Case No: 1305972/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr M Khan

Respondent: Professional Pizza Company Ltd

Heard: by Cloud Video Platform (Midlands West)

On: 14, 15 and 16 December 2021

Before: Employment Judge Faulkner
Mrs S Bannister
Mr N Forward

Representation: **Claimant** - in person
Respondent - Mr G Edwards (Solicitor)

JUDGMENT

1. The Respondent did not contravene section 39 of the Equality Act 2010 by directly discriminating against the Claimant:

1.1. because of race in reducing his working hours in week commencing 4 May 2020;

1.2. because of race or religion or belief in dismissing him with effect from 12 May 2020;

1.3. because of race or religion or belief in failing to give him a formal opportunity to present his case before deciding to dismiss him; or

1.4. because of race or religion or belief in ignoring the Claimant's complaint presented on 27 May 2020.

2. All of the Claimant's complaints are dismissed accordingly.

REASONS

1. Oral Judgment and Reasons were given to the parties on the final day of this Hearing, 16 December 2021. The Claimant requested written reasons orally at the end of the Hearing and subsequently by email of the same date. He has followed up that request by email on several occasions, expressing some frustration at the delay in the reasons being provided. As indicated on 21 January 2022 in response to the latest of those emails, it was made clear to the parties orally on 16 December 2021 that there would be some delay, until late January 2022, because Employment Judge Faulkner had an extended period of leave. It should be recorded that the Claimant sent further emails on 22 and 24 January 2022, essentially making further submissions about the case. Plainly, it was not appropriate to take them into account in preparing these reasons, though in fact all of the points set out in the email had already been put to us in evidence.

Complaints

2. The Claimant's complaints were of direct race and/or religion and belief discrimination (as defined by section 13 of the Equality Act 2010 ("the Act")).

Issues

3. The issues we were required to determine on the question of liability were agreed on day 1 of this Hearing to be as follows, essentially following the list prepared by Employment Judge Coghlin at a Preliminary Hearing on 26 May 2021, at which he also struck out the Claimant's complaints of breach of contract, sex discrimination, and three complaints of race and/or religion or belief discrimination and also granted an amendment application made by the Claimant. One difference from EJ Coghlin's list is highlighted below.

4. It was plain, and agreed, that the Respondent dismissed the Claimant. Mr Edwards confirmed that the Respondent conceded that the Respondent also subjected the Claimant to the following detriments:

4.1. reducing his working hours in week commencing 4 May 2020;

4.2. failing to give him a formal opportunity to present his case before deciding to dismiss him; and

4.3. ignoring his complaint presented on 27 May 2020.

In EJ Coghlin's list of issues, the complaint at paragraph 4.3 above was described as a complaint "on or around 9 May 2020 regarding Chris Sharpe's behaviour". After we enquired about that complaint at the start of the Hearing, Mr Edwards forwarded an email from the Claimant dated 27 May 2020 and the Respondent's reply of 1 June 2020. Both parties proceeded on the basis that this was the complaint in question; we were not taken to a complaint dated 9 May 2020 by either party.

5. The first issue to be determined was whether the Respondent treated the Claimant less favourably than it treated or would have treated:

5.1. the Claimant's colleagues Cody Reynolds and Nick (surname unknown) in relation to the matter at paragraph 4.1 above;

5.2. a hypothetical white or non-Muslim person in relation to the matters at paragraphs 4.2 and 4.3 above; or

5.3. Chris Sharpe, Employee P, Employee A, Employee N or a driver employed by another employer in Yeovil, in relation to his dismissal.

6. If so, the second and final issue to be determined was whether this was because of race in relation to the matter at paragraph 4.1 above and otherwise because of race or religion or belief.

7. It was agreed there were no time limit issues.

Hearing and evidence

8. We read statements produced by, and heard oral evidence from, four witnesses – the Claimant (he produced two statements), Faraz Wasti (the Respondent's Area Trainer and part of its HR Team), Melissa Jordan (the Respondent's Accounts Manager) and Ryan Cronin (the Manager at the Respondent's store where the Claimant was employed). Two friends of the Claimant also produced statements, but they were at no time employed by the Respondent or party to the relevant events and did not attend to give evidence. On both counts, their evidence could plainly be of no value in deciding the issues outlined above, and their statements were therefore disregarded in reaching our decision. In any event, they only repeated what the Claimant said in his statements.

9. The parties agreed a bundle of 117 pages, and one additional document was handed up on day 1 by agreement – see the last part of paragraph 4 above. Towards the end of day 1, confirming his position on the morning of day 2, the Claimant made an application to admit an email that had been sent to him by ACAS on 27 May 2020. Having heard both parties' submissions, which we decided to take initially without seeing the document in question, we refused that application for the following reasons:

9.1. The starting point in relation to correspondence from ACAS is that it is without prejudice, whether labelled as such or not, and therefore privileged and not liable to be shown to the Tribunal.

9.2. It was accepted, as is plain given the involvement of ACAS, that there was a dispute between the parties at the time it was written.

9.3. Although not entirely clear from what the Claimant told us, it seemed likely that the email was, at least in principle, part of a series of communications aimed at resolving the dispute, or at least setting out the Respondent's position in relation to it.

9.4. The Respondent did not consent to waiving privilege.

9.5. We were told of nothing which indicated that the Respondent had impliedly waived privilege by any action on its part. The Claimant's assertion that it had lied in the email (about the reasons for his dismissal) was plainly no such waiver.

9.6. Based on what the Claimant told us about the email, maintaining privilege on a without prejudice basis was not unambiguously improper. The Claimant said that it implied criminality on his part by spelling out the purported reason for his dismissal, but that was plainly insufficient to amount to unambiguous impropriety. An express assertion of criminality may have given us more pause for thought, but we were not satisfied that even that would have been sufficient to compromise the status of the email.

9.7. In any event, there was no disadvantage to the Claimant in our refusing his application. We had already been told the date of the email, that it was the first time (as was agreed) the Claimant was given a reason for his dismissal in writing, and that it did not include all of the reasons for dismissal the Respondent later set out in its Amended Response in these proceedings. It was not necessary for us to see the email to establish any of that. The Claimant asserted that the email showed Miss Jordan (as the person responsible for his dismissal – see further below) had lied to the Tribunal about having telephoned the Claimant on the date of dismissal to outline the reasons for her decision, because the email does not mention all of the reasons the Respondent set out in its Amended Response. We were satisfied that of itself the email would not show that Miss Jordan had lied. It was for us to take a view as to whether we believed her evidence in that regard, and we did not need to see the email in order to do so.

10. Finally, the Claimant submitted a couple of additional documents by email, after the completion of the evidence and submissions. As Mr Edwards pointed out in email reply, it was too late for us to consider them at this stage. No reason was given as to why they could not have been disclosed sooner. In any event, our having briefly considered them, they added nothing of significance to the evidence.

Facts

11. Based on the above material, our findings of fact now follow. Of course, we were not present during any of the crucial discussions on which this case principally turns nor, equally obviously, were we inside the minds of the relevant decision-makers. As always in tribunal litigation therefore, we based our findings of fact on the documentary and oral evidence presented to us, making those findings where there were key disputes between the parties, on the balance of probabilities. Whether witnesses gave us their true recollection of events is of course, and as ever, a matter for their consciences. References to page numbers below are references to the agreed bundle.

12. The Respondent is a franchisee of Domino's Pizza. The Claimant was employed as a delivery driver based at its Studley store from 25 November 2019 until 12 May 2020. He was recruited by the store manager in Redditch. The Respondent had 15 stores and between 350 and 400 employees at the time of the Claimant's dismissal. It is an independent employer, making its own decisions on recruitment and dismissal. There was no evidence suggesting that it relies on or even refers to Domino's UK head office in relation to such matters.

