee wants to take a break from working that is one thing. If they are able to provide service then it seems only right their current employer should have first call. If the employee wants a break without that restriction, they are free to resign.
223. On 7 September 2018 shortly before the grievance meeting, Mr Zerehannes wrote to Mr Turner referring to that condition of the career break. Having alleged now that the work-related stress and anxiety was now caused by acts of race discrimination and/or disability discrimination, he went on to say at paragraph 4:
- “4. As previously informed, I reserve my right to find any paid job to fund my family trip to my Country-Eritrea in August 2019 and thus is on the grounds that I have been unlawfully treated by ASDA Lutterworth IDC Depot's Managers causing me to request a Career Break alternatively; I request to be transferred to one of the ASDA – Coventry Stores because:
- “4.1 This will increase myself esteem, mental well-being and as well as financial stability (and to fund my family trip to Eritrea in August 2019).
- “4.2 This will have substantial positive benefits for my wellbeing and rehabilitation and could also prevent potential relapse as I will not be in contact to those managers who committed those acts of discrimination which led to my health conditions. ...”
224. At the same time he submitted a formal application to transfer his employment to the Coventry store.

***The resumed grievance hearing on 28 September 2018***

225. The grievance meeting with Mr Farooq took place on 28 September 2018. He explained that the reason he had taken over was that during the course of that hearing there were concerns raised about how Mr James conducted the hearing and about Ms N Hersey being involved (even though no complaints were made at the time). He explained that he was an Operations Manager who had stepped in to take over and that Ms Hallam had been appointed in place of Ms Hersey to take notes.
226. Mr Zerehannes confirmed that he was content for the meeting to continue with Mr Farooq conducting it.
227. The meeting itself was significant and lengthy in its content. During the course of the meeting, Mr Zerehannes went into detail about his desire to change his shift pattern and the history. We have considered it but see no merit to repeating it here.
228. When asked about discrimination, however, Mr Farooq said:

“I completely understand your point around the delay of the outcome and let’s say going against policy but I’m failing to understand who is this racial discrimination, would you please substantiate that.

Mr Zerehannes replied:

“Everything for me is racial discrimination. She [i.e. Ms N Hersey] would never ever treat if I was white British, never. I have got all the emails I will highlight, that in a copy of the email ...”

He then handed Mr Farooq a copy of an email of 12 January 2018.

229. This related to emails from Ms N Hersey who was following up Mr Statham’s grievance investigation. Again, it is notable that the highest that Mr Zerehannes’ allegations gets is simply that it is racial discrimination because he says it is. He adduced no evidence or points to nothing that even begins to suggest that he would have been treated differently if his race were different. It is, again, a bare allegation made without any attempt to support it beyond subjective belief.

### ***Complaint about the career break***

230. On 2 October 2018, Mr Zerehannes wrote to Natalie Hersey in the following terms (page 692):

“... Please consider this letter as my response to your letter of September 24, 2018. I do not accept that my request for a career break was given fair and reasonable consideration because the management have failed to examine and take in consideration that my ongoing work related stress and Anxiety were caused by the acts of racial discrimination or/ and disability discrimination committed by ASDA ... and due to the Company’s failure to address my workplace stressors ...

“You say it is standard practice to receive 3 months’ notice my Application was approved. My position to this is that my Application was approved in breach of your standard practice to receive 3 months’ notice of Application because my career Application has been approved in bad faith as it has been approved to make my life miserable, without any source of financial revenue by stopping me to request to work elsewhere.

“You said your policies are statements of principles and practices dealing with the on-going management and administration of the business therefore: my question is why my Application for flexible work; numerous grievances or/and complaints and career break application were not or/are not dealt with as per your policies’ timescale?

“You then said Policies act as a guiding frame of reference for how the business to respond to requirements to comply with legislation, regulation and codes of practice therefore; my question is why my Application for flexible work based on my wife’s disability, numerous grievances or/and complaints were not dealt with in accordance to the legislation, regulation and codes of practice.

“You asked me to contact [Mr U] Farooq ... with the particular details of the work I wish to undertake including company I wish to work for, in what capacity and the hours and for how long (permanent or temporary)

therefore, I would like to request to be transferred to one of ASDA's Stores in Coventry instead of undertaking work elsewhere....”

231. The Tribunal finds that letter particularly difficult to understand since it is not structured in the clearest or most logical way. However, the Tribunal is particularly struck by the fact that it is Mr Zerehannes who has asked for a career break, has been granted a career break on a clear term he does not work elsewhere without written consent, agreed to that, and is now complaining about being granted what he sought.
232. The words  
“application has been approved in bad faith”  
are odd to say the least. The Tribunal has never seen person complain they got what they wanted from their employer was an act of bad faith on the employer's part. In our view it is yet a further example of Mr Zerehannes setting out to create trouble and obstruction because he has not got his way. The fact he maintained this position at the hearing shows the unreasonable of his approach.
233. As for the suggestion that the career break with a condition that he cannot work elsewhere is somehow unfair, the Tribunal can see no justification for such a criticism. If he wants a break from work while still being an employee then that requires mutual agreement with the employer. As noted, the term of the break seems reasonable to us and accord with standard practice in employment.
234. However, we also note that he requested to work at the Coventry stores. We find that somewhat strange if the employer is as bad as he says and as racist as he says and discriminatory as he suggests and victimises him repeatedly, the idea of continuing to work for the employer does strike us as somewhat odd and further undermines his allegations that Asda is being institutionally racist.

***Attempts to find alternative employment for Mr Zerehannes***

235. On 3 October 2018, Ms Hersey replied to Mr Zerehannes' letter saying:  
“In relation to your request I have contacted our Coventry stores in relation to current vacancies.  
“I have been informed that they are looking to recruit shortly and will have positions available. The roles offered are a range of hours from part time to full time and will all include at least 1 weekend day per week. I am more than happy to arrange a meeting with the stores Deputy manager who is eagerly awaiting my response.  
“If I could please ask you to let me know by 5<sup>th</sup> October if you want me to arrange this meeting, these roles go very fast when they are advertised and the Deputy manager has asked that I respond to him by Friday.”
236. Mr Zerehannes replied on 4 October 2018 confirming that he wished to indeed take up this possibility.
237. On 10 October 2018, Ms Hersey contacted Mr Zerehannes saying



"I am trying to contact store but am struggling at present as the Duty manager is on bereavement leave. I have passed your details onto Ms E Knight who is the new HR Business Partner for IDC. She will pick this up from here and she will be in contact as soon as she can."

238. Mr Zerehannes replied to that in the following terms:

"I do not understand how Natalie is trying to contact store but she is struggling at present as the Duty manager is on bereavement leave because my understanding is that when a Manager is off work, the business is to appoint an acting manager to act on his/her absence and secondly; Natalie was supposed to respond to the Duty Manager by Friday 5<sup>th</sup> October 2018 as requested by the Duty Manager; I question myself why did Natalie contact the Duty Manager by 5<sup>th</sup> October?"

"I would like to inform you that I and my family are financially struggling at present therefore; I will urge you to address my transfer request not only in a timely manner but also fairly because I feel being victimised for raising grievances about race and disability discrimination and my current Employment claim and this is why I have previously stated that my career Application has been approved in bad faith as it has been approved to make my life miserable, without any source of financial revenue by stopping me to request to work elsewhere."

