EMPLOYMENT TRIBUNALS

Claimant: Mr G Kikwera Akaka

Respondent: Salvation Army Trading Company Ltd

Heard at: Croydon in person
On: 12 -14 January 2022 and 25 May 2022

Before: Employment Judge Nash
Mr Corkerton
Mr Havard

Representation
Claimant: In person
Respondent: Mr Tiplady, Consultant

JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS Early Conciliation on 24 April 2019 only, the claimant presented his complaint to the Tribunal on 16 May 2019.

2. There was a preliminary hearing before Employment Judge Wright on 7 November 2019 attended by the claimant and Mr Tiplady for the respondent. At this preliminary hearing the claims and issues were identified and agreed.

3. At this final merits hearing, the Tribunal heard from the claimant. He relied on his witness statement, the amended particulars of claim at pages 24-30 and a skeleton argument at pages 47-51. He swore to all of these.

4. The respondent provided the following witnesses all provided written witness statements –

    a. Ms Julie Brown, a store manager at the material time;

b. Mr Santos Fernandez, a regional manager at the material time;
c. Mr Adam Sergeant, a regional manager at the material time;
d. Ms S Hemmings, HR manager and
e. Miss S Trivett, a training and HR manager.

5. Tribunal also had sight of a statement from Mr Steven Wynn, an assistant manager who did not attend the hearing.

6. The Tribunal had sight of a bundle to 401 pages. There were a few amendments to the bundle during the hearing.

a. On the first day a document was added with consent. This was a complaint from the claimant to the respondent in respect of data protection issues.
b. Further to the tribunal's request, the parties provided a copy of the claimant's earlier ET complaint under 2300111/2018 on the second day.
c. During cross-examination on the third day, the claimant sought to rely on a further document, being a different version of a document in the bundle at page 62. The respondent did not object and although this disclosure was made late, the Tribunal accepted this document into the bundle.

Preliminary Issues

7. The claimant informed the Tribunal that he suffered from memory loss. He did not provide any medical evidence going to this. The Tribunal had sight of medical evidence on its file from a consultant stating that the claimant had suffered from Leukaemia and had undergone chemotherapy. However, the claimant had written to the Tribunal - and he confirmed this at the hearing - that this diagnosis was incorrect, and he had suffered no more than a mild stroke. Nevertheless, he told the Tribunal he had great difficulty in reading, writing and in processing information.

8. From the claimant's presentation at the hearing, the Tribunal and the respondent accepted the claimant's account of his difficulties. With the consent of the claimant and the respondent, the Tribunal considered adjustments to its practice.

9. It was agreed that all documents on which the claimant was questioned would be read out to him. The Tribunal explained to the claimant that if he did not understand a document or needed it reading out and/or repeating, it would be read out. Further, if he needed time to answer the question of process information this would be provided. The Tribunal further explained that if he needed a break, he should ask in the tribunal would be happy to oblige. The tribunal at times proactively asked the claimant during his evidence whether he wished to have a break. In the event, the claimant said that he did not need any breaks.

10. It was agreed that cross-examination would proceed at a steady pace, and time would be allowed for the claimant to process questions and information. It was agreed that the Tribunal would, following cross-examination by the claimant, put any outstanding elements of his case to the respondent witnesses.

11. The Tribunal ascertained that the claimant did not have anyone who could accompany him at the Tribunal hearing. The Tribunal asked if the claimant had any more suggestions for adjustments and he said that he did not. The claimant explained that he was relying heavily on the bundle which he had prepared and agreed before he fell ill.

12. During the hearing the claimant experienced significant difficulties in finding documents or expressing which issue or point he was seeking to pursue. The Tribunal was appreciative of the respondent's representative who spent considerable time on many occasions seeking to ascertain the claimant's issue or identify the document on which he sought to rely. This meant that the hearing took longer than anticipated and it went part-heard.

13. At the beginning of the hearing, the Tribunal informed the parties that one of its members was formerly the head of HR for a Police Force in the south-east. The respondent's representative had formerly been HR head for the Metropolitan Police. About ten years ago, the member and the respondent's representative had met on a number of occasions in a professional setting, including some after work socialising in groups. They have not had any contact for about ten years. After this explanation, the claimant confirmed that he wished to continue with the Tribunal as constituted, as did the respondent.

14. The claimant had applied under Rule 32 for a witness order on 15 November 2019. This application had not been considered by the time of this hearing. He wished to call Ms Leach, his former manager in another respondent store.

15. The Tribunal considered the application and refused on the following grounds. Ms Leach was the claimant's manager when he was first employed by the respondent in 2016 in a different store. The grounds of the claimant's application were that she would be able to give evidence as to his training, which would cast doubt on his alleged performance failure in 2019. The Tribunal found that it was not proportionate or sufficiently relevant to the issues to call Ms Leach as she had not worked with the claimant at or close to the material time. It was therefore unlikely that her evidence would assist the Tribunal as to the claimant's performance at the material time.

16. At the end of the second day, the Tribunal reminded the claimant whether he wished to make a further application in respect of Ms Leach, and he renewed his application for a witness order on different grounds. Ms Leach had given a statement about finding, in 2018, a letter setting out the claimant's criminal conviction. The claimant's case was that this illustrated a failure under data protection legislation by the respondent.