13. The Claimant describes himself as British Pakistani, Brown and Muslim. He further describes himself as a "Scientific Muslim" or "Muslim Scientist", namely someone who essentially accepts the current scientific consensus about origins, and believes that it was Allah who caused the "Big Bang". Mr Edwards confirmed that the Respondent accepted this was a religious belief within the meaning of section 10 of the Act and although EJ Coghlin had indicated in his list of issues his understanding that the Claimant only sought to rely for his remaining allegations of religion or belief discrimination on his Muslim faith generally, Mr Edwards also helpfully conceded that the Respondent was content for the Claimant's case to be put on this specific basis.

14. The Claimant openly expressed his Muslim scientist views whilst at work, in discussion with two white female colleagues, Zoe and Employee N, and told us that Mr Cronin also heard him do so. Although these views are well-received in his mosque, the two female employees said that he was talking nonsense, using crude terminology to make that point, though the Claimant did not raise this with anyone, whether in management or otherwise. He told us he thought it possible Mr Wasti was informed of his views, though he accepted this was speculation on his part. Both Mr Wasti and Mr Cronin said they had no knowledge of the Claimant's beliefs in this regard at all. Particularly as the Claimant did not put to them that they did, and in the absence of any evidence to the contrary, we accepted their evidence on this point.

15. The Respondent does not keep a central record of employees' racial backgrounds, though each new starter has to show an identity document, usually a passport, so that the Respondent can carry out right to work checks. Passports will of course show an employee's place of birth – Lahore, Pakistan in the Claimant's case. The Respondent has no record of employees' religious beliefs at all. Its case is that neither protected characteristic is relevant to employees' work in any way.

16. Mr Cronin was the manager at the Studley store at the relevant times, including at the time of the Claimant's dismissal, and is of White English race. The Assistant Manager was of Asian race. The 24 staff there at the time included other White British staff, some from other European countries and other Black and Minority Ethnic staff as well. Some of these employees were Muslims. Although the Claimant says that only he had his particular views about science, he accepts that the Respondent's workforce was multi-cultural. Mr Wasti is of Asian origin and also a Muslim. His role is to visit stores and oversee staff training. Miss Jordan works at the Respondent's head office in Wolverhampton. We do not know her race or nationality, but it seems evident she is not of Asian ethnicity.

17. The Studley store opened in December 2019 and as part of his role, Mr Wasti went there to assist with the opening. The Claimant confirms that he only saw Mr Wasti on two or three occasions during the whole of his employment. Shortly after the store opened, Mr Wasti was present when a customer placed an order for pizza and a diet Coke. Mr Wasti's evidence is that the Claimant said, "So much for healthy eating", apparently making a joke. Mr Wasti says that the customer was offended by the comment – he says she started to try to explain her choices – and Mr Wasti therefore intervened. He was very specific when describing this event in his oral evidence, saying that he remembers the exact words the Claimant said, and that the Claimant was standing to his left at the

time. He says he then spoke to the Claimant informally to explain the importance of treating customers with respect, it being part of his role to provide coaching. The Claimant says that to the best of his memory this did not take place, describing it as "complete fiction".

18. It was clear to us that Mr Wasti was recalling an actual event, in particular given the detail he referred to. We therefore accepted his account, including of his discussion with the Claimant. He said in his statement, "As the Claimant had not long started, I decided to give him a chance and hoped that my advice would be taken on board".

19. Mr Cronin says in his statement that he had "no significant issues" with the Claimant during his employment. He does record however discussing with the Claimant his interactions with customers, saying in his statement that the Claimant could be "overly friendly and chatty". The Claimant's oral evidence on this point was that he "did not get into customers' faces too much" and that there were never any complaints about him. He also said that he did not recall any conversations with Mr Cronin on this subject. Mr Cronin said that being friendly and chatty is not a bad attribute, but it did disrupt the Claimant's primary role as a driver, in that it would slow down the process of him going into the store and back out again with deliveries; it would also distract the in-store staff. Mr Cronin's evidence was that he reminded the Claimant that his job was to deliver to customers, whilst it was the in-store staff who were responsible for greeting those who came to the store.

20. We preferred Mr Cronin's evidence. Not only was he the clearest, most precise and most straightforward of all of the witnesses before us, his evidence in this respect entirely chimed with that of Mr Wasti referred to above. Further, the Claimant's oral evidence on this point was more to the effect that he could not recall the conversations than that they did not happen.

21. Mr Cronin also recalled speaking with the Claimant "on multiple occasions" about not using the customer area for eating during breaks. The Claimant again said that this was a fabrication. He said that this was only discussed once to the best of his understanding, when he ate in the customer area because it was so cold outside. On balance, for the reasons just given in relation to Mr Cronin's evidence generally, we again prefer his account. "Multiple" might not be quite the right description, but we were satisfied that this took place and was discussed on more than one occasion. Mr Cronin described these events as "minor incidents" which were "taken care of informally" – see his statement at paragraph 6.

22. Chronologically, the Claimant's first complaint of discrimination is that Mr Cronin reduced his hours in week commencing 4 May 2020, unlike his white colleague, Cody Reynolds (no reference was made during the evidence to "Nick"), at a time when the store was extremely busy. The Claimant made the broader point, for the first time in oral evidence, that white workers got more hours than other colleagues generally.

23. It was Mr Cronin who was responsible for allocating hours and it was he who prepared the staff rota, doing so at least a week in advance. He was unable to recall any specific reason why the Claimant's hours went down in this particular week, but said that any changes in hours were based on business needs, and that all employees' hours, including his own, fluctuated from week to week. We

accepted that undisputed account of the general position. As for the Claimant's hours specifically, the Respondent says that he worked on average 42.53 hours per week from January 2020 until his dismissal. We did not check the calculation, but the Claimant's wage slips (pages 95 to 105) suggest that this is about right. Indeed, the Claimant himself repeatedly emphasised how he often worked 50 hours or more, again as his wage slips show.

24. Mr Cronin set out at paragraphs 7 and 8 of his statement, apparently as a possible explanation for why the Claimant was allocated fewer hours in the week in question, his view that the Claimant was not receptive to late changes to his hours, so that when additional hours were available on short notice, they were allocated to other drivers. He was thus careful to say that it was not the hours the Claimant worked that he found inflexible, but the times when he was willing to work them. The Claimant disputed this assertion. Although there was little for us to go on, other than the witnesses' different accounts, on balance we preferred Mr Cronin's evidence. We reached this conclusion based on his general credibility as a witness already referred to, the fluctuating hours of the store generally (which supports the notion that last minute requests would sometimes be required), his willingness to recognise that the Claimant – like many colleagues – worked long hours on occasion, and the specificity of his evidence that it was not the hours, but when the Claimant preferred to work them, that sometimes led to others getting more work.

25. More broadly, the Claimant's payslips show that he worked 38.29 hours in week ending 24 April 2020, 41.87 hours in week ending 1 May 2020, 33.53 hours in week ending 8 May 2020 and 29.78 hours in week ending 15 May 2020 (when he was dismissed and therefore did not work a full week). His earlier payslips also show quite significant fluctuations in hours worked from January 2020 onwards. The Claimant speculated in oral evidence that he received fewer hours in week commencing 4 May 2020 because of what had been said by his colleague Chris Sharpe about the Claimant's conduct, which we will come to below.