239. The Tribunal is struck by the lack of sympathy and understanding for a manager being absent because of a bereavement. We accept that there may well be a temporary manger put in place but they cannot be expected to anything but keep things ticking over. It shows us that Mr Zerehannes is either incapable or unwilling to accept that not everything runs smoothly even if he is not at fault, or that things sometimes go wrong.

240. On 12 October 2018, Ms Hallam confirmed to Mr Zerehannes that the store had asked her to send across the endorsed application form from her in order to progress the matter. She said:

"I have sent an internal application form in the post to you today, would you complete this please and return to me in the enclosed stamped address envelope, upon receipt I will ensure the application is endorsed and forwarded to the store on your behalf.

"Once they have received your application form they will be in contact with you in due course."

It is clear that Mr Zerehannes had to fill in the form and return it.

241. On 22 October 2018, Mr Zerehannes requested a copy of the business policy about employee transfer from warehouse to one of the stores and also help to complete the 2-page form. Ms Hallam confirmed the next day that such a policy does not exist. It is not entirely clear why Mr Zerehannes needed the policy to be able to fill in the form to apply for a job and it is not entirely clear why it was only 10 days later that Mr Zerehannes was raising this query.

He also raised queries about pay and Ms Hallam confirmed that they were awaiting information from HR Shared Services.

242. Ms Hallam also said that she would be happy to assist Mr Zerehannes in completing the form and this if he wished to take up the offer, then he simply needed to provide a telephone number so she could contact him to arrange that. She expressed that she could be flexible with her diary on 24 October, which was two days after Mr Zerehannes asked for the policy. He did not make contact.

### ***Outcome of grievance from Mr Farooq***

243. On 1 November 2018, Mr Farooq issued his decision in Mr Zerehannes grievance from 6 February. The letter is lengthy and shows that he had gone through each allegation that Mr Zerehannes has raised. He rejected any allegation that Mr Zerehannes had been subjected to bullying, harassment discrimination or victimisation, noticing that there was absolutely no evidence of them at all.
244. However, he did note that Mr Zerehannes had incorrectly been identified as being absent without leave on one particular occasion because Asda had failed to provide the promised transport. The fact that Mr Farooq was prepared to rule in his favour tends to undermine arguments that they were subjecting Mr Zerehannes to racism.

### ***Appeal against the grievance outcome***

245. Mr Zerehannes submitted an appeal on 15 November 2018 to Ms E Knight and Ms K Hallam. In essence, the letter is detailed takes issue with every single thing that Mr Farooq has said. Suffice it for present purposes to note that he simply says as follows at page 706:

“In write to lodge an Appeal against Mr U Farooq’s decision which is itself an act of racial discrimination and/or victimisation by way of discrimination for the following grounds:...”

246. He then proceeded over eighteen grounds, many of which are divided into sub-grounds, to suggest that Mr Farooq’s conclusions were unreasonable and discriminatory. However, at no point does he provide any evidence or explanation as to how the fact that Mr Farooq has reached conclusions contrary to what Mr Zerehannes averred is discriminatory in nature or an act of victimisation.

### ***Fixing and preparation for the grievance appeal hearing***

247. There are were some difficulties arranging the grievance appeal meeting, again with Mr Zerehannes insisting that Mr N’Kshama be there to represent him and that either one of his colleagues interpret or otherwise that Asda provide him with an interpreter.
248. On 29 November 2018, Mr Tilley, the General Manager for Bristol who had no previous involvement or connection with this case and does not have any involvement with the IDC at Lutterworth arranged an appeal meeting to take place on Tuesday 11 December 2018 at 17:00. It would require Mr Tilley to drive from the South West to the IDC for the hearing.
249. As part of his preparation, Mr Tilley set out a grievance appeal timeline that runs to approximately four pages. During the course of this he notes not just the dates of the various grievances, grievance appeals, outcomes and

so forth but he also sets out in detail the allegations that have been made of racial discrimination and that there is in his opinion from the reading of the papers, no evidence to support the allegations was ever advanced by Mr Zerehannes. He also set out the points that would need covering, the points that have not been covered but must be and points that require further clarification. He also made some preliminary enquiries as to why it had taken so long for Mr Statham to send out his outcome letter and had a look through the demographics of those who had applied for flexible working requests and whether they had succeeded or failed or what they had resigned for.

250. There is one particular comment that Mr Tilley made in his notes that struck the Tribunal:

“[Mr Zerehannes] seems reluctant to accept that people make genuine mistakes despite him having to clarify in the meeting dated 28/09 [Mr Zerehannes] has to make a correction of his wife’s birthday in fact being in September and not October. There seems to be no acknowledgment of the fact that we are all human and make mistakes...”

251. We are satisfied that Mr Tilley had thoroughly prepared for the grievance appeal. He had clearly gone through the history and identified pertinent points. We think it impressive he had commenced enquiries on relevant matters that were plainly going to have to be looked into before the hearing itself.

***Mr Zerehannes does not attend the grievance appeal hearing***

252. Mr Zerehannes attended on 11 December 2018. Unfortunately Mr Tilley had a previous meeting that overran. Although his meeting with Mr Zerehannes was scheduled to start at 17:00 it could not do so.

253. Mr Zerehannes left. He wrote as follows a note which was handed to Mr Tilley later on:

“I came here for an appointment for 17:00 and I am now the time is 18:10 so I cannot wait more than this time.”

The Tribunal notes there is no explanation as to why he could not wait more than this time. The Tribunal also notes that this meeting was taking place because of Mr Zerehannes’ request. It could have been an important step to resolve matters and the alleged stress at work. We think that Mr Zerehannes had no excuse to leave and his behaviour was a further example of his unreasonable conduct.

254. Mr Tilley made a note that recorded that he had asked Mr N’Kshama to go and see Mr Zerehannes and tell him that they were going to be late because the previous meeting was running late. The note also discloses that during a break in the previous meeting, Mr Tilley himself went to see Mr Zerehannes. He recorded in his contemporary note as follows:

“ I decided to go and see [Mr Zerehannes] and greet him and say that I would be conducting the meeting shortly. [Mr Zerehannes] did not want to listen to what I had to say and stated it was unacceptable to be an hour late and he was not staying. I stated I had agreed to do it on the late shift as

he had requested due to his rep and translator being on this shift and we had plenty of time to conduct the meeting by the end of the shift time.

He still refused and said it was not acceptable and was not listening when I was trying to explain that I had gone to a lot of trouble when my depot was very busy having done 2½ hours each way of driving in order to hear his complaint in a timely manner. I really cannot understand why this colleague was not prepared to wait when he alleges to have such a serious complaint....”

255. We find this note is accurate. We come to this conclusion after weighing up the witnesses’ general credibility, the accuracy of the note and that the obstructive and petulant behaviour it describes appears to reflect Mr Zerehannes’s conduct throughout.