17. The Tribunal refused the application on the following basis. If this failure was made out, it would not go to the issues. The relevant issue, on the claimant's case, as the Tribunal understood, was the extent to which this conviction was taken into account in material decisions. The respondent's witnesses confirmed Ms Leach's account of when she made them aware of the conviction, and so there was little if anything relevant that Ms Leach could usefully add.

18. Finally, during the break on the first day a respondent witness, Ms Trivett, came into the room without knocking as she was looking for a computer. She apologised. The Tribunal advised the parties of this, who raised no issues.

The Claims

19. The claims were set out in the preliminary hearing order by Employment Judge Wright as being:-

    a) Unfair dismissal under section 98 of the Employment Rights Act 1996;

    b) Harassment on the grounds of race under section 26 of the Equality Act 2010;

    c) Direct discrimination on the grounds of race under section 13 of the Equality Act 2010;

    d) Victimisation under section 27 of the Equality Act 2010; and

    e) Failure to provide written reasons under section 92 and 93 of the Employment Rights Act 1996.

The Issues

20. The issues were set out in the case management order of 7 November 2019. The relevant extracts from the case management order are appended to this judgement, being paragraph 5 to 12 of the case management order.

21. At the beginning of the hearing, the Tribunal asked the parties if there were any amendments to the list of issues. The tribunal explained that it was concerned about the difference between the issues and the contents of the pleadings and the witness statements. It reminded the parties that it would only consider evidence and submissions going to the issues.

22. The Tribunal explained to the claimant that much of his statement did not relate to the issues, but to background. It reminded the parties that they must concentrate on the list of issues, that is the alleged acts of discrimination and the fairness or otherwise of the dismissal.

23. The following issues were clarified.

24. In respect of unfair dismissal, according to the list of issues, the only potentially fair reason for dismissal relied upon was conduct. The ET3 referred to capability. Before the Tribunal the respondent sought to rely on both potentially fair reasons. The Tribunal reminded the parties of *Hotson v Wisbech Conservative Club 1984 ICR 859, EAT*, as follows, 'even in those cases where… no more than a change of label is involved… great care must always be taken to ensure that the employee is not placed, as a result of the change in the label… at a procedural or evidential disadvantage'.

25. The Tribunal asked the claimant if his mental state put him at a disadvantage because the respondent had extended its reasons for dismissal. He was unable to say that this put him at a material or procedural disadvantage. The Tribunal bore in mind the claimant's disadvantage in expressing himself but could did not find that the change in label put the claimant at any material prejudice.

26. In making this decision, the Tribunal took into account that the respondent expressly relied on capability in its grounds of response. All witness statements went in some detail into matters relevant to capability. Accordingly, there was little or no prejudice to the claimant in permitting the respondent to rely on conduct and capability in the alternative.

27. The Tribunal also clarified the acts of discrimination relied upon under section 13 as follows:-

    a) A West Wickham manager role in July 2018;

    b) A Catford assistant manager role in November 2018; and

    c) An assistant manager role at Walworth Road in November 2018. (The list of issues incorrectly referred to 2019. The claimant said it was 2020. However, during evidence the parties agreed this had occurred in 2018.)

The Facts

28. The respondent is a trading arm of the well-known charity and it operates a number of charity shops.

29. The claimant started mandatory voluntary work with the respondent at its West Wickham store in 2016. The store manager was Ms Leach.

<u>The claimant's application for employment</u>

30. The claimant successfully applied for employment with the respondent on 14 July 2016. It was not in dispute that the claimant had a previous conviction for gross bodily harm. There was a conflict about whether the claimant had told the respondent about his convictions and specifically, what version of a document in respect of previous convictions he had provided to the respondent.

31. The respondent relied on finding in its records an application document (page 62) from the claimant stating that he had no criminal convictions. It therefore contended that the claimant has misled the respondent. In contrast the claimant alleged that a Ms Hemmings of HR, who was not employed by the respondent at the time, had forged the document at page 62. He had provided the respondent with a different version of the form which did refer to a criminal conviction. His case was that he had provided this alternative document to the respondent and had not provided the document page 62. Accordingly, he had not misled the respondent. He provided this different version during the hearing and it was added to the bundle.

32. The Tribunal found that the respondent's version of the document at page 62 was the version provided by the claimant to the respondent at the material time, for the following reasons.

33. The version at page 62 relied upon by the respondent was a completed document. It was better presented and formatted and contained considerably more detail. The claimant provided no evidence about the two versions. He stated that his memory of this incident was poor. His statement that Ms Hemmings had forged the document at page 62 was a bare allegation. The Tribunal was not taken to any evidence that Ms Hemmings forged the document, which included seemingly uncontroversial matters such as the claimant's next of kin. Further, there was no explanation as to what Ms Hemmings' motivation for forgery might be. The Tribunal found that the version relied upon by the claimant was a draft of his application document, which he had kept. The claimant did not remember that he had sent a finished version to the respondent, the version at page 62 of the bundle.

34. The claimant started employment as a sales assistant in the Beckenham store on 17 October 2016.

35. A conflict developed between the claimant and a volunteer with learning difficulties and his other colleagues. The claimant felt unsupported. He made allegations and resigned on 17 October 2017. He brought a claim, including race discrimination, to the Tribunal. The claim was settled on the basis that he was reinstated in the respondent's employment with continuous employment from 16 April 2018.

<u>The claimant's role at Beckenham</u>

36. At this time, the Beckenham had no vacancies. Therefore, the claimant went to work at the respondent's Walworth Road store. This store had one of the highest turnovers and was very busy. It had a large number of volunteers, including many with learning disabilities and other vulnerabilities.