26. For reasons unexplained to us, no rota or record of time worked for the week in question was included in the bundle, although the Claimant says that the document at page 80, for week commencing 18 May 2020 (and therefore immediately after his dismissal) was typical. Looking at that document, Mr Cronin accepted that the Asian/Muslim drivers were allocated fewer hours in that week than their colleagues, but asserted that it is completely untrue that the Claimant's hours were reduced because of his race and said that some drivers have other jobs elsewhere. He told us race was irrelevant to the allocation of hours and pointed to the substantial number of hours the Claimant had worked previously. The Claimant did not complain about the change in his hours until after his dismissal, and no complaints were made by other employees about the allocation of hours at all. Mr Cronin told us that, in contrast, the Claimant did complain when the times he was expected to work were changed, evidence which the Claimant did not challenge and which we therefore accepted.

27. On or around 5 May 2020, the Claimant spoke with Chris Sharpe, who was a colleague and fellow driver, initially orally and then via Facebook messages (see pages 79, 82 and 84). Both appear to have disclosed incidents in their former employment, the Claimant telling Mr Sharpe that his former employer had dismissed him because whilst cleaning a changing room he had asked a 12-year-

old girl if she had been a good girl that day, which had led to a complaint from her father. Page 79 is a "to whom it may concern" letter from the Claimant's former employer – though it is not a complete copy – referencing the incident. Pages 82 and 84 show the Claimant disclosing to Mr Sharpe part of his former employer's ET3 response to a tribunal claim and saying, "You can bully and harass sum1 but u can't ask a customer how they r!!!!". Mr Sharpe replied, "What a joke mate". The Claimant says he suggested Mr Sharpe attend his hearing to get a flavour of it, and that any suggestion he mentioned a jury during these exchanges is fabricated. Whilst the content of this conversation is not essential to our decision, in the absence of evidence from Mr Sharpe we were prepared to accept that it took place broadly as the Claimant described, though for reasons we will come to below, we concluded that it is more likely than not that the Claimant made reference to a jury and a court.

28. Mr Sharpe evidently then had a conversation about these exchanges with Zoe, who was another driver. We can make no findings about that conversation as such, as neither Mr Sharpe nor Zoe were witnesses in this hearing.

29. Mr Wasti then had a conversation with Zoe. He was again very specific in his oral evidence about this occasion, saying that he had just walked into the store, Zoe was standing by the office and took him to one side. She informed him that Mr Sharpe had told her that the Claimant had asked him to go to court with him as a witness. Zoe told Mr Wasti that the case was to do with child sex abuse, and that she felt uncomfortable about this as there were young female workers at the store. Mr Wasti told her he was unaware of the matter, but would speak to the Claimant. The Claimant did not contest this account, given of course that he was not present to witness it.

30. On the Claimant returning from a delivery, Mr Wasti asked him to go into the office. He does not recall telling the Claimant it was a formal conversation of any description, though the Claimant accepted that having a conversation was the right thing to do in light of what Zoe had told Mr Wasti, regardless of a person's race or religion or belief. The conversation lasted only a few minutes. It was clearly not a formally constituted meeting.

31. Mr Wasti asked the Claimant if he had requested that Mr Sharpe go to court with him for his upcoming trial and that in response the Claimant told him that Mr Sharpe was already going to the same court on the same day and so might as well appear in front of the Claimant's jury. Mr Wasti was clear that he recalls the Claimant referring to the words, "court" and "jury". The Claimant described this as "100% fiction". Mr Wasti insisted he had no reason to lie and that he did not misunderstand what was said to him, specifically recalling these words.

32. Mr Wasti asked the Claimant whether he had told Mr Sharpe that the hearing was about child sex abuse – it was Mr Wasti who used the words, "child sex abuse", not the Claimant. According to Mr Wasti, the Claimant replied, "Oh it's a false allegation, I used to work as a cleaner in David Lloyd clubs, I was in a changing room cleaning and bumped into a 12-year-old girl and I asked her how are you and have you been a good girl at school today? The girl started crying and ran to her dad saying I was grabbing her. Her dad was not very happy about it, called me a paedophile, complained to management of David Lloyd and asked them if they had done a DBS [check] on me". Mr Wasti's evidence was that this

was entirely consistent with what Zoe had reported to him had been said to her by Mr Sharpe.

33. The Claimant told us that the quote set out above, taken from Mr Wasti's statement, is an accurate account of what he said to Mr Wasti, with the exception of the references to the girl telling her father the Claimant had grabbed her and the father calling him a paedophile. Mr Wasti's evidence was that he is 100% sure the Claimant used the word "grabbing" and that the Claimant specifically used the word, "paedophile", adding that the Claimant told him that this was the subject matter of the upcoming trial in September.

34. Mr Wasti accepts (paragraph 18 of his statement) that in fact the Claimant was bringing a claim against his former employer in the employment tribunal, and that the Claimant was not charged with, still less convicted of, any criminal offence. His evidence is that the Claimant did not mention this to him at the time however, and that what the Claimant said led him to believe that he was the subject of criminal proceedings, specifically the use of the words, "court" and "jury". The Claimant on the other hand told us that he informed Mr Wasti he was going to the employment tribunal, and reassured him that his former employer had misunderstood the situation. It is agreed that the Respondent did not see the Claimant's exchange of messages with Chris Sharpe referred to above until after the Claimant's dismissal. The Claimant nevertheless told us that he said to Mr Wasti, "If you don't believe me, I will show you the Facebook messages". This is not mentioned in his witness statement or his Claim Form and Mr Wasti denies it was said. We were not inclined to believe the Claimant's evidence on this point. He is not someone who is slow to make any point in his defence and whilst we did not find that he was seeking to mislead us, we concluded that this was not an accurate recollection of what was said on this occasion. If he had made this statement, it is highly likely it would have been included in his witness statement or in one of the other documents he submitted to the Tribunal.

35. The Claimant told us that Mr Wasti was relaxed about the conversation and said he would "bring Chris Sharpe in" for a disciplinary hearing: that too is omitted from the Claimant's statement and Claim Form and he later changed his evidence on this point to Mr Wasti having told him he would "severely talk to" Chris Sharpe, which led the Claimant to believe he would be disciplined. Mr Wasti says he said nothing like it. For the same reasons as given above, on balance we concluded that Mr Wasti did not say anything to this effect, as much as the Claimant may have wished he had. It did not cross Mr Wasti's mind, either then or later, to investigate why Chris Sharpe was also going to Court.

36. Mr Wasti wrote down in his diary what the Claimant told him. He could not explain why the note was not in the bundle. The existence of these notes only arose on day 2 of this Hearing, during Mr Wasti's evidence. Over a slightly extended lunch break Mr Wasti searched his car, enquired of his wife at home, and enquired of a colleague who was at the Respondent's former head office, but could not find them.

37. Mr Wasti's contemporaneous notes may well have helped us resolve the evidential disputes between the parties as to what was said during this crucial discussion. In the absence of those notes, we had to make our findings of fact based on all of the evidence before us. What was clear to us was that Mr Wasti had clearly formed the view by the end of the meeting that the Claimant was

subject to criminal proceedings – not that he was guilty of an offence, but that proceedings were on foot. The Claimant can properly be said to be someone who, though clearly intelligent, is often unmeasured and somewhat careless when speaking and is on occasion prone to hyperbole. The diet coke incident with the customer referred to above is one example, and there were examples before us when he referred to "millions" or a "billion" people not understanding the Respondent's conclusions about his conduct and "millions of people" being interested in the outcome of this tribunal case. Moreover, generally speaking and as already indicated, the details of Mr Wasti's recollections were more consistently reliable than the Claimant's. We therefore concluded that it was likely, on balance, that the Claimant used the words "jury" and "court" during this conversation with Mr Wasti, however inadvisably, and he does not appear to have expressly denied that there was a trial even though he denied any guilt. The use of those words reinforced the concerns Mr Wasti had already formed from what Zoe had told him. We did not deem it necessary to determine whether the words, "grabbing" and "paedophile" were also used.