### ***Mr Zerehannes’s verbal abuse of Ms Knight***

256. On 11 December 2018, Ms Knight, who is an HR Business Partner at Lutterworth IDC, met Mr Zerehannes for the first time purely by chance. He happened to be waiting for Mr Tilley to finish the previous meeting. She spoke to him in a friendly way. however Mr Zerehannes became very aggressive towards Ms Knight. He shouted at her. He was abusive towards her and solely blamed her for the meeting with Mr Tilley not going ahead on time.
257. Mr Zerehannes’ conduct was out of all proportion and totally unreasonable. It left Ms Knight shaken and upset.
258. Mr Zerehannes denies this. We reject his denial and prefer Mr Knight’s version of events. Firstly she is more believable than he is for reasons outlined above. Secondly the idea it is someone’s fault that he has to wait fits with the fact he is incapable of accepting that not everything goes to plan. Thirdly it tallies with Mr Tilley’s evidence about how Mr Zerehannes interacted with him. We note Mr Tilley is very senior to Mr Zerehannes. Ms Knight is not. If Mr Zerehannes were prepared to behave towards Mr Tilley like he did, then it is entirely plausible he would behave in the way Ms Knight said.

### ***Grievance of 12 December 2018***

259. On 12 December 2018, Mr Zerehannes raised yet another grievance in which he alleged as follows:
- “I would like to grieve [sic.] that the way you are handling or dealing with my concerns, complaints with no supporting reason, grievances and appeal grievances is itself an act of victimisation due to my complaints about race discrimination and due to my ongoing tribunal claim. ...”
260. In the grievance he requested an explanation for the payment into his bank account of £1,487.06 from Asda and says that although he was promised an explanation, none was given. He also says:
- “5. I attended a listed grievance appeal meeting at 4.53pm (check what time I have signed in and out on the reception paper) as the meeting was due to start 5.00pm and I was there until 6.10pm and I was told that Mr C Tilley, Bristol Operations manager was not available. I would like to say

this even visiting the site is stressing me worst waiting an hour for a meeting to start is so stressful for me therefore; the appeal meeting did not go ahead.

“Please I request the explanation or details and reasons of the two payments being made to bank account secondly, to receive your response to my application for a transfer to one of ASDA-Coventry Store.”

Ms Hallam sent to Mr Zerehannes an explanation for the payments and a copy of his payslip.

### ***Rearrangement of meeting with Mr Tilley***

261. Eventually, the grievance meeting with Mr Tilley was rearranged for 5 February 2019. Mr Zerehannes was sent notice of that on 28 January 2019 by Ms Z Avern. He said that he would attend the meeting provided Mr N’Kshama was there as his supporter and Mr Tekleab was there to interpret.

### ***Further grievance of 1 February 2019***

262. On 1 February 2019, Mr Zerehannes sent in yet another grievance. He identified ten people who he said had applied for flexible working and he wanted to know what the circumstances or grounds were for each application. He also asked to receive supporting documents relating to each individual’s application, asking for the names of the individuals to be redacted as appropriate. He asked for other details in relation to the individuals concerned. He also asked why he had not been transferred to one of the Asda stores in Coventry.

### ***Commencement of investigation to grievance of December 2018 and meeting on 5 February 2019***

263. On 5 February 2019, Mr Gamble started the investigation into the grievance that Mr Zerehannes had submitted on 12 December 2018 by having a meeting with Mr Zerehannes. The meeting with Mr Gamble had to be adjourned because Mr Teklab, the translator and colleague whom Mr Zerehannes was responsible for arranging to attend was not there. That was adjourned to 26 February 2019.

### ***Rearranged meeting with Mr Tilley***

264. That meeting with Mr Gamble was then followed by the meeting with Mr Tilley.

265. We have read the notes in detail. We note again that Mr Zerehannes disclosed nothing that showed a suggestion that any complaint of discrimination has played a role in what has happened or that he has been discriminated against. It was, again, mere bare assertion. Mr Zerehannes refused to sign those notes, writing as follows:

“I am not signing as I am agree with all notes from 1 to 6 pages.”

266. The Tribunal is puzzled by that statement because if he agrees, why not sign them. He did not give evidence that they were inaccurate in any way. It seems to be yet another thing in which Mr Zerehannes is simply seeking to be awkward.

267. That grievance meeting itself with Mr Tilley had had to be adjourned because of Mr Tekleab had not attended. Mr Zerehannes was responsible for arranging his attendance. Mr Tilley made it clear the next meeting would be the last opportunity. We can see no objection is such a position. Mr Tilley had attended once but Mr Zerehannes refused to wait for him for no good reason. This meeting had not gone ahead because his interpreter had not shown up.

### ***Complaint about Mr Tilley***

268. On 11 February 2019, Mr Zerehannes wrote to Mr Tilley complaining about the manner in which he had handled the meeting. He alleged Mr Tilley was aggressive and rude. He complained that though he organised for his interpreter Mr Teklab to attend it was not his fault he did not. He alleged that if Asda had paid for an interpreter it would not have been an issue. The Tribunal sees this is an attempt to pass the blame. Rather than reflect on why the person he was responsible for securing the attendance of did not show, he sought instead to blame Asda. We think that is unreasonable.

### ***Postponement of grievance meeting of 26 February 2019***

269. The rearranged grievance meeting with Mr Gamble on 26 February 2019 did not go ahead because again there was no interpreter. Mr Gamble recorded and Mr Zerehannes agreed that he would make arrangements for an outside interpreter to be made available.
270. At that meeting, Mr Zerehannes handed in a letter asking for the matter to be postponed because of the need for an interpreter, which also said:
- “I would ask you to give me any questions or clarification questions relating to grievance so I can answer each of them so you can conclude my grievance without the needs of having a grievance meeting.”

### ***Rearrangement of meeting with Mr Tilley***

271. On 1 March 2019, Mr Zerehannes wrote to Mr Tilley saying he was willing to attend a resumed grievance appeal meeting on 14 March 2019 but emphasising that he needed an interpreter. He adamantly rejected any suggestion that the responsibility for the meeting not having gone ahead on the first occasion when he walked out or the second occasion when the interpreter he had arranged (Mr Tekleab) had not turned up was his fault. The failure to attend the first meeting was plainly Mr Zerehannes's fault: he left without good reason. The refusal to accept this is another illustration of his distorted view of events and how he believes everyone is at fault but him.
272. The meeting went ahead on 14 March 2019 and Mr N'Kshama attended as the representative and Mr Kidane acted an interpreter. It is not clear from the notes whether Mr Kidane is the gentleman's first name or second name.
273. Unfortunately, the meeting appeared to have a number of difficulties that developed during the meeting (page 760). The interpreter said:
- “I don't want to be here I'm afraid to be honest I don't want the cross communication – we are at equal level and would rather leave.
- “Mr Zerehannes: due to your English level?

“Mr Kidane Yes I have already stated

“Mr N’Kshama: I have just noticed there is a conflict of interest and the colleague feels uncomfortable. It would be better if we would bring a professional interpreter.

“Mr Tilley: I have looked through [Mr Farooq’s] notes and there was an interpreter [Mr] Tekleab in there. I can’t see a single point that he appears to have said anything during the meeting. Is that just an error on the notes? Did he speak?

“Mr N’Kshama: he did but the meeting was conducted in a different way where [Mr Farooq] had to put things across then [Mr Teklab] and put it over in their mother tongue.

“Mr Tilley: Who would answer?

“Mr N’Kshama: “[Mr Zerehannes] would answer.

“Mr Tilley: I just need to understand what was different.”

“Mr Zerehannes: I heard the meeting notes was checked and you said there is no interpreter on there. Is that why the company have not provided me with a professional interpreter.”

“Mr Tilley: by the quality of your answers I have no doubt that you knew what you were being asked and exactly how to respond to that as the answers show a very good response. Given that [Mr Kidane] wishes to leave we will read and sign the notes to date them and then adjourn.”