37. The Walworth Road manager, Julie Brown, said that after the claimant started work, she received a number of complaints from staff and volunteers about the claimant, in effect, not pulling his weight and general poor performance. The Tribunal had sight of an unsigned and undated letter from staff and volunteers in July 2018 to this effect.

38. When the claimant joined Walworth Road, Ms Hodges was maternity cover for the assistant manager. In July 2018 she successfully applied for the manager position at the West Wickham store. The claimant did not apply for this role. The role was only advertised in *Indeed*, a monthly internal respondent email. The email was password protected but, a manager could give access to staff. Ms Brown had encouraged Ms Hodges to apply.

The television incident

39. On 1 June 2018 the claimant asked to purchase a television which had been donated. Ms Brown agreed to sell it to him for £50, a special price so that he would not be allowed any additional staff discount. The claimant rang the sale through to himself on the till, contrary to policy and practice, and applied a staff discount. He then showed Ms Brown the receipt. He failed, contrary to policy and procedure, to enter this into the staff purchase book.

40. On 17 July 2018 the claimant was informed that he was being investigated for alleged dishonesty on 1 June in obtaining a staff discount to which he was not entitled. There was a second allegation that on 19 May he had failed to process properly a refund when a customer returned a handbag.

41. The allegations were investigated by Ms Brown and she took statements from the claimant and relevant witnesses. The claimant said that he did not recall being told that he was not allowed the discount, so he applied the discount at the till. He said that he was "stupid" to do the discount himself and not get another member of staff to do it for him. The claimant said, "I didn't think it was worth wasting your time, so I did it."

42. Ms Hodges (the assistant manager) said that it had been made clear to the claimant that the television was not to be further discounted and, in any event, no one was allowed to use their own staff code for a discount. A volunteer gave a statement that the true price of the television was £70.

43. The claimant before the Tribunal said that it was not against company procedure for a staff member to ring through their own purchase at the till. He, however, agreed that he had not acted sensibly. The claimant had said "I didn't think it was worth wasting their time, so I did it."

44. In the view and experience of the tribunal, in particular its lay members, it is a well-known and standard retail industry practice that a staff member does not ring through their own purchases, in particular in a discount situation.

45. Later in the process, the claimant alleged that one of the witnesses interviewed by Ms Brown had not been present on the day in question. He alleged that Ms Brown had forged an entry in the store's staff diary to falsely show the witnesses present on the day. He did not make this allegation at the time. The tribunal had sight of what may have been two copies of the same dairy entry page, but the quality was too poor to draw any reliable conclusions from the documents.

46. On the balance of probabilities, the Tribunal did not find that anyone including Ms Brown had forged the diary for the following reasons.

47. There was little if any evidence of forgery. There seemed no apparent reason for any forgery - the volunteer in question was only one of several witnesses and by no means crucial. There was no other evidence of any conspiracy. Ms Brown's evidence was consistent and clear. In contrast, the claimant's evidence was confused, and he said that he could not remember what had happened. Further,

the tribunal had rejected the claimant's other forgery allegation - that human resources had forged the criminal record document.

48. On 27 July 2018 the respondent invited the claimant to a disciplinary hearing. He was warned that the matter could amount to gross misconduct and he was provided with the witness statements and the relevant till receipts.

49. The hearing was heard on 27 July by Ms Lebbern, regional sales and training manager.

50. In respect of the television, it was put to the claimant that two witnesses had agreed that he was told that there would be no discount. The claimant's defence was that he had not been told that there was no discount. He started to say that the manager should have stopped him, but then agreed that Ms Brown did not know in time and that it was her fault for failing to stop him afterwards. He refused to say why he did not tell anyone that he had processed his own discount. He did not record the purchase in the staff purchase book because Ms Brown had told him it was wrong, and he was scared. He said that he took no action on the handbag refund because he was unsure what to do.

51. The claimant was given a final written warning in respect of the television incident only on 30 July 2018. It was determined that he was not culpable for the handbag incident. The

52. On 8 August 2018 the claimant left money outside the safe overnight at the store.

53. The claimant appealed his final written warning to Mr Fernandez, the regional manager. He said that he was victimised because of the earlier Employment Tribunal proceedings.

54. Mr Fernandez held the appeal meeting on 14 August 2018. In effect, Mr Fernandez found the procedure flawed and said he, "gave the claimant the benefit of the doubt" even though the witnesses were against him. He reduced the sanction to a first warning. Mr Fernandez told the tribunal that the respondent had a compassionate culture.

55. For the avoidance of doubt, the Tribunal did not accept the claimant's characterisation of the partial upholding of his grievance as an acceptance that there was bias in the investigatory decision. The reduction of sanction was based on procedural failings, and a self-described compassionate culture.

56. The claimant said that the respondent's rule that staff may not apply their own discount was based on the respondent's distrust of its staff. In the view of the Tribunal this indicated that the claimant did not understand the reasons behind the practice, which is to protect the employee as well as the employer.

57. On 9 October 2018 the claimant raised a grievance against Mr Fernandez and Ms Brown (page 218). He alleged harassment and victimisation. In effect, he tried to reopen the disciplinary decision. He alleged that Mr Fernandez and Ms Brown had forged diary entries. He said that it was racial prejudice to forge the witness

statements of one of the volunteers. He said that he was not safe at work and, "I do not wish to be killed in the workplace".