38. Having spoken with the Claimant as above, Mr Wasti then spoke with Melissa Jordan by telephone. Again, this conversation lasted only a few minutes. Ms Jordan is responsible for HR, payroll and accounts, though she has no HR qualification. She and the Claimant had never met. Mr Wasti told Ms Jordan that the Claimant had said he had "been involved" with a 12-year-old girl in a changing room in his previous employment and had asked her about her day or if she had been good that day, that as a result the Claimant was due in court, and that he had asked a colleague to go with him and appear in front of the jury. Ms Jordan says (paragraph 3 of her statement) that this led her and Mr Wasti to believe the Claimant was referring to a Crown Court matter. Accordingly (paragraph 4 of her statement) she and Mr Wasti decided that, because the Respondent employs under 18s in the store, it would not be desirable to have the Claimant continue in its employment. Neither recalls whether Mr Wasti told Ms Jordan that Chris Sharpe was also going to Court. Contemporaneous notes would have helped us on this point also, but on balance, we conclude he did not, on the basis that Mr Wasti's focus was wholly on the Claimant's position.

39. Ms Jordan told us that she made notes of what Mr Wasti told her, though these too were absent from the bundle. She says that she did not realise they had to be disclosed. She says she would have to go back to those notes to see how she got from what Mr Wasti told her, which she said was consistent with paragraph 15 of Mr Wasti's statement, to the Respondent's statement on page 33 (at paragraph 2.1.2), in a document submitted to the Tribunal responding to the Claimant's further information about his Claim, that the Respondent understood the Claimant to have told Chris Sharpe that he had been "accused of sexual relations with a child". The existence of Ms Jordan's notes also arose on day 2 of this Hearing. Over the lunch break, she enquired of colleagues at the Respondent's former and current head offices and told us they could not be located. Given that the Claim was brought so soon after the Claimant's dismissal, such that it would have been evident that the notes were relevant and needed to be produced, and given the absence of any reference to the notes in her statement, we concluded that Ms Jordan was mistaken in saying that any such notes were taken.

40. No dismissal procedure was followed. As already noted, the Claimant complains that he was not given an opportunity to have his say before he was

dismissed. Neither the Respondent's disciplinary procedure nor the Claimant's contract were in the bundle, but it was agreed the procedure did not have contractual effect. The Respondent says that it did not follow the procedure given the Claimant's short length of service. For this reason, and because in her view Mr Wasti had already carried out an informal investigation, Ms Jordan did not see the need to speak with the Claimant at all. She did speak to Mr Cronin about what the Claimant was like as an employee; he told her what is reflected in his statement, namely that the Claimant could be disruptive and had been told several times about eating in the customer area. Mr Wasti appears to have told her about the diet coke incident.

41. Ms Jordan wrote the letter at page 91 dated 12 May 2020. It was headed "Termination of Employment" and read, "I am writing to confirm that the Company has decided to terminate your employment. //You are entitled to one week's notice, but you will not be required to work your notice and you will be paid in lieu of it; your final date of employment is therefore the date of this letter. //Your final pay and P45 will be sent to you in due course. You will also be paid for any holiday entitlement that you have accrued but not yet taken".

42. Ms Jordan told us that before sending the letter she followed the Respondent's standard practice and called the Claimant. She told us that she was "pretty sure" she told him he was being dismissed for a few reasons, namely his attitude and conduct in the store (arising from her discussions with Mr Cronin and Mr Wasti), his not being the "right fit" for the business (by which she says she meant these various small issues which were disruptive and the information regarding the court appearance), and the conversation he had with Mr Wasti on or around 5 May 2020. The telephone conversation is not mentioned in her statement; when asked about that, she told us that she did not realise it needed to be detailed. The Claimant does not accept that Ms Jordan called him as she asserts, saying that it was in fact the other way round; it appears to be agreed that the Claimant called the Respondent on several occasions around the time he was informed of his dismissal. On balance, given that it was not mentioned in her statement, nor in the dismissal letter, and given as the Claimant says it is highly likely he would have raised the reasons with the Respondent had they been given to him, we concluded that any conversation that took place between the Claimant and Ms Jordan on or around that day – and it seems agreed that there were some such conversations – did not include an explanation of the reasons for dismissal.

43. What we did accept was Ms Jordan's evidence that she would not have dismissed the Claimant had he not had the discussion about his court appearance – as she understood it – with Mr Wasti, though she would have directed that he be further trained given the other issues raised with her by Mr Wasti and Mr Cronin. The Respondent did not put in writing until its Amended Response in July 2021 (page 43) that matters other than what it says Chris Sharpe and the Claimant reported to Mr Wasti on or around 5 May 2020 were grounds for dismissal. Ms Jordan did not mention the other reasons for dismissal in her statement either, as we have said, saying that she was focussed on the issue of what had been reported to Mr Wasti. For her, the words "court" and "jury" were crucial, as these were words used by both by the Claimant and by Zoe.

44. Ms Jordan says that a White, non-Muslim employee would have been dismissed in the same circumstances. She cites the dismissal of "Driver A", a White employee (religion unknown), in 2019. He was caught by the police driving over the alcohol limit whilst on duty and was dismissed by Ms Jordan when convicted. He was suspended beforehand as he could not drive. As he had 2 years' service, this followed a standard dismissal procedure. Ms Jordan considered an in-store role for him but did not want to be seen to endorse his actions.

45. Mr Cronin told us that he was not aware that the Claimant was going to be dismissed. He was told the news on the day it took place, 12 May 2020, and was told that it was to do with the Claimant's upcoming court case and his performance in work. He knew nothing about the court case issue before this point. For the reasons already given, in short, the unvarnished way in which Mr Cronin gave all of his evidence, we accept his account.

46. The Claimant asks in his statement why the Respondent did not inform the police, if he had told colleagues he was due in court as alleged. His case is that someone facing charges of this nature should not have been permitted to work with under 18s until exonerated. Whilst he accepts the Respondent could have concluded the police would already have been involved if the matter was going to trial, his point is that the police would not necessarily have known he was working with people under 18.

47. The Respondent said in its Amended Response that the decision to dismiss was taken by Mr Wasti and Ms Jordan, having initially said to EJ Coghlin at the Case Management Hearing in May 2021 that it was its Managing Director, Nav Bains, who took the decision. A short while after his dismissal, the Claimant went to the store, let himself in and saw Mr Cronin to hand back his uniform. He says Mr Cronin told him he was not being dismissed but that they were "letting [him] go". Mr Cronin was adamant that he said no such thing. He also denied saying that the Claimant could be "got rid of" because he had less than 2 years' service – he was not aware that this was the qualifying period to complain of unfair dismissal – and that he referred to the Respondent having liaised with Domino's UK head office in making the decision. His evidence was that in fact there was no discussion about the Claimant's dismissal at all. None of what the Claimant says took place on this occasion is mentioned in his statement. It was clear to us that Mr Cronin is someone who is very careful about what he says in the workplace, for example saying in a different context that religious discussions are not encouraged. For these reasons, we preferred his evidence to the Claimant's about what took place on this occasion.

48. Ms Jordan told us that it was she who took the decision to dismiss the Claimant, having taken legal advice, and that Mr Wasti did not venture any opinion on what that decision should be. She says he just gave the facts. Mr Wasti's evidence is similar, to the effect that his role in the matter was at an end once he had spoken with Ms Jordan. He says that he was obliged to raise such a serious matter, whether the allegation the Claimant referred to was false or not. In his view, it was for Head Office, in the person of Ms Jordan, to take things from there. We accept on balance that it was Ms Jordan's decision alone, notwithstanding the changing position from the Respondent on this point. Other than his being mentioned at the Case Management Hearing, when it must be recognised very often the details of a party's case are not entirely clear to its

representative, there was no evidence or other indication that Mr Bains was involved in the decision at all.