274. Mr Tilley then decided to adjourn the meeting until a time when the previous interpreter was available.

275. Mr Tilley made a contemporary note at the time that recorded that although he had driven on a number of occasions and for about 15 hours and had three meetings in an attempt to hear this grievance, he wanted there to be a fair hearing. He said that it was clear from the meeting of Mr Farooq that the person who had interpreted there had done a good job and it had worked well and therefore that is what he sought to arrange. We accept this was his thinking and conclude it shows an attempt to be fair to Mr Zerehannes. It somewhat further undermines his allegations of discrimination and victimisation.

### ***Further grievance of 19 March 2019***

276. On 19 March 2019, Mr Zerehannes submitted another grievance letter to Ms Knight. His complaints were that Mr Tilley had insisted that Mr Kidane was a suitable person to interpret, which meant that the meeting itself could not have gone ahead. This is of course incorrect as the meeting notes themselves disclosed because it was postponed to secure Mr Teklab’s attendance. It also did not reflect it was Mr Kidane who wanted to leave. He also said that Asda, and Mr Tilley in particular, had failed to take reasonable steps to secure a qualified Bilen-English interpreter to assist with interpretation. He provided no supporting reasons why Asda should however take that step. The Tribunal can see no reason why it was the responsibility for Asda to provide Mr Zerehannes with a Bilen-English interpreter.

277. He also set out a number of other complaints saying that Mr Tilley's conduct was unreasonable, mainly focussing on the failure to provide a professional interpreter. He alleged that Mr Tilley's handling of the appeal grievance was itself an act of "race discrimination and victimisation by way of race discrimination" due to his complaints about race discrimination.
278. Again, nowhere in the letter does Mr Zerehannes even hint at anything that shows that his race or previous complaints played any part in the way that Mr Tilley conducted matters.

### **Delays**

279. There had been delays dealing with Mr Zerehannes's various grievances. This is no surprise. Mr Zerehannes raised grievances freely and liberally often without awaiting progress of earlier grievances. The Tribunal has had difficulty tracking them all so can appreciate why Asda may have had the same challenges.
280. On 4 April 2019, Mr Zerehannes chased Ms Knight for updates:
- 280.1. to the response his letter to Ms Aaverns on 30 January 2019;
  - 280.2. his formal grievance against Mr C Tilley's handling of his appeal grievance dated 19 March 2019;
  - 280.3. his grievance letter of 12 December 2018; and
  - 280.4. his grievance appeal relating to his letter of 16 November 2018.
281. On Monday 15 April 2019, Ms Knight replied to Mr Zerehannes letter. She wrote as follows:
- "I am writing in relation to your letter dated the 4<sup>th</sup> April 2019 which was submitted via email. My apologies for the delay in responding to this however I have been out of the office.
- "I have noted a number of points which you have outlined within this letter, many of which relate to ongoing processes within the depot.
- "As part of this process and a subject that has caused a number of delays has been the availability of an interpreter to attend the meetings with you.
- "After reviewing this matter, I must inform you that it remains your responsibility to source an interpreter to attend these meetings with you, and any cost associated to this will not be met by the depot and will remain your responsibility.
- "In line with this, can I please ask you to confirm back a suitable time and date for your meetings to go ahead whereby you, your representative and your chosen interpreter can attend the site in order for your outstanding meetings to be carried out.
- "In order for these to be concluded in as timely a manner as possible, can I ask you to confirm the details of this back to me by no later than Monday 29<sup>th</sup> April 2019.
- "Once I have received this detail, I will be in a position to answer your points outlined on your letter in more detail.



“In relation to the points regarding your payslips and your P60, I have attached the requested copies of your payslips to this letter. As the P60’s have not been issued at this time and we do not have the required visibility of this, they can be only be accessed through the online system however I will look into this matter further and advise you of the best course of action to access this...”

282. The reply seems to us to be clear, concise and efficient.
283. During the hearing before the Tribunal, it became apparent that Ms Knight’s delay in dealing with this had been driven by very difficult personal circumstances in her life involving a close family member who was seriously ill at the time and which had placed stress upon her. The Tribunal does not need to go into the details of this for the purposes of the public judgment.
284. However, the Tribunal does note the complete lack of sympathy that Mr Zerehannes displayed in this regard. He did not accept her personal circumstances were a reasonable excuse for the delay, or that he might be placing a heavy burden on people with his multiple complaints. In echoing the words that Mr Tilley used in his own preparatory notes for the grievance, Mr Zerehannes demonstrated to us he had no understanding that other people have lives too; that everyone else is human and that mistakes get made, and that not everyone can perform at their best all the time for all sorts of reasons. We think it is somewhat telling of Mr Zerehannes’ conduct that he was unable, even when confronted with this information, to accept that maybe things were not how he had chosen to believe them, and further shows how unreliable he is as a witness.
285. On 18 April 2019, Mr Zerehannes wrote in response to Ms Knight a lengthy letter which in essence suggested that it was not his responsibility to find someone to interpret for him and that he felt that it should be the responsibility of Asda. He also requested written questions relating to the following grievances and letters :
- “1. My letter to Zoe Small, letter dated 30/01/2019.
- “2. My formal grievance against Mr C Tilley’s handling of my appeal grievance, dated 19/03/2019.
- “3. My grievance letter of 12<sup>th</sup> December 2018.
- “4. Grievance appeal relating to my letter of 16<sup>th</sup> November 2018.”

***Grievance of 15 May 2019***

286. Mr Zerehannes raised another grievance on 15 May 2019 in which he wrote (so far as relevant):
- “I write to complain as follows:
- “1. The business is failing to deal with my concerns raised within my grievance dated 12/12/2018, my letter dated 30/01/2019 and 01/02/2019, my letter dated 26/02/2019; my appeal letter (on 15/11/2018) and grievance letter dated 19/03/2019; in accordance to the grievance procedure time scale in order to cover up discrimination act and / or hide evidence of race/ disability discrimination;

“2. The business failing to deal with my concerns raised within my grievances and letters above because of my ongoing tribunal claim.

“3. I invite the business to provide me with the requested information in the table below and to provide me with material evidence: copy of each individual’s Application or letter, notes of meeting and decision being made by managers. Each part of documents related to an individual will be referred as “Employee 1” documents; “Employee 2” documents etc...; this within 14 days from 16/05/2019 to avoid further unreasonable treatments....”

He then sets out a table in which the columns are:

“Date of the request & of the decision to allow the Application.

“Circumstances and/or supporting grounds of Application.

“Shift being allowed to do,

“Why Application were granted.

“Name of the manager who dealt with the request.

“Reason why I was not offered any of the same shift.

“Terms & conditions of Employment.

287. It is quite clear at this point that Mr Zerehannes is now receiving some advice behind the scenes. It would also seem to us that Mr Zerehannes is unable himself to identify any actual examples of discrimination. That is apparent from the earlier correspondence in which he makes bare assertions. Furthermore he had in earlier grievances identified people who he felt were treated more favourably. Now he was trying to seek information to enable him to build a case.

***Transfer application query 16 May 2019***

288. On 16 May 2019, Mr Zerehannes wrote to Ms E Knight. He told her that he said that he was suffering from work related stress and anxiety. He explained that he had requested back in September 2018 to be transferred to one of Asda’s Coventry stores. He said he completed the application form for transfer, and it was sent to the IDC on 27 October 2018. He complained that he had not received any offer of employment from the Coventry store. He also complained that Asda has not replied to various items of correspondence.