58. As a result of the money incident, Ms Brown issued the claimant with a letter of concern on 10 October 2018.

59. Ms Sarah Trivett of HR heard the claimant's grievance on 17 and 25 October 2018. She did not uphold the forgery allegation due to lack of evidence. She did not uphold his allegation that Ms Brown, Mr Fernandez and the volunteer had all conspired on the grounds of the claimant's race to cause him harm. The claimant's allegations that he was not safe were not upheld as there was no other evidence.

The Catford and Walworth Road vacancies

60. The respondent had changed its internal vacancy advertising system. Internal vacancies were advertised by way of an internal noticeboard.

61. On 8 November 2018 the position of manager at the respondent's Catford store became vacant. It took some considerable time at the hearing for the claimant to accept that he had applied for this job and it was the subject of his second race discrimination allegation. It was ascertained that the claimant had applied late but was still interviewed and not appointed.

62. The Tribunal had sight of the claimant's interview notes and those of the successful candidate (page 86) and compared their performance at interview. The tribunal found that the successful candidate follows at interview was manifestly superior. To illustrate, the successful candidate provided practical and positive suggestions about working with volunteers. In contrast, the claimant answered this question by saying that he would stop volunteers drinking coffee and put them to work.

63. At about the same time, the position of assistant manager at Walworth Road was advertised. The claimant did not apply for this position. (Mr Fernandez when setting out the chronology of this case, stated that the claimant had applied. Nevertheless, the tribunal was satisfied based on the evidence that this was an error and the claimant had made no such application.) The successful candidate was Mr Wynn, a former team leader at Woolworths.

Further incidents

64. At this time, the claimant's criminal record came to light. On 27 November 2018 Ms Carruthers of HR interviewed the claimant's former manager at Beckenham who gave a confusing and confused account of how the matter came to light. She said that she found a letter about the claimant's criminal record in another employee file. She had told Ms Brown but left it in the cabinet. She did not know if she put the letter in the other employee's file. Ms Brown agreed, before the Tribunal, that she was aware of the conviction.

65. Human Resources decided that because the claimant had been working for a few years, they would not take any action.

66. Ms Brown then received a number of other complaints by members of staff about the claimant's performance (starting at page 337).

67. Matters deteriorated further. Ms Brown criticised the claimant for his attitude, for not being a team player, for rudeness to customers, for avoiding tasks, for walking off during tasks and failing to carry tasks with due diligence.

68. The claimant made a complaint against Ms Brown. He said that on 2 February 2019, when takings were unusually high at the store, Ms Brown had said 'has the claimant been selling his body to raise that much money?'

69. The respondent investigated and found that Ms Brown had said, joking, to a female colleague on the phone, 'have you been selling your body?' and the claimant overheard. The Tribunal accepted the respondent's conclusion as there was a witness who corroborated Ms Brown's version of the conversation.

Complaint from volunteer

70. On 10 January 2019 the respondent received a complaint against the claimant from a vulnerable volunteer at the store. The tribunal accepted the respondent's case that the volunteer was manifestly vulnerable with significant learning difficulties and special needs. She was physically small, described as between 3 and 5 foot tall. She was always accompanied by her carer or mother. She was a long-term volunteer and very shy. All staff knew that she needed considerable supervision as she not suited to doing much in the way of substantive tasks. She carried out few substantial tasks in the store but made a lot of cups of tea.

71. The Tribunal did not accept the claimant's evidence that it was not obvious that she was vulnerable or had learning difficulties. The Tribunal preferred the respondent's case because of the number of people who gave consistent evidence, and because it was accepted that the volunteer was always accompanied by her mother or carer.

72. The claimant said that the vulnerable volunteer had inappropriately touched him twice after he had told her to stop. There were a number of different accounts of what happened. The accounts varied between her touching him on the arm, and her touching him around both sides of his waist from behind. The claimant alleged that he had touched him on his waist from behind. He had asked her to stop and she did it again and said that it was funny when he jumped.

73. There was no dispute that the claimant then threatened to punch her in the face. He made no physical contact. In her complaint the volunteer stated that the claimant has raised his fist at her. The claimant denied this.

74. Other volunteers and the vulnerable volunteer said that she was extremely distressed by the incident, and that she no longer wanted to work with the claimant. Although a very long-standing volunteer, she stopped volunteering after this incident and only started again on days on the claimant was not in the store.

75. The claimant was invited to a disciplinary meeting on the charge of using threatening or inappropriate behaviour towards the volunteer. The respondent provided the claimant with the volunteer's statement and the statement of a witness who said that the claimant had raised his fist.

76. Before the tribunal, the claimant resiled from his allegation that the vulnerable volunteer was racially motivated in making the complaint.

77. The disciplinary hearing occurred on 19 February 2019 (page 281). The decision maker was Mr Adam Sergeant. It was agreed that during the hearing, the claimant shouted at the panel so loudly that he could be heard next door. The claimant said that he shouted when the respondent refused to tell him the exact nature of the vulnerability of the volunteer.

78. At the hearing, the claimant said that he had not told his manager about how the volunteer was behaving because the manager was bullying and harassing him. He said that he would never tell his manager. He said that at the time he was told that he had made the volunteer upset. He had told another volunteer that he did not care.

79. The claimant described the vulnerable volunteer as obsessed and malicious. He agreed that he had threatened to punch her in the face but denied that he had raised his fist. When he was told that the volunteer was now scared of him, he said that he could not see how his behaviour was threatening. He made it clear at the hearing that he had no regrets. He said about the incident, "she made me feel upset. How do you expect me to react?" He said, "it is [the volunteer] who made me upset and not the other way around."