49. Mr Wasti had no difficulty in allowing the Claimant to complete his shift on the day of their discussion. He initially told us he provided a statement to Ms Jordan before the Claimant's dismissal, but after consideration and being recalled to give further evidence, said that it was a few days after it. Mr Edwards informed us that the statement was produced at his request, in contemplation of the litigation which was then imminent. In the light of that we did not deem it necessary or appropriate to probe this point further, and it was not pursued by the Claimant.

50. The Claimant relied on a number of comparators to assert that his dismissal was discriminatory. Other than Mr Sharpe, who is central to the factual matrix in the case, we think it fairer not to name them: they did not give evidence, and it is not essential to our decision that they be named.

51. Employee P was a new employee who in April 2020 walked out during a shift and, the Claimant says, started to hurt himself in the Respondent's car park. The Claimant says he went to see how P was, and was sworn at and pushed. P is of South-East Asian race and not a Muslim. Despite the Claimant raising the matter, with Mr Cronin, no disciplinary action was taken. The Claimant did not complain to Mr Cronin that this was evidence of race discrimination; he was simply "insinuating unfairness". The Respondent says that P had become overwhelmed with the pace of the work and left his duties to calm down. Ms Jordan says that what happened with P would have been treated as a welfare matter, not a disciplinary case. Mr Cronin told us that he went outside to see P; he was not aware of any self-harming, and saw no reason for disciplinary action. He too saw it as a welfare matter.

52. The second comparator is Mr Sharpe. The Claimant says he should have been disciplined or dismissed for spreading false rumours about him – he refers of course to what transpired on or around 5 May 2020. He is White, and not a Muslim.

53. The Claimant says that two other White colleagues, Employees N and K, argued openly in the store. The Respondent does not accept that they did. No disciplinary action was taken though K was moved to another store; the Respondent says this was to enable her to work nearer home. The fourth comparator was Employee A. The Claimant says he was a poor worker and made an offensive comment about a colleague's mother in March or April 2020 but no action was taken on either count.

54. The Claimant also cites a driver in Yeovil, who worked for another Domino's franchisee, who drove into two women but was not dismissed.

55. As will be clear from our analysis below, we did not think it necessary to resolve the finer detail of the evidential conflicts between the parties in relation to the comparators, for example whether Employee P pushed the Claimant, and in any event, there was limited evidence before us to enable us to do so.

56. After learning of his dismissal, the Claimant commenced ACAS Early Conciliation, and also contacted the Respondent (both the Studley store and head office including Ms Jordan) several times; individual employees were also

contacted. Apparently after receiving for the first time in writing confirmation (via ACAS) that he had been dismissed because the Respondent had been told he was to face a criminal charge/trial, the Claimant lodged a complaint on 27 May 2020 to a general email address – this is the additional document produced during the Hearing – saying "I am currently writing my claim to the Tribunal and I would like to know why Domino's Studley did not dismiss [P] instantly who vigorously self-harmed himself in public whilst in uniform on shift, he was in breach of the mental health act. //On the other hand you terminated me instantly when I can easily prove with undeniably strong evidence that I had no such conversation with your client. //I want a reasonable reply ASAP please". The Claimant did not say in this email that Employee P pushed him or anything of that nature. He says he wrote it in a hurry, being shocked at the reason he was now given for his dismissal.

57. Ms Jordan replied on 1 June 2020, "I write in response to your email of 27 May. The Company cannot disclose confidential information relating to another employee. //Please refrain from further communication with us". Other individuals had also contacted the Respondent on the Claimant's behalf protesting the unfairness of his treatment. Ms Jordan says that for this reason, and also because legal proceedings were imminent, she wanted the matter dealt with via the Respondent's solicitors, though we noted that her email did not say that as such.

58. In stating to us why he believes his race or religious beliefs were part of the reasons for the Respondent's actions, including in dismissing him, the Claimant relied on no action being taken against Employee P and Mr Cronin failing to mention any positives about him in his statement such as his hard work and long hours. On the latter point, Mr Cronin agreed in oral evidence that the Claimant was punctual and reliable in his attendance, but says that in preparing his statement he was asked to comment on the Claimant's conduct. The Claimant also repeatedly referred to the Respondent's changing explanations as to the reasons for his dismissal, specifically that it made no written reference to other conduct or performance issues as a basis for dismissal until its Amended Response in these proceedings, drafted in July 2021.

Law

59. The relevant law to which we had regard can be summarised as follows.

Direct discrimination

60. Section 39 of the Act provides, so far as relevant:

"*(2) An employer (A) must not discriminate against an employee of A's (B)— … (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; //(c) by dismissing B; //(d) by subjecting B to any other detriment*".

61. Section 13 of the Act provides, again 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*". The protected characteristics relied upon in this case are race and religion and belief. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of*

section 13 … there must be no material difference between the circumstances relating to each case".

62. The Tribunal was therefore required to consider whether one of the sub-paragraphs of section 39(2) was satisfied, whether there had been less favourable treatment than one of the actual or hypothetical comparators, and whether this was because of the Claimant's race or religion or belief (it did not have to be both for a complaint to succeed).

63. It was accepted that the Claimant was dismissed and that the three pre-dismissal matters the Claimant complains of were detriments, and so there is no need to say anything further about that.

64. The fundamental question in a direct discrimination complaint is the reason why the Claimant was treated as he was. As Lord Nicholls said in the decision of the House of Lords in **Nagarajan v London Regional Transport [1999] IRLR 572** "this is the crucial question". Race or religion or belief being part of the circumstances or context leading up to the alleged act of discrimination is insufficient. Usually, the act complained of is not in itself discriminatory but is rendered discriminatory by the mental processes (conscious or otherwise) which led the alleged discriminator(s) to act as they did. Establishing a decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator(s) and the surrounding circumstances. In determining why the alleged discriminator(s) acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for the protected characteristic to be a significant influence on the decision, in the sense of being more than trivial (again, **Nagarajan** and **Wong v Igen Ltd [2005] ICR 931**).

65. As for comparators, as the Equality and Human Rights Commission Code of Practice on Employment expressly states, the circumstances of the Claimant and the comparator need not be identical in every way. Rather, what matters is that the circumstances which are relevant to the Claimant's treatment are the same or nearly the same for the Claimant and the comparator – paragraph 3.23.

66. In **Hewage v Grampian Health Board** (see below) it was stressed that the question of whether the situations of the Claimant and his comparators are comparable is one of fact and degree. In **Kalu v Brighton and Sussex University Hospitals NHS Trust and ors EAT 0609/12**, Mr Justice Langstaff suggested that another way of determining what circumstances are relevant in any particular case is to identify the purpose of the comparison, or what proposition the comparison is intended to address. Sometimes a tribunal can go straight to the question of determining the reason for the impugned conduct, but if it does identify a comparator, it is permissible to determine which circumstances are relevant by reasoning backwards from the reason for the treatment accorded to the complainant.

Burden of proof

67. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

68. Direct evidence, certainly of direct discrimination, is rare and tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Igen,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

69. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all and, in a direct discrimination case, evidence related to comparators. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts.

70. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

71. In a direct discrimination context, it is important for the Tribunal to bear in mind that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant, and may emerge for example from the context considered by the Tribunal in making its findings of fact.

72. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race or religion or belief as the case may be. That would require that the explanation is adequate to discharge the burden of

proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

73. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Other case law

74. We also considered the two cases the Claimant wished to draw to our attention. The first was **Base Childrenswear v Otshudi [2020] IRLR 118**. The main point of the case seems to have been that a manager/employer repeatedly lying about the true reason for dismissing an employee was evidently the sort of conduct which indicated a well-founded allegation of discrimination. When the case was in the Employment Appeal Tribunal (**UKEAT/0267/18**), there was also an issue about an uplift in compensation for failure to comply with the ACAS Code on Disciplinary and Grievance Procedures, which seemed to be the point the Claimant wanted to draw to our attention. That judgment said nothing new in our view about the fact that the uplift can apply in discrimination cases, but we did not read it as saying that employers must follow the Code in dismissing employees with less than 2 years' service. Even if it did, the question for us was whether in failing to do so, the Respondent discriminated against the Claimant because of race or religion and belief.

75. The second case highlighted by the Claimant was **Graham v London Borough of Barnet EAT/221/99** which noted that there can be same-race discrimination (that is, for example, discrimination by an employee of the same race as a claimant), but also made clear that the fact that an alleged discriminator is of the same race as a claimant is a factor that can be taken into account by a tribunal in its overall assessment, as long as it does not make the mistake of thinking that this of itself must mean no discrimination had taken place.

Analysis

76. As tribunals must always do, the focus of our deliberations was to deal with the main points and arguments put to us during the course of the evidence and submissions, not to consider every point of detail. The basic questions we were required to consider were twofold, detriment and dismissal having been accepted in relation to each complaint. The first question was whether the Respondent treated the Claimant less favourably than it treated or would have treated his comparator, having regard to the requirements of section 23 of the Act referred to above. The second was whether, if less favourable treatment was made out, it was because of race or religion or belief.

77. We reminded ourselves throughout our analysis that a difference in protected characteristic and treatment is not sufficient to establish direct discrimination – as the case law says, there must be something more. We equally kept in mind that direct evidence of discrimination is rare and that accordingly our task was to

decide what inferences of secondary fact we could rationally and properly draw from the primary facts as outlined above. The burden was on the Claimant to prove that there were facts from which we could conclude, in the absence of an adequate explanation, that the Respondent had discriminated against him. If he satisfied that burden of proof, it was then for the Respondent to prove that the treatment was in no sense whatsoever because of the protected characteristic. As noted in our summary of the law however, if the reason for any of the relevant treatment was clear, it was permissible to go straight to analysing that question, without going through detailed consideration of the burden of proof.

78. With those core principles in mind, the following paragraphs set out how we dealt with each complaint in turn.

Reduction in hours

79. We were not inclined to attach any weight to the Claimant's assertion that White employees were preferred generally in the allocation of hours at the Studley store. Whilst Mr Cronin was very open about the record for week commencing 18 May 2020 seeming to give Asian Muslims fewer hours than their colleagues, that was nowhere near sufficient evidence to support the Claimant's case in this regard, and it was in any event a late assertion. We also noted that neither he nor any Asian colleague complained about the allocation of work at any time. It was in our view highly inadvisable to draw from one timesheet the conclusion suggested by the Claimant. Indeed, it seemed to us inadvisable to draw any conclusion at all on the basis of that one document, though it might have been helpful if the Respondent had produced others by way of comparison.

80. As to the week in question, that beginning 4 May 2020, less favourable treatment was established in that the Claimant worked fewer hours in that week than Cody Reynolds who is White. The crucial question therefore, as often, was the reason why. The simple fact of the difference in hours and race was not enough to draw an inference of discrimination as the case law makes clear.

81. In reaching our conclusions on this matter, we took into account the following relevant matters from our findings of fact:

81.1. The Claimant's hours seem to have fluctuated regularly and over the whole of his employment, or at least from January 2020.

81.2. This was in the nature of the Respondent's business – there was no challenge to Mr Cronin's evidence on that point.

81.3. The Claimant did not complain at the time the hours were reduced, whether of race discrimination or otherwise, and it is plain to us that he is an individual who would have been able to complain had he thought there were grounds to do so.

81.4. The Claimant was less flexible than Mr Cronin would ideally have liked, in terms of when he would work; that may be a partial explanation, as Mr Cronin suggested, for the Claimant's allocation in that particular week, though Mr Cronin was frank in accepting that he could not be certain as to the reasons.

81.5. The Claimant was positively allocated long hours in other weeks, as he was himself keen to emphasise, by the same manager, namely Mr Cronin. That was an important factor in our analysis.

81.6. The Claimant's case seemed to change during the course of the Hearing, from an allegation that Mr Cronin's decision was an act of direct race discrimination, to saying that Mr Cronin made this decision because he had found out about the supposed court case. There were two things to note about that. First, that is a reason which was not the Claimant's race – the Claimant at no point sought to make a case that the Respondent somehow acted on the basis of racial stereotypes in connecting the supposed court case to his race. Secondly and in any event, we accepted that Mr Cronin did not know about this matter until the date of the Claimant's dismissal.

82. Taking all of the above into account, we concluded that the Claimant had not established that there were facts from which we could conclude that he had been discriminated against in this regard, that is that race played any part in the allocation of his hours. Mr Cronin, who came across to us as a careful manager who was focused only on the interests of the store, had allocated ample hours to the Claimant on many occasions previously. There was nothing in the evidence before us to suggest any change of practice in his making such decisions based on availability and business need, except the Claimant's assertion that Mr Cronin knew what had been alleged by Mr Sharpe, which as we say was unrelated to the Claimant's race and was in any event not the case.

83. This complaint failed accordingly.

Dismissal

84. Although the complaint about not being given a say before his dismissal came next chronologically, we dealt first with the dismissal itself and came to the other allegation separately – see below.

85. On the question of dismissal, we dealt first with the Claimant's religion and belief. He plainly relied on his Muslim science beliefs, and not on the more general fact of his being a Muslim, as having played a part in the Respondent's decision. Of course, this belief did not have to be the sole reason for dismissal to give rise to discrimination.

86. We noted the following:

86.1. The Claimant's Muslim science beliefs were only discussed with two employees, neither of whom played any part whatsoever in the decision to dismiss him. Although of course Zoe held the initial discussion with Mr Wasti, it was not part of the Claimant's case that she had brought any influence to bear on the Respondent's decision.

86.2. There was no evidence before us that the Claimant discussed his Muslim science beliefs with Mr Wasti or Ms Jordan. He met Mr Wasti only rarely and had never met Ms Jordan at all. It was entirely a matter of speculation that the two employees to whom the Claimant disclosed his beliefs mentioned them to either Mr Wasti or Ms Jordan.

86.3. As noted above, we accepted that Mr Cronin did not know about the Claimant's Muslim science beliefs either, and in any event, it is absolutely clear that he played no part whatsoever in the decision to dismiss the Claimant, other than the tangential point of being asked for his views on the Claimant generally.

86.4. The Respondent kept no record of employees' religious beliefs, whether the Claimant's or otherwise.

86.5. The Claimant did not put to any of the Respondent's witnesses that his beliefs were a factor in the decision to dismiss him.

87. Taking all of the above into account, the Claimant plainly did not prove that there were facts from which any reasonable Tribunal could conclude that his specific religious belief was any part of Ms Jordan's thinking in deciding to dismiss him.

88. We dealt next with the allegation that the dismissal was an act of direct race discrimination, dealing first with the question of comparators.

89. Section 23 of the Act plays a crucial role in determining whether there has been direct discrimination. As stated more fully above, it provides that there must be no material difference in the cases of the Claimant and the comparator. Taking each comparator in turn, our conclusions were as follows, beginning with Employee P.