***Ms Knight replies to Mr Zerehannes letters***

289. On 20 May 2019, Ms Knight replied formally to Mr Zerehannes.
290. Firstly she dealt with the letter received on 12 December 2018. She wrote as follows:
- “Point 6: I have subsequently contacted the Coventry Store who have informed me that due to a consultation programme that retail were undergoing, they were unable to proceed with your application for a transfer following on from a recruitment ban being implemented. They have also advised that they did attempt to make contact with you on two occasions

however their attempts were unsuccessful and they were unable to leave a message.

“Based on this I can find no evidence of an act victimisation due to your complains or race Discrimination and due to your ongoing tribunal claim....”

We note that Mr Zerehannes being uncontactable and there being no option to leave a message was something that others (such as occupational health) had experienced. Mr Zerehannes had called no evidence that suggest this explanation is a sham.

291. She then dealt with the other items of correspondence to which Mr Zerehannes referred as follows:

291.1. there was no reply to his letter of 30 January 2019 because Asda never received it (it is not clear why he did not complain about this until May);

291.2. his letter received on 1 February 2019 saying it had been forwarded to Mr Tilley since it related to his grievance appeal meeting;

291.3. his letter of 26 January 2019 was not responded to because it was not received (again there is no explanation for the delay);

291.4. With regard to his letter of 19 March 2019, she could find no evidence to support Mr Zerehannes' complaints. In particular there was no evidence of discrimination, and pointing out and reminding Mr Zerehannes that if he wanted an interpreter, it was his responsibility to source it;

291.5. Regarding his letter of 18 April 2019, she pointed out that the primary reason for the delays was due to lack of an interpreter, which he was responsible for sourcing

291.6. Finally, she dealt with his letter of 15 May 2019. She said that the information that was sought about the employees had already been dealt with by Asda legal representatives in connection with Mr Zerehannes' Tribunal claim and in correspondence with his representative, Dr Ibabakombo. She referred him therefore to Dr Ibabakombo for an answer.

292. She ended her letter as follows:

“In addition to this and in relation to your points relating to a potential transfer to the Coventry Store, I must advise that all job vacancies within the Asda network are available to view on the Jobs Website, any applications going forwards need to be completed via this online application system.

“ ...

“In conclusion, I can find my evidence to support your allegations of Victimisation or Discrimination on any grounds.

“Should we receive any further grievances relating to any of these matters, they may be deemed as vexatious which may result in a formal investigation against yourself.

“I hope this clarifies the matter for you.”

...”

***Mr Tilley continued the grievance 20 May 2019***

293. On 20 May 2019, Mr Tilley wrote to Mr Zerehannes indicating that he was willing to conclude the grievance in writing and advised that due to the comprehensive detail he had outlined in his grievance appeal, he did not need to ask any further questions. However he provided Mr Zerehannes with a further opportunity to submit any extra information by 31 May 2019.

Mr Zerehannes provided further information by 24 May 2019.

***Mr Zerehannes’s reply to Ms Knight’s letter***

294. On 30 May 2019, Mr Zerehannes responded to Ms Knight’s letter of 20 May:

“1.1 I do not accept your apologise for the delay in responding to my emails/letters because no clear or good reason for the delay was given. ...

“1.2 That complaint about race discrimination are so serious therefore, are to be pick up and fully investigating within the company grievance procedure.

“1.3 The delay is due to: your lack of considering that race discrimination complaints are so serious and should be pick up and full investigated within a reasonable timescale; for instance the business has kept or ignored to deal with my letter dated 20/05/2019 until your letter of 10/05/2019....”

295. The letter continued for a number of pages in which he made tens of different requests for disclosure of various pieces of information. It seems to us that again this is just another example of Mr Zerehannes seeking to be obstructive and frustrating the process in order to try and grind Asda down, and furthermore a fishing expedition to find evidence to support his bare assertions of discrimination and victimisation.

***Ms Knight replies to Mr Zerehannes’ letter***

296. On 10 June 2019, Ms Knight replied:

“I do not feel that it would be appropriate for me to comment any further on the letter which was sent to you and I am satisfied that all outstanding points of concern have been responded to accordingly.”

***Mr Zerehannes chases Mr Tilley for an outcome***

297. On 13 June 2019, Mr Zerehannes replied to Ms Knight, copying in (amongst other people) Mr Tilley:

“Further to Chris Tilly’s letter dated 20<sup>th</sup> May 2019 and to my letter to you on 24/05/2019, I write requesting to be updated as to the progress of my grievances and appeal grievances before [Mr] Tilly and [Mr] Gamble.”

298. It is quite apparent he had Mr Tilley’s contact details: the fact he copied him into the email proves it. There was no justification provided for not emailing him, but instead emailing Ms Knight resulting in more work for Asda. It is another example that Mr Zerehannes is simply seeking to be contrary.

**Outcome to the grievance appeal from Mr Tilley on 16 July 2019**

299. On 16 July 2019, Mr Tilley provided the outcome to the grievance appeal hearing that he had heard. The grievance appeal letter is 15 pages long and it is written in a similar style to other grievance appeal outcome letters, that is to say he sets out Mr Zerehannes' allegations and then sets out his response to it. It is quite clear that Mr Tilley has dealt with every single point that Mr Zerehannes raised in his grievance appeal that Mr Tilley was asked to consider. He had clearly carried out a thorough investigation and full consideration of matters. He came to the conclusion that there was no evidence to support any allegation of discrimination or victimisation. The letter is a detailed and through consideration. We can see no legitimate criticism of his conclusions.

**Events afterwards**

300. On 25 July 2019, Mr Zerehannes wrote to Ms Knight asking for witness statements of everyone who was interviewed as part of the appeal grievance process. He also asked for the notes of all appeal investigation meetings and for the investigation report to be sent to him so that he could submit Mr Tilley's decision to the employment tribunal alleging that that also was an act of race discrimination and victimisation. We can see no evidence that suggests Mr Tilley came to his conclusions because of Mr Zerehannes' race, his wife's asthma or because he had raised complaints of discrimination.
301. On 25 July 2019, Mr Zerehannes submitted a new flexible working, relying on his wife's asthma. The outcome that he sought was exactly the one that he had put in in the first place.
302. On 30 July 2019, Mr Zerehannes wrote to Ms T Francis, who is the Late Shift Manager, care of Ms Knight in response to Ms Francis' letter of 29 July 2019. The Tribunal does not have a copy of that letter of 29 July 2019; however, it appears that there were some difficulties in communication between Ms Francis and Mr Zerehannes.
303. A return-to-work meeting was arranged for 5 August 2019. This was because Mr Zerehannes' career break had come to an end.
304. The documents at this point become rather sparse but it is apparent from Mr Zerehannes' letter of 4 September 2019 that Mr Zerehannes' new flexible working request had been refused. Mr Zerehannes again alleged that the refusal was itself an act of victimisation due his tribunal claim and previous grievances about discrimination. We have no evidence to suggest that was the case.
305. An appeal hearing was fixed for 19 September 2019. The letter dated 7 November 2019 from Mr Morris, Operations Manager, reads as follows (page 834):

"Reference: Flexible Working Meeting 19<sup>th</sup> September 2019

"I apologise for any inconvenience the delayed response has caused you.