80. Questions were put to him as to his criminal record for grievous bodily harm which he refused to answer.

81. The panel found the claimant guilty of gross misconduct and gave him a final written warning on 22 February 2019. Mr Sargeant said that the reason he did not dismiss the claimant was because he wanted to give him another chance.

82. The claimant appealed the final written warning. His grounds of appeal were as follows. He was defending his dignity. The warning was not appropriate. He was the victim, and he was being vilified. The volunteer had been bullying him.

83. Mr Fernandez heard the appeal. The claimant told Mr Fernandez that he was trying to stop the volunteer having fun and laughing. Mr Fernandez refused the claimant's appeal and said that the respondent was justified in considering the unspent conviction for GBH when deciding on a decision about the claimant threatening to punch the volunteer in the face.

<u>The performance improvement plan</u>

84. Following the final written warning, the respondent placed the claimant on a four-week performance improvement plan (PIP). The PIP was specifically linked to the incident with the vulnerable volunteer. The PIP covered conduct : engaging and

working with staff and volunteers, insensitivity to volunteer needs, volunteers not being happy to work alone or work with the claimant, his not being a positive team member and customer service. It also covered capability : following procedures, front of front of house standards, and back of house standards such as pricing and sorting donations.

85. The Tribunal had sight of the minutes of the meeting at which Ms Trivett discussed the PIP with the claimant. The respondent's concerns were fairly general and wide ranging - the claimant had not engaged with staff, volunteers or management, he was not following processes front of house and not complying with customer standards. The plan was that the claimant would meet with his managers every week, who would talk through progress.

86. Ms Trivett said that the claimant walked out of the meeting. Although this was not put to the claimant, the Tribunal accepted this allegation as it was consistent with the claimant having shouted at the panel on 19 February.

87. The respondent's case as to the dates of the PIP was confused. However, Ms Brown was able to confirm that the first week of the PIP finished on 18 March 2019. Therefore, the tribunal found that the PIP started on or around 11 March 2019.

88. In the review of the first week of the PIP, the claimant's progress was mixed. He was failing to work well with volunteers, who would still not work with him.

89. The second review took place not after two weeks, but later on 29 March 2019. According to the review, the volunteers were still reluctant to work with him. The volunteers had complained that the claimant had told them to complete a task and had himself just gone back to stand on the till. He had given them good instructions, but they needed more assistance. According to the review, some aspects of his performance were good such as customer service. However, there were problems in other areas including Gift Aid, his attendance sheet, with stock and tills, and with the minimum daily standards form. The claimant was told that the respondent needed to see improvement.

90. The final week's review was on 5 April 2019. This was four days shy of a four-week PIP. In effect the PIP lasted only three and a half weeks before a decision was made. The review found that the claimant has left floor walk forms unsigned, stock replenishment was unsatisfactory, there were issues with stock, the banking was short, the float was wrong, and areas needed immediate improvement. There had been a complaint from a customer saying that they were reluctant to shop when the claimant was there because he was arrogant, rude and unhelpful. There was a serious shortfall in that he refused to engage with volunteers. The review also found positives – such as, following management instructions

91. Ms Brown together with Ms Hemmings of HR, decided that the matter should proceed to a capability hearing. They said that his progress on processes was mixed, there had been improvement on performance, but there was a significant concern about conduct.

92. Ms Brown's evidence was that during the PIP she had offered the claimant training at the review meetings and he had refused this. This was recorded in the meeting notes. The claimant denied this.

93. The Tribunal accepted Ms Brown's evidence that training was offered and, apart from group volunteer training, the claimant refused saying that he said he had no need. Ms Brown's case was consistent with the review minutes. The Tribunal was bolstered in this finding by the claimant's view that he had done nothing wrong in respect of the vulnerable volunteer and, in effect, had nothing to learn. And by his walking out of the meeting with Ms Trivett.

Dismissal

94. The claimant was invited on 15 April 2019 to a performance capability hearing. The letter warned him of the possibility of dismissal. It stated that the respondent still had concerns about conduct and capability, particularly engaging with volunteers, taking into account individual needs and customer service.

95. The letter of invitation enclosed the PIP documents. It asked the claimant to provide any further evidence and invited him to submit a witness statement. The hearing procedure was explained. It told the claimant that he had the right to bring a companion and invited him to suggest any reasonable adjustments in case of health issues.

96. The performance capability hearing was heard on 23 April 2019 (page 363A).

97. The claimant told the hearing that he had received no meaningful training but also there were no areas on which he needed more time to improve. He said that he did not need training in customer services twice. When he was offered till training, he did not say yes or no. He said that Ms Brown could not train him, and nor could the assistant manager who the claimant stated (incorrectly) was still in training. He said that he did not need more training with volunteers.

98. The claimant attributed many of his problems at the store to the volunteers. He said the volunteers envied him. When he was asked why volunteers were reluctant to work with him, he said that it did not matter to them. He said that the volunteers were up in arms with him, and it was Ms Brown's job to fix this. When asked what he had done to build better relationships with the volunteers, and he questioned why it should be him, when it was the volunteers who were not getting along with him.

99. He denied that he was the subject of the customer complaint although he was named by the customer. He apologised over the till error, saying that he was embarrassed.

100. The respondent alleged that he had shouted at this meeting. The claimant denied this. The Tribunal preferred the respondent's account as he had shouted in the earlier meeting on 19 February.