90. We accepted that the alleged pushing of and swearing at the Claimant, and the alleged self-harm by Employee P, were not known to Mr Cronin as the manager who spoke to Employee P in the car park on the day in question. As we have said many times, his evidence was highly credible. We have also noted above that these matters were not mentioned in the Claimant's complaint of 27 May 2020, even though Employee P was central to the subject matter of that complaint. We therefore attached no weight to those specific allegations. The Claimant said to us that Cody Reynolds had given evidence of what happened, but we did not hear from him or receive any statement from him; all that we had before us was a message from Mr Reynolds agreeing with the Claimant. That evidence was not tested in this Hearing and was therefore of little value.

91. Mr Cronin, and indeed anyone else in a management position at the store at the time, was aware Employee P was new and that he had left his post feeling overwhelmed by the work. That was indeed the main point the Claimant emphasised during this Hearing, namely that Employee P had caused difficulties for the Respondent in meeting customer requirements because he had left his post and should have been disciplined accordingly. In the circumstances however, it was in our view entirely appropriate for Mr Cronin and any other manager aware of the situation to treat Employee P walking out as a welfare issue. Employee P was not a proper comparator, as even if his walking out was an act of misconduct, the issue the Respondent faced as a result was plainly not of the same order as it concluded prevailed in relation to the Claimant.

92. Employees N and K were said by the Claimant to have argued publicly. Taking the Claimant's word for that, whilst it was arguably misconduct, what the Respondent believed in relation to the Claimant was manifestly of a different order of seriousness. They were not appropriate comparators either.

93. The same can be said of Employee A who, again taking the Claimant's evidence about Employee A on face value, said something offensive about a colleague's mother. Again, that was arguably misconduct, but causing offence to colleagues is not of the same order as potentially posing a risk to colleagues. Again, this was not a valid comparator.

94. The driver for the other franchisee in Yeovil was plainly not a valid comparator as he was not in the same employment as the Claimant and so we could not know how this Respondent treated him. In fairness to him, the Claimant appeared to recognise that this was the case.

95. What the Claimant said about Chris Sharpe was that his misconduct was spreading untrue, malicious rumours about the Claimant, namely what ended up being said to Zoe, and thence to Mr Wasti, on or around 5 May 2020. The Claimant also suggested late on in the presentation of his case that Mr Sharpe was a valid comparator because he too was involved a court case. As to the latter, we have set out above our conclusion that Ms Jordan was not aware of Mr Sharpe's involvement in any court case and in any event, we note and agree with Mr Edwards' submission that being so involved does not establish that he was involved in a case against him as a defendant. As to spreading of rumours, first we have found as a fact that it is likely Mr Sharpe heard from the Claimant the words "jury" and "court"; secondly, we cannot know what Mr Sharpe told Zoe; thirdly, and in any event, spreading rumours, whilst it too could be a conduct issue, was not of the same level of seriousness for the Respondent as the circumstances it believed it faced in relation to the Respondent. For all of these reasons, we concluded that Chris Sharpe was not an appropriate comparator either.

96. We accepted the Respondent's case that it was Driver A who was the closest comparator. One key difference between him and the Claimant was that he was employed for more than 2 years, which led the Respondent to undertake a full disciplinary procedure having suspended him first. The reason he was nevertheless the closest comparator is that, like with the Claimant, the Respondent formed the view – albeit in Driver A's case based on much more detailed information and investigation – that he had been charged with, and in his case eventually convicted of, a criminal offence. An alternative analysis is that the treatment of Driver A is the best evidence of what the Respondent would have done in relation to another employee – a hypothetical comparator – facing a criminal charge.

97. The conclusion from this analysis is that the Claimant did not establish on the evidence facts from which we could conclude, in the absence of an adequate explanation, that the Respondent treated him less favourably than it treated or would have treated someone in materially the same position as him, as section 23 requires. It is true that the Respondent treated Driver A differently, not only because of the procedure followed to dismiss him, but also because he was not dismissed as soon as the Respondent found out he had been charged. It nevertheless suspended Driver A once it knew he had been charged. The reason for the difference in treatment when compared with the Claimant was plainly not the difference in race, but the difference in length of service. We return to this below in the related context of the Claimant not being given an

opportunity to have his say before he was dismissed. The view that the Respondent took, or would have taken, in relation to an employee it believed was charged with a criminal offence of similar gravity, and the action that then followed or would follow, was clear. Its treatment of the Claimant was consistent with that of the actual or hypothetical comparator.

98. The complaint of race discrimination in relation to the Claimant's dismissal failed on that basis. We nevertheless went on to consider the reason why question, i.e., if the Claimant had established less favourable treatment, whether he had also established something more than a difference in treatment and race from which we could decide, in the absence of an adequate explanation, based on all of the evidence we considered, that his race was more than a trivial influence on Melissa Jordan's decision.

99. There were a number of factors, none of which on their own was conclusive but which in our judgment taken together showed very clearly that the Claimant's race was not a factor in the decision to dismiss him at all:

99.1. The Respondent is recognisably a multi-cultural employer.

99.2. Neither Melissa Jordan who dismissed the Claimant, nor Mr Wasti who reported to her his concerns, had any history of note with the Claimant – in fact, Ms Jordan had no previous dealings with him at all, and Mr Wasti very limited involvement. We do not say that of itself means that race could not have been a factor in their decision-making, but it tends to suggest that what they saw as protecting the business was much more likely to have entirely governed their thinking.

99.3. There had been previous issues with the Claimant's conduct at work, one involving Mr Wasti (in relation to the customer who ordered the diet coke), and he had not been dismissed even though he had no employment rights at that point either. That was an important factor to weigh in the balance, as Mr Edwards submitted.

99.4. Mr Wasti, based on whose evidence Ms Jordan took the decision to dismiss, is an Asian Muslim. We entirely accept that this too is not in any sense determinative because British Pakistani people can discriminate against other British Pakistani people in same way as there can be discrimination between people of any other race. It is nevertheless properly a factor that can give a tribunal pause for thought before concluding that the necessary secondary inference of discrimination can be drawn, and is certainly a factor to include in the mix.

99.5. Ms Jordan's evidence, which we accepted, that she would not have dismissed the Claimant for the lower-level conduct matters alone, demonstrates that it was her conclusion, shared by Mr Wasti, that the Claimant was facing criminal proceedings which led her to dismiss him: rightly or wrongly, it was this which clearly ruled her thinking in deciding on her course of action.

99.6. We also noted that Mr Wasti's meeting with the Claimant and Ms Jordan's discussion with Mr Wasti were both very brief. This meant that the Respondent did not in our judgment take a considered or careful view of what it had been told. Rather, on hearing words which indicated the imminence of a criminal trial on a

matter involving a child, both seem to have barely thought about the matter at all. It seems very much to have been a knee-jerk reaction that led Mr Wasti to report to Ms Jordan and an equally knee-jerk reaction which led Ms Jordan to dismiss the Claimant at the earliest opportunity, once she had heard from Mr Cronin and Mr Wasti that the Claimant was someone whose performance had previously given cause for concern. The point to be made here is that who the Claimant was barely entered their thinking.

100. What the Claimant highlighted in seeking to persuade us that we should draw an inference that his race featured in the decision to dismiss him was the following:

100.1. The Facebook messages he exchanged with Chris Sharpe. As already noted, these were not seen by the Respondent until after the dismissal and we have made clear our findings as to what Mr Wasti heard in his meeting with the Claimant.