"Within our meeting of 19<sup>th</sup> September 2019, I accepted an option presented by you as one of two working patterns presented. The request

was to work every Monday on the Late Shift, on a shift pattern of 1500hrs-2300hrs.

“There are two main points that I took away to review following our discussions:

“i) Clarification as to why a 1700hrs start time had been made available to other colleagues. This point was presented on the basis that I had not accepted the second option that you presented in working 1700hrs to 2300hrs on a Sunday. I did not accept this on the basis that we have three set shift patterns ... Your representative presented confirmation of two comparative colleagues that have been given working patterns that deviate from this schedule. I have reviewed these comparators and extended my review behind this point. I can confirm that no colleague has been offered a permanent shift start of 1700hrs.

“ii) You requested feedback on why the business could accommodate you on Sunday previously but not on a Monday and how that has transitioned to being the reverse now. I would advise, as a business, we continue to look at matching capability with volume constraints. Flexibility can be achieved through revision of recruitment, which planned to commence at the time we met on 19<sup>th</sup> September 2019. I would note that the availability of Sunday working may have been considered at the time of our meeting had you been in a position, which I appreciate you are not, to have committed to a set shift schedule....”

306. On 14 October 2019, Mr Zerehannes was invited to attend an investigatory hearing into an allegation that he had worked outside of Asda during his career break without Asda’s written permission contrary to terms and conditions of the career break.

307. On 19 October 2019, Mr Zerehannes confirmed that he was and still is self-employed in order to earn money to support himself, his family and his disabled wife. He requested various copies of numerous documents and how Asda became aware he was self-employed and requested that Asda deal with various other concerns.

Curiously, the letter ends with the following paragraph (page 833):

“You may be aware or not that I have raised various grievances and appeal grievances about race discrimination which are subjected to my ongoing Employment Tribunal claims against ASDA and even if my claims are rejected by the tribunal, I will give consent to my Representative to refer my Claims including grievances, appeal grievances, grievance outcomes etc. in his Book titled *“Black phobia at workplace and lack of remedy and recommendation”*.

This is Dr Ibabakombo’s book. In his skeleton argument to the Tribunal he says this case and our decision may be referred to in that book. We put that to one side. However, it implies that in the latter stages at least, Mr Zerehannes had the benefit of Dr Ibabakombo advice and support. We do not know if he had the benefit of that in the earlier stages.

**Ability to bring a claim**

308. The Tribunal notes that as of 24 October 2017 at the latest Mr Zerehannes was aware of the **Equality Act 2010** and (at least some) rights under it. Mr Zerehannes was also a member of a trade union in the early days at least up to the presentation of this grievance. He has not given us any explanation of why he was not able to present claims earlier, when he became aware that he might have a claim, what he did to investigate the possible claims or when. He has not alleged he was dissuaded from bringing a claim by anyone or that he was misled as to his rights. He has not alleged he was unable to take reasonable steps to find out more about the types of claims available (e.g. from the **Equality and Human Rights Commission's** website or from his union) or how to present a claim to the Tribunal.

**Law****Direct discrimination**

309. The **Equality Act 2010 section 39** prohibits an employer from discriminating against or harassing an employee. Discrimination could include dismissal.
310. The **Equality Act 2010 section 13** provides as follows (so far as relevant):  
“(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.  
“...”
311. “Disability” is to be interpreted to mean the particular disability complained of: **Equality Act 2010 section 6(3)**.
312. Likewise “race” means the particular race complained of: **Equality Act 2010 section 9(2)**.
313. Whether treatment is less favourable is to be assessed objectively: **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT**.
314. The section contemplates a comparator. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL** Lord Scott explained that this means that:  
“the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class.”  
Where there is no real comparator, the Tribunal must consider how a hypothetical comparator should be treated (**Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646 CA**) unless the reason for the treatment is plain: **Stockton on Tees Borough Council v Aylott [2010] ICR 1278 CA**.
315. The protected characteristic need not be only reason. Provided it has a “significant influence on the outcome, discrimination is made out’.

see **Nagarajan v London Regional Transport [1999] ICR 877 UKHL**. The Equality and Human Rights Employment Code (the Code) [3.11] says

“the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause”

316. When analysing whether the difference in treatment is because of race or disability the Tribunal is entitled to take into account if the reason is inherently discriminatory (by asking “What were the facts that the discriminator considered to be determinative when making the relevant decision?”) or, where the reason is not immediately apparent, to look at why it happened analysing the conscious or sub-conscious mental processes of the discriminator: **R(E) v Governing Body of JFS aors [2010] 2 AC 728 UKSC**.
317. Motive is irrelevant: The code [3.14] and **JFS**.
318. We have taken into account the guidance that discriminators tend not to advertise the fact (**Glasgow City Council v Zafar [1998] IRLR 36 UKHL**), people may be unwilling to admit to themselves they are discriminatory (**Nagarajan**) and that discrimination can be based on innocent or well-intentioned motives even (**King v Great Britain-China Centre [1991] IRLR 513 CA**; **Amnesty International v Ahmed [2009] ICR 1450 EAT**).

### ***Victimisation***

319. The **Equality Act 2010 section 27** provides:
- “27 Victimisation
- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
- “(a) B does a protected act, or
- “(b) A believes that B has done, or may do, a protected act.
- “(2) Each of the following is a protected act—
- “(a) bringing proceedings under this Act;
- “(b) giving evidence or information in connection with proceedings under this Act;
- “(c) doing any other thing for the purposes of or in connection with this Act;
- “(d) making an allegation (whether or not express) that A or another person has contravened this Act.
- “(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
- “(4) This section applies only where the person subjected to a detriment is an individual.
- “(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.”
320. The focus is on “why” A acted as they did: **St Helens BC v Derbyshire aors [2007] IRLR 540 UKHL**.



321. Like other areas of discrimination, motive is irrelevant to liability and it need only be one of the reasons: **Nagarajan**.
322. The test for causation requires only that the protected acts have a “significant influence” on the employer’s decision making: Nagarajan. This means “an influence that is more than trivial.”: **Igen Ltd aors v Wong aors [2005] IRLR 258 CA**.
323. As for detriments, we understand “detriment” to be something that the claimant reasonably believes they have been subjected to a disadvantage: **West Yorkshire police v Khan 2001 ICR 1065 UKHL**; **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL**; **Derbyshire aors v St Helens MBC 2007 ICR 841 UKHL**; **Barclays Bank plc v Kapur [1995] IRLR 87 CA**; **Employment code [9.8]-[9.9]**

***Burden of proof: Equality Act 2010***

324. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained In **Igen; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA**; **[2021] 1 WLR 3863 UKSC**; **Hewage v Grampian Health Board [2012] ICR 1054 UKSC** and **Madarassy v Nomura International plc [2007] ICR 867 CA**.
325. Mr Zerehannes in his opening skeleton argument referred us to **Efobi** as decided by the Employment Appeal Tribunal. However he did not refer us to the subsequent Court of Appeal decision (which had been decided before the case began) that reversed the Appeal Tribunal’s decision. Neither party referred us to the decision in **Efobi** in the Supreme Court because the written submissions were prepared before the Supreme Court handed down its judgment in the case. We did consider whether to invite further submissions in light of the Supreme Court’s decision. We decided not to do so. We were conscious that further delay would be undesirable but, moreover, the Supreme Court’s decision on our reading confirmed that the law remained as set out in **Igen, Hewage, Madarassy** and **Efobi**. It did not in our view change or challenge the understanding of the burden of proof or what was required to shift the burden to the respondent. It merely confirmed the common understanding. Besides Mr Zerehannes had clearly addressed his closing submissions to the correct understanding of the burden of proof in **Equality Act** cases as confirmed in **Efobi UKSC**, as had Asda. To ask for submissions would not have assisted in light of the clear guidance from the Supreme Court which Mr Zerehannes had clearly understood and focused on. It would have resulted only in a further delay.
326. Drawing on the cases therefore our understanding is as follows:
- 326.1. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage but it can take into account the respondent’s evidence is assessing if the claimant has discharged the burden of proof. At this stage it is irrelevant that the respondent has not adduced an explanation.