101. Mr Sergeant decided to dismiss the claimant. He confirmed his decision with reasons by way of a letter of 24 April 2019. The decision to dismiss was based in terms on the PIP and the disciplinary interview. The effective date of termination was 23 April, the date of the meeting.

102. Mr Sargeant stated in his letter that he believed the claimant was aware of what was required of him in his role and was capable of performing. However, the claimant had chosen to refuse to do tasks, such as working with volunteers. The claimant had not adhered to standards of conduct in respect of basic customer service. His performance was unsatisfactory. The fact that the claimant denied needing training meant that there was no or little prospect that further training would result in meaningful improvement. The claimant was on a final written warning for conduct.

103. Before the tribunal Mr Sergeant in terms denied that he had taken the final written warning into account. The tribunal preferred what he had said at the time of dismissal – that he had taken the warning into account. This was a contemporary document, whereas the evidence before the Tribunal was given about two years and nine months later.

104. The claimant, on 30 April 2019, made a request for written reasons for dismissal.

The appeal

105. The claimant sent two letters of appeal on 27 April and 4 May 2019. His grounds contested the validity of the earlier warnings and also complained about the unacceptable behaviour of the vulnerable volunteer. He stated that the warning in respect of the volunteer constituted discrimination because she had not been sacked. He said that he got on well with other staff and wanted to be left alone without "spying".

106. Mr Fernandez heard the appeal on 19 June 2019. He had been involved in the setting up of the PIP, but he had not been involved in monitoring or any decisions. The claimant said that Mr Fernandez had seen him working in the shop. Mr Fernandez agreed that he had witnessed the claimant interacting with volunteers and working, but volunteers had complained to him about the claimant not working.

107. Mr Fernandez asked the claimant what the issue with volunteers was. The claimant said that if the volunteers were challenging the employees, then what was the point in having an employee? He said that the line manager should tell the volunteers that they were there to volunteer, and not to discredit the claimant. That would improve relations. He said that he did not like being challenged unnecessarily when he knew that he was right.

108. He stated that the volunteers did not respect him and they were "on his back" and fed back to the manager. The volunteers were out to discredit and challenge him. He said that the volunteers at the Beckenham store had also turned against him.

109. He told Mr Fernandez that it was in order for him to leave work early without telling his line manager because he was a paid member of staff. He also said that the appeal should not investigate customer complaints further. He repeated he did not need training.

110. The claimant raised the issue of race discrimination in his appeal. The claimant alleged that there was a conspiracy to remove him from both the stores in which he had worked because he was the only black sales assistant. (It was agreed that there was a black volunteer.) He did not contend that his failure to obtain the three managerial positions was because of his race.

111. Mr Fernandez refused the appeal on 28 June 2019. His letter (page 391) gave the following reasons. He said that the claimant's performance and conduct had not improved to an acceptable standard and it was reasonable to believe that was unlikely to be any further improvement. The claimant had decided not to engage with volunteers, which was essential to the business model and the ethos of the respondent. Walworth Road volunteer hours had been going down before the claimant's dismissal and increased after he left. He found that the claimant had had an impact on volunteers and he took that into account. There was no evidence of race discrimination.

112. Mr Wynn was later promoted to store manager at Walworth.

The Law

113. The discrimination law is set out in sections 13, 23, 26, 27 and 136 of the Equality Act as follows

13 Direct discrimination

(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.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

26 Harassment

(1) A person (A) harasses another (B) if—
(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

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.

136 Burden of proof

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

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) 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.

114. The law on unfair dismissal is set out in section 98 of the Employment Rights Act as follows.

98 General
(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,…

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

115. The law on written reasons is set out in sections 92 and 93 of the Employment Rights Act as follows

92Right to written statement of reasons for dismissal.

(1)An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—…

(2)… An employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request.

Complaints to employment tribunal.

(1)A complaint may be presented to an employment tribunal by an employee on the ground that—

(a)the employer unreasonably failed to provide a written statement under section 92, or

(b)the particulars of reasons given in purported compliance with that section are inadequate or untrue.

Submissions

116. Both parties made oral submissions.

Applying the Law to the Facts

117. The Tribunal found that at times when giving evidence, the claimant was genuinely unclear about basic facts. To give just one example, he refused to accept that his letter of 26 July 2018, (setting out his case in respect of the television incident), was written during his employment, despite its date and contents. After the Tribunal took some time to take him carefully through the relevant documents, he did accept it was written during his employment. This occurred with a number of documents. The tribunal accepted that the claimant's recollection of events was, as he contended, poor.

Race Harassment s26 Equality Act 2020

118. There are three essential elements for harassment claims under section 26(1). There must be unwanted conduct. It has to have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, and it must relate to the protected characteristic on which the claimant relies, in this case black African.

119. In *Richard Pharmacology v Dhaliwal 2009* [ICR 2009 EAT], (a case brought under legacy legislation), the Employment Appeal Tribunal recommended a Tribunal address all three elements. Nevertheless, the EAT acknowledged that in some cases there is a considerable overlap between the components of the definition.

120. The Tribunal reminded itself that conduct amounting to harassment must be of significant consequence. It directed itself in line with *Richmond Pharmacology v Dhaliwal* as follows:-

*"*We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

121. Further, another President of the Employment Appeal Tribunals stated in *Betsi Cadwaladr University Health Board v Hughes & Others [EAT0179/13]* that

'…the word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'.