100.2. The changes in who the Respondent said was the decision-maker and the missing notes of Mr Wasti and Ms Jordan. Changes in evidence and missing documents might in some cases be the "something more" that leads to adverse inferences being drawn. In this case however, for the reasons we have set out above, although of course he was a key player in the events leading to dismissal, and was materially involved to that extent, we are in no doubt that Mr Wasti was not the decision-maker and we were satisfied that Mr Bains was not involved in the decision either. As already set out, it is not always possible for a representative to correctly confirm every detail of their client's case at a Case Management Hearing, when he or she is rarely in possession of all of the relevant materials. Furthermore, the Claimant did not say how an adverse inference could be drawn from either of these matters or how they made any difference to the case – it was not suggested for example that if Mr Bains was involved in the dismissal, that somehow indicated a greater likelihood of discrimination. These matters were in our judgment what we saw in various aspects of this case, namely muddle on the part of the Respondent, and no more. Ms Jordan wrote the dismissal letter, she owned the decision in her evidence, and she did not seem to us to be seeking to shield some other participant in that decision.

100.3. The Claimant also referred to the fact that the Respondent did not put in writing until July 2021 that the lower- level issues were a factor in his dismissal. That is true, but crucially we found as a fact that Mr Cronin was told that they were a factor on the day of the dismissal, and we were satisfied that they were, following naturally from the general enquiries Ms Jordan made of Mr Cronin and indeed Mr Wasti, albeit – another failure on the part of the Respondent – the Respondent did not communicate this to the Claimant at all until these proceedings. We note also Mr Edwards' submission that the July 2021 Amended Response was the first time the Respondent was able to file a fully considered response to the Claim given, as EJ Lloyd recognised at the initial Case Management Hearing, the Claim was not properly pleaded in the first instance.

100.4. As already noted, the Claimant made much of the Respondent not calling the police and allowing him to finish his shift. As to the former, the Respondent could properly conclude the authorities would have been already appropriately

involved. As to finishing his shift, that was nowhere near enough to change our conclusion as to what was in mind of Ms Jordan in making her decision. The decision to let the Claimant finish the shift was taken by Mr Wasti (we heard no suggestion that Ms Jordan was aware of it) and once he had handed things over to her, he was satisfied he had done his job.

100.5. We also considered whether our rejection of Ms Jordan's evidence regarding the notes she said she made of her discussion with Mr Wasti and the content of her call with the Claimant at around the time he received the dismissal letter, were sufficient to draw an adverse inference as to the reason for dismissal. In short, we did not. This was not something to which the Claimant drew any attention as something he sought to rely upon. In any event, as our findings of fact make clear, we did not conclude that Ms Jordan had misled us, any more than we concluded that the Claimant had done so in the various aspects of his evidence that were rejected. We simply did not accept that her recollection was correct. Further, whilst they drew our attention to shortcomings in the process followed by the Respondent, the flaws in Ms Jordan's evidence did not suggest to us that the reason for dismissal was anything other than that which we have already set out.

101. In summary, in addition to our conclusion that the Claimant had not established less favourable treatment, when we examined the reason why question we were amply satisfied that the Respondent's decision to dismiss the Claimant was in no sense because of his race. The complaint failed on this basis also.

The Claimant not being given a say before dismissal

102. It seemed to us perfectly clear that we could go straight to the reason why the Respondent dismissed the Claimant without giving him a chance to have his say first, making it unnecessary for us to go through the two-stage burden of proof. The reason was obvious on the evidence we heard: he had less than two years' service.

103. Based on the brief conversation with the Claimant reported to her by Mr Wasti, Ms Jordan did not think anything further was necessary and we were in no doubt that this was the Respondent's standard practice with short-serving staff. Whilst not uncommon, we are not saying we endorse the practice – in fact, quite the reverse, as we will indicate below – but this was not a decision we think was in any sense infected by considerations of race or religion or belief, whether the Claimant's specific Muslim science belief or his wider Islamic beliefs.

104. The reasons for this conclusion will already be clear. As noted above, Driver A was treated differently because he had 2 years' service. His case proves the point: the Respondent treated the Claimant differently to the actual comparator, but entirely based on his length of service. Put another way, and again as already intimated, he was in our judgment treated in exactly the same way as the Respondent would have treated another employee, of whatever race, with less than 2 years' service, who it believed had been charged with a criminal offence of similar gravity.

105. This complaint also failed accordingly.

The decision not to hear the Claimant's complaint of 27 May 2020

106. Again, whilst we do not endorse the Respondent's failure to consider the Claimant's complaint, it was plain to us that the evidence enabled us to go straight to the reason, or reasons, why the Respondent acted or, as it might be said, failed to act as it did.

107. The first reason was that Ms Jordan concluded that because it was plain the Claimant was very likely to pursue a tribunal case – ACAS Early Conciliation having been concluded – and the matter was in the hands of its solicitors, she did not need to have, and did not want to have, any further dealings with the Claimant directly. Secondly, as the Claimant accepted, he and others on his behalf, had regularly been in contact with the Respondent's head office and store, and with individual employees, sometimes doing so in a less than ideal manner, and for that reason too, Ms Jordan wanted no further dealings with him. We may have taken a different view as to whether those were appropriate grounds on which not to deal with his complaint, but they were clearly not in any sense because of the Claimant's race or religion or belief.

108. For completeness, we were also in no doubt that a hypothetical comparator, namely a former employee who was about to commence a tribunal case and had persistently been in contact with the Respondent to complain, would have been treated in exactly the same way. This complaint also failed.

Concluding comments

109. At the conclusion of our oral judgment and reasons, we made two further things clear.

110. The first is particularly important as this document will be made publicly available on the Tribunal judgments website. As the Respondent accepts, the Claimant at no point as far as we know faced any criminal investigation or charge, let alone trial, in relation the matter which played a significant part in the decision to dismiss him, namely the events involving a 12-year-old girl at his previous employer. We are satisfied that the Respondent dismissed him because it believed he had been so charged, but it is accepted that it was mistaken.

111. Secondly, it must be said that the Respondent's conduct of the Claimant's dismissal and the events leading up to it left a lot to be desired to say the least. We were conscious throughout our deliberations that we were not dealing with an unfair dismissal case, as Mr Edwards submitted. As our conclusions make clear, we sought to focus rigorously on the questions before us related to the allegations of discrimination. It must nevertheless be said:

111.1. Whilst we have accepted his evidence as to what he understood from his meeting with the Claimant, Mr Wasti can fairly be criticised for taking far too little time and care to understand precisely what the Claimant was telling him. Even if he had asked a few further questions, events might have turned out differently, depending of course on the answers he received.

111.2. Equally, Ms Jordan can be fairly criticised for not taking the time and care herself, to go back to the Claimant to establish clearly what was being said, or

requiring Mr Wasti to do so. The Claimant may have had less than 2 years' service, but any dismissal, however short-serving the employee may be, is a serious matter for them and should be treated as such.

111.3. The dismissal letter should have articulated the reasons why the Claimant was dismissed, notwithstanding the Claimant did not have the statutory right to written reasons, not least because that might have saved the Respondent itself some trouble in presenting its case to this Tribunal.

111.4. We appreciate Ms Jordan is not HR-qualified, and she appears to have many responsibilities. The Respondent thus collectively bears some responsibility for the poor practice we have observed in this case.

112. For all of these reasons, although the Claimant was not able to show on the evidence presented to us facts from which we could conclude in the absence of an adequate explanation that he was discriminated against in the ways he alleged, it is in our view unsurprising that he questioned the Respondent's conduct by bringing this Claim, particularly given the paucity of the information he was given at the time of his dismissal.

113. For all of the reasons set out above, the Claimant's Claim was dismissed.

Employment Judge Faulkner

Date: 24 January 2022