- 326.2. It is not enough for a claimant to prove bare facts of a difference in status and a difference in treatment. They only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that the respondent had committed an unlawful act of discrimination or harassment: **Madarassy at [56]; Efobi UKSC at [46]**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.
- 326.3. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.
- 326.4. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.
327. In **Efobi UKSC** and **Hewage** the Court said it is important not to make too much of the role of the burden of proof provisions. As Lord Hope said in **Hewage** at [32] (endorsed in **Efobi UKSC**):
- "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

***Time limits for claims under the Equality Act 2010 and continuing acts***

328. The **Equality Act 2010 section 123** require a claim to be presented within 3 months of the detriment/less favourable treatment, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. To decide if there was a continuing act, the Tribunal must look at the substance and ongoing state of affairs to determine if the claimant was treated less favourably over that period: **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 CA**.
329. When deciding whether to extend time the factors in the **Limitation Act 1980 section 33** can be a useful aide but are not prescriptive: **Southwark London Borough Council v Afolabi 2003 ICR 800 CA**. They are not a framework for thinking. Their relevance depends on the facts of the particular case. The best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay": **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. We remind ourselves that there is a public interest in enforcing time limits and that the claimant must persuade us to extend time, if a claim is otherwise out of time.

330. Ultimately the Tribunal has a broad discretion when weighing up all the circumstances, but length of delay and reasons for it are always relevant, as is the prejudice to the respondent if a claim that is out of time is allowed to proceed: **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA.**

### ***Unauthorised deductions from wages***

331. The **Employment Rights Act 1996 Part II** regulates the right of an employer to deduct from an employee's wages. In summary an employer cannot make a deduction from wages that are properly payable. Sick pay is something that can fall within the meaning of wages.
332. However properly payable means there must have arisen a legal entitlement to the money: **New Century Cleaning Co v Church [2000] IRLR 27 CA.**
333. Once an employer tells an employee that they are going to receive a discretionary payment e.g. sick pay on terms, the employer is under a **legal obligation** to pay that bonus in accordance with those terms, at least until the terms are altered and notice of the alteration is given — **Farrell Matthews and Weir v Hansen [2005] ICR 509 EAT.** Such sums therefore fall within the act. However if a payment is discretionary, then it is not properly payable until the employer has decided to exercise its discretion to pay that sum to the worker. In particular the act does not empower the Tribunal to direct the employer how it should exercise a discretion nor to award damages for the unreasonable exercise of a discretion.
334. A Tribunal is entitled to interpret a contract of employment to determine what sums are properly and lawfully due from the employer to the employee: **Agarwal v Cardiff University [2019] ICR 433 CA.**
335. The approach to interpretation of an employment contract is the same as that used in the civil courts: **CF & C Greg May Ltd v Dring [1990] ICR 188 EAT** which is to look at the meaning of the terms to the reasonable person appraised of all the facts in the case.

### ***Deposits***

336. **Rule 39(5)** provides:
- “(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
- “(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
- “(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
- “otherwise the deposit shall be refunded.”

### ***Evidence***

337. We have reminded ourselves of 2 other points:

337.1. The fact that a party does not succeed on one allegation does not automatically mean that the other allegations are less likely to be correct. We should look at all the facts: **Qureshi v Victoria University of Manchester and anor 2001 ICR 863, EAT**

338. We must decide on the evidence and not make assumptions or use verbal short hands like “institutional racism” without evidence of the same. There is a need for evidence that shows that the claimant themselves was the victim of a prohibited act under the **Equality Act 2010**.

## Conclusions

### ***Unauthorised deductions from wages***

*Was Mr Zerehannes paid less in non-statutory sick pay than he was entitled to be paid, in the period 18 October 2017 – 28 February 2018?*

339. No. The reason for this conclusion is that it is our opinion that the payment of CSP is entirely at Asda’s discretion and that they had not exercised their discretion to make a payment of CSP to him for this period.

340. The reason we conclude that the entitlement is based on a discretion is as follows.

340.1. The use of the word

“may”

in

“Subject to [proper notification] you **may** be eligible for the following occupational sick pay at basic rate plus shift allowance if applicable.”

in our opinion can only objectively be interpreted as indicating a possibility, a power, an option and not a right. Were it the parties’ intention to make CSP a right, then the contract would have used the word “will”, “shall” or similar to include the consequence of proper notification is automatic entitlement under the contract. The structure of the clause in our view means that the only reasonable interpretation is that the power or possibility of payment of sick pay arises only on the employee complying with the notification requirements.

340.2. In addition the words

“The procedure for notification of absence is detailed in the Asda Logistics Services Absence & Sickness Policy, which is available from the People Team, and does not form part of your contract of employment. ...”

also point towards a discretion and not a right. The words

“and does not form part of your contract of employment”

can refer only to the policy as a whole and not the procedure. That would explain the use of the word “may” earlier, and its clear emphasis on the notification of illness being merely the first step to Asda being able to exercise a power to pay CSP. As the lay

members observed, it would also be more sensible and fitting with general employment practice if the whole policy were non-contractual rather than just the notification requirement.

341. The issue for us to resolve is in our view a simple one: had Asda exercised its discretion to pay Mr Zerehannes CSP for the period 18 October 2017 – 28 February 2018? It is clear that the answer is no. Mr S Wells concluded that Mr Zerehannes was not entitled to CSP because he was not attending work to deal with appeal hearings that addressed the issue that said he could not attend work in the first place. He also missed a number of occupational health appointments and failed to attend the IDC when he should have. For those reasons they declined to exercise their discretion to pay CSP. We note that all these factors are potentially reasons for withholding CSP (see paragraph 49 above)
342. Whether that failure is itself a breach of contract is something we have no jurisdiction to consider. What is clear is that the CPS for that period was not “wages properly payable” within the meaning of the **Employment Rights Act 1996 Part II**. This claim is therefore dismissed.

### ***Discrimination and victimisation – overview***

The Tribunal has considered all of the evidence. Even though we recognise that discrimination is often not overt, and that the failure to succeed one allegation does not mean that the other allegations are less likely, we were struck by how there is not one single thing that Mr Zerehannes drew our attention to that even begins to evidence that what happened to him was because of his race, his wife’s asthma or because he had previously made complaints of discrimination. His case before us was similar in content to his numerous grievances. In essence he has done nothing more than label various events (seemingly randomly) as either discrimination and/or victimisation. At no point has he been able to explain why he has so categorised those events in that way. It is a stream of bare assertions unsubstantiated by anything like evidence. He has often used the labels simply because either he did not get his own way or he did not like the outcome or both. He has used the labels indiscriminately and liberally without any evidence to back them up. It seems that Mr Zerehannes simply uses the labels of discrimination and victimisation freely to try to get his own way. This is demonstrated by his petulant conduct which often seems purely intended to frustrate others.