122. According to the EAT under its President in *Weeks v Newham College of Further Education [EAT 0630/11],* environment means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration.

123. Further, according to the Employment Appeal Tribunal in *Insitu Cleaning Company Limited v Heads 1995 [IRLR 4],* the question of whether an act is sufficiently serious is essentially a question of fact and degree for the Tribunal.

124. When it comes to the question of perception, the Tribunal reminded itself of *Pemberton v Inwood 2018 [ICR1291*] where the Court of Appeal instructed Tribunals to consider both whether the putative victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect.

125. According to the EHRC Code, relevant circumstances can include the claimant's circumstances such as health, including mental health and capacity, cultural norms, previous experiences of harassment and can also include the environment where the conduct takes place.

126. Finally, the Tribunal reminded itself of the guidance of the Employment Appeal Tribunal in *Reed & Another v Stedman 1999 [IRLR 299 EAT],* where Tribunals were reminded to take a cumulative approach to whether harassment has been established. It quoted with approval a USA Federal Appeal Court decision:-

"The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment might exceed the sum of the individual episodes".

127. The first contended act of harassment were the allegations in respect of the television, and the consequent warning. The Tribunal found that this constituted unwanted conduct. The claimant did not want to be subjected to an allegation that he had followed procedure and had been dishonest, or to be investigated and subjected to a warning.

128. The tribunal considered whether the unwanted conduct had the proscribed effect and whether it related to race. It considered these issues together as it viewed them as interlinked.

129. In determining if the conduct had the proscribed effect, a tribunal must take into account the claimant's perception, the other circumstances of the case and

whether it is reasonable for the conduct to have that effect. That is, a tribunal must consider the effect that the conduct on the claimant (the subjective element) and whether it was reasonable for the claimant to claim that the conduct had the unlawful effect (the objective element) (see *Pemberton v Inwood 2018 ICR 1291, CA*).

130. In respect of the burden of proof, the Employment Appeal Tribunal in *Martin v Devonshires Solicitors 2011 ICR 352, EAT* reminded tribunals that 'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'. This approach was endorsed by the Supreme Court in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

131. The Tribunal asked itself, why did the respondent act as it did? It does not matter if motivation was conscious or subconscious as long as it was related to the protected characteristic of race.

132. The Tribunal could not find any indication that the allegation, investigation, procedure or decision was in any way related to the claimant's race. There was no dispute about most of what had happened and, therefore, the facts of that the allegation. The claimant had failed to follow standard procedure by ringing up his own purchase, by ringing up his purchase with a discount and by failing to record the purchase. The claimant had accepted that he had applied a discount for himself, and he accepted that he had failed to record it correctly. He said that he was "stupid" in his actions.

133. His comments that the respondent's procedures indicating that it distrusted its employees, in the view of the Tribunal, indicated the claimant's lack of insight into the need for these procedures, which are standard practice in the retail industry. He simply did not understand, or affected not to understand, why the procedures were in place, and so did not accept the obvious explanation for the allegation, investigation and warning.

134. The element of the allegation that was not agreed was that the claimant had knowingly claiming a discount that he was not entitled to. In this respect, the Tribunal preferred the evidence of Ms Brown that she had told the claimant he was not entitled to a second discount for the following reasons. Her evidence was certain, convincing, plausible and consistent. As the television had already been discounted, it was more likely than not, in view of the tribunal, that a staff member would not be entitled to a second discount. This was her account both at the time and before the tribunal. Her evidence was consistent with Ms Hodges, the deputy manager, and other volunteers.

135. In contrast the claimant's evidence about what he was told about the television was, at the time, inconsistent and uncertain. (The Tribunal considered his evidence given at the material time, rather than his evidence before the Tribunal

in order to discount the effect of any current health issues.) Further, the claimant had made what the tribunal found to be unjustified allegations of forgery. Further, he had failed to follow the standard procedure in processing the purchase which was consistent with his seeking to avoid oversight of the purchase.

136. Accordingly, Ms Brown had made an accurate allegation against the claimant, that he had knowingly applied a second discount to his own purchase and failed to follow procedures. This was manifestly a serious matter and the tribunal could find no evidence suggesting that there was any racial motivation on Ms Brown's part.

137. The evidence available to the respondent at the time pointed to the claimant's culpability.

138. The conduct of respondent employees in this matter was not consistent with a conspiracy to exit the claimant because of his race. Ms Brown dismissed one charge against him at the first stage. The regional manager dismissed another charge, and the sanction was reduced to a first warning on appeal.

139. The Tribunal found, accordingly, that the respondent's conduct did not violate the claimant's dignity or create an unlawful environment under section 26. The respondent had made an accurate and significant allegation against the claimant, which was well evidenced, it had investigated appropriately and had been lenient with the claimant as to sanction. If the claimant perceived that his dignity was violated or that he was subjected to an unlawful environment, it was not reasonable for him to have this perception.

140. The second alleged act of harassment was placing the claimant on a performance improvement plan (PIP). The Tribunal accepted that this was unwanted conduct. If there was no justification for the PIP, this might amount to proscribed conduct under s26. However, the tribunal found that the respondent was justified in placing the claimant on the PIP for the following reasons.

141. The respondent had received a number of complaints from staff and, particularly, volunteers about the claimant's conduct and performance. He had previously received a warning for misuse of staff discount and failure to follow procedures in respect of his purchase. He had been given a letter of concern about leaving money out overnight. Mr Fernandez had witnessed the claimant's failures in working with his team.