343. His own explanation to the Tribunal that he felt it was discrimination or victimisation (that that is what he felt) shows the paucity of evidence that even he has now to support his allegations.
344. He appears to have proceeded on the assumption that provided he used the label “discrimination because of race or disability” or “victimisation” that was enough to make it the respondents’ responsibility to prove otherwise. He may well believe this is the law. However he is wrong.
345. The Tribunal believes that this case can be summed up by quoting the words of Mr Tilley in paragraph 250 above:

**“[Mr Zerehannes] seems reluctant to accept that people make genuine mistakes ... There seems to be no acknowledgment of the fact that we are all human and make mistakes....”**

***Direct discrimination because of the claimant's race***

346. The Tribunal has considered each allegation individually and looked at the whole of the evidence put before us. However our conclusion in relation to each allegation of direct discrimination because of his race is the same.
347. In relation to each allegation of direct discrimination because of race set out in paragraph 24 above, we have concluded there is insufficient evidence from which we could properly conclude that Mr Zerehannes was treated as he was because of his race.
348. We note that Dr Ibabakombo suggested in closing that there was evidence of institutional racism because no managers at the IDC are African. WE heard no evidence about the managerial make-up. We note that Africa is a diverse continent and are not sure that it can simply be fairly categorised as “African”. We note also that Mr Zerehannes defined his race “Eritrean-Bilen” nationality and/or “dark skin colour”. Therefore the existence of African nationalities at managerial level is not relevant since Mr Zerehannes does not identify his race that way. As Employment Judge Camp pointed out, Mr Zerehannes is suggesting that it is Eritrean-Bilen nationality that is the issue, not his African race: he is saying that if he were, say, Sudanese, Congolese or South African then he would have been treated more favourably. There is nothing to suggest that his Eritrean-Bilen nationality has had any effect on any respondent in their acts or omissions towards him. Not only is there no evidence of it, it seems inherently implausible that the respondents would have some conscious or sub-conscious animus towards Eritrean-Bilen that they did not have to, say, Sudanese or Ethiopian. We conclude that there is no evidence of institutional racism like he seeks to allege, and even if there were, there is no evidence that Mr Zerehannes was the victim of it.
349. As for “dark skin colour” we noted there was a diversity of ethnicities at the IDC. These included someone else of Bilen ethnicity because that person acted as an interpreter. There were also other diverse races who were not all white. It is implausible the respondents would have therefore an issue with “dark skin colour”. Besides Mr Zerehannes has adduced no evidence from which we could properly conclude that it played any part whatsoever in what happened in this case.
350. Besides, even if he had shifted the burden of proof, the respondents have satisfied us their conduct was not because of Mr Zerehannes's race.
351. The claims of direct race discrimination that are in time fail and are dismissed. We address those out of time below.

***Direct discrimination because of the claimant's wife's asthma (disability)***

352. The Tribunal has not seen or heard any evidence that suggests that the fact his wife was disabled because of asthma played any part in the respondents' acts or omissions. It is simply a fact on the side of the case that played no direct part (even on the claimant's evidence) to the facts of

this case. There is simply no evidence from which we could properly conclude that it did. Mr Zerehannes's cases implies that asthma itself is an issue and that the respondent's view may be different if, for example, the disability were something other than asthma. There is no evidence that asthma itself triggers any animus. Asthma is a commonly known disease in the UK and it is difficult to see why anyone would have a prejudice towards the fact a third party had it. It is highly implausible that his wife's asthma in some way affected the respondents' behaviour or decisions towards him. We cannot see why knowing an employee's spouse has asthma could even influence what happened and Mr Zerehannes has not provided any evidence that it did, yet alone some credible basis for believing that it might.

353. Besides, even if he had shifted the burden of proof, the respondents have satisfied us their conduct was not because of Mr Zerehannes's wife's asthma.
354. The claims of direct discrimination because of his wife's asthma that are in time fail and are dismissed.

### ***Victimisation***

355. Having considered the documents we are satisfied that the acts identified at paragraph 28 above are protected acts. They complain of discrimination or victimisation and so fall within the statutory definition.
356. We dismiss the claims for victimisation, however. Even if we accept that he suffered the detriments as alleged, there is absolutely no evidence that links what the respondents did or did not do was in any way to the fact he raised complaints of discrimination and victimisation. This is quite apparent from our findings of fact. It is no more than repeated self-assertion. Nothing he has adduced shows circumstances that might even suggest victimisation, yet alone the level of co-ordination that his case implies took place between all the various actors. There is nothing that would suggest that, as individuals acting under their autonomy without reference to others, they have consciously or subconsciously reacted to the fact he made protected acts (assuming they knew of them which is not clear itself) by subjecting him to detriments. We cannot properly conclude on the evidence that the respondents might be guilty of victimisation in relation to the allegations.
357. Besides, even if he had shifted the burden of proof, the respondents have satisfied us their conduct was not because of Mr Zerehannes's complaints of misconduct under the **Equality Act 2010**.
358. The claims of victimisation that are in time fail and are dismissed. We address those out of time below.

### ***Jurisdiction in relation to claims out of time***

359. Because there are no claims in time that succeed, all claims that are possibly out of time cannot be part of a continuing act (because there are no acts). Therefore they are prima facie out of time unless we extend time.
360. As of 24 October 2017 at the latest Mr Zerehannes was aware of the **Equality Act 2010** and rights under it. Therefore there is a strong implication that at least after that date he knew of or should have made a reasonable enquiry into his rights under the act.

361. There is no evidence he has advanced that explains why he did not or could not bring his claim earlier. He had a trade union representative at the beginning, clearly had access to resources about his rights under the Act (in order to be able to reference them in correspondence).
362. He has not persuaded us that he was not able to bring his claims in time. We also note that the claims on the evidence have no merit, the delay is significant and there are no good reasons for the delay. If we extended time the respondents would have to deal with the claims that are out of time for no good reason.
363. Therefore those claims that are out of time are dismissed for lack of jurisdiction because it is not just and equitable to extend time.

### **Deposit**

364. In his order of 29 January 2019, Employment Camp ordered Mr Zerehannes to pay a deposit as a condition of continuing with his claim for direct disability discrimination. His reasons were as follows:
- “2. I make the deposit order because I decided that the claimant’s associative direct disability discrimination claim has at best little reasonable prospects of success. I know that this is the claimant’s only remaining disability discrimination claim and consists of the series of complaints [set out above].
- “3. The problem the disability discrimination complaints have – a problem common to the whole of the claimants claim under the Equality Act 2010, but particularly acute in relation to those complaints – is causation. It appears that there is no proper basis, and will be no proper basis, upon which the Tribunal at the final hearing could decide, even in the absence of any other explanation, that the reason for any mistreatment of the claimant was the claimant’s wife’s disability”
365. The claims failed for substantially same reasons Employment Judge Camp identified. On the evidence adduced, and even without any explanation from the respondents, there is no basis we could properly conclude that he was treated as he alleges because of his wife’s disability. Therefore the deposit is forfeited to the respondents.

---

Employment Judge Adkinson

Date: 1 November 2021

### **Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.