142. The Tribunal found that the final warning in respect of the threat to the volunteer played a part in the decision to put the claimant on a PIP. The final written warning was for conduct, but it went to performance in relation to working with volunteers, in a store with many volunteers, of whom a number were vulnerable. The PIP in terms covered both conduct and capability. The conduct element was particularly focused on working with volunteers.

143. For the avoidance of doubt, the Tribunal found that the final written warning was justified. The claimant's conduct was serious; he threatened to punch a vulnerable volunteer in the face. Further, he was entirely unrepentant. There was no reason

not to think that he would do this again, because he thought he had done nothing wrong. He constituted a real risk in the future.

144. The claimant said that he was upset at the volunteer for failing to respect boundaries. In the view of the Tribunal, it was potentially reasonable for him to be upset at her conduct in the moment. However, he told the employer, after threatening to punch her in the face, what else was he expected to do? He said that anyone would have reacted in the same way or worse.

145. The Tribunal does feel required to express some surprise that the respondent permitted the claimant to continue working alongside vulnerable people in these circumstances. The Tribunal is respectful of the respondent's need to manage its operation as it sees fit. It is the employer. It has a charitable ethos. It sees itself as having a compassionate culture. It is not the Tribunal's role to oversee how an employer manages its operation. The Tribunal is well aware of the competing duties on the respondent as an employer in such circumstances. However, the respondent may well wish to consider how it protects vulnerable employees and volunteers going forward.

146. Accordingly, the tribunal found that placing the claimant on a PIP did not violate his dignity. If there are significant issues with an employee's conduct and performance, a PIP is appropriate and may be of assistance to the employee in that it gives him a chance to improve. For the same reasons, it did not subject him to an intimidating, hostile, degrading, humiliating or offensive environment.

147. For the avoidance of doubt, the tribunal did not find that there was any racial motivation to the respondent's conduct. The respondent had good reason for its conduct.

148. The third act of racial harassment was that the complaint made by the vulnerable volunteer against the claimant. When asked about this by the Tribunal, he resiled from this allegation. For the avoidance of doubt, the tribunal found no evidence to back up this allegation.

149. The Tribunal considered the volunteer's statements and allegations at page 273. It noted that the claimant did not say at the time that she was racially motivated in making her complaint. In respect of the complaint, he essentially said that she had disrespected him and that is why he was justified in threatening to punch her in the face. He said, 'I was upset and what did you expect me to do?' He said that he did not accept that the volunteer was justified in being scared. In effect, he thought his behaviour was justified and that he had not done anything wrong.

150. Again, the in the view of the tribunal, the claimant failed to recognise the problems with his behaviour. He therefore looked for another explanation when he was subject to a complaint, investigation and warning.

151. It was not reasonable for the claimant to perceive the volunteer's complaint as violating his dignity or creating an unlawful environment for him. She was justified in her complaint. She was vulnerable, physically much smaller than the claimant and the tribunal accepted that the incident would likely have been very frightening

for her. Further, there were no reasons to believe that race played any part in her decision to make a complaint. There was no reason to believe that if a white man had behaved as the claimant did, that she would not have complained.

152. As the tribunal was in all three cases of alleged harassment, able to make clear positive findings, it was not necessary, to go through the burden of proof provisions.

Direct race discrimination – section 13 Equality Act 2010

153. The claimant contended that he was discriminated against because he was black African.

154. This was a claim of what is often called subjectively discriminatory conduct (see *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC*). There was nothing inherently discriminatory about failing to appoint the claimant to the three roles. The question is the reason why the respondent acted as it did. The tribunal has to consider the respondent's mental processes.

155. The tribunal reminded itself of the guidance in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a case under legacy race legislation) as follows, 'many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

156. It does not matter if the decision-maker was consciously or sub-consciously racially motivated. The tribunal asks why they acted as they did.

157. Further, the House of Lords in Najaragan stated that for discrimination to be made out "racial grounds"(the material test) must have a significant influence on the decision. According to *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*, the discriminatory reason does not have to be the main reason, as long as it is an effective cause.

158. The Tribunal asked itself a simple question – why did the respondent act as it did?

159. There were three acts of discrimination alleged – passing over the claimant for promotion in respect of three roles.

160. The first occasion was Ms Hodges being appointed in July 2018 as West Wickham store manager. The claimant did not apply for this position and the claimant's complaint about this was first raised in Tribunal proceedings. Ms Brown told the Tribunal that she had encouraged Ms Hodges to apply. The putative discriminatory conduct was therefore that the claimant was not encouraged to apply. The

advertising process at the time, in effect, meant that a store manager, whilst not a gate-keeper, was able to exert some influence on who applied.

161. The factual basis of the claimant's complaint was inaccurate. His case was that Ms Hodges was a volunteer at the time. This was not the case. She was employed as maternity cover for the assistant manager at the claimant's store at Walworth Road. The tribunal could not understand how the claimant was unaware of this. She had been in effected promoted to this role before the claimant got to Walworth Road. He

162. Nevertheless, the tribunal considered if Ms Brown's encouragement of Ms Hodges but not the claimant was racially motivated.

163. In the view of the tribunal there were a number of reasons why Ms Brown had encouraged Ms Hodges and not the claimant. Firstly, whilst the claimant had been continuously employed since October 2016, he had only been at the Walworth Road store, and therefore known to Ms Brown, since April 2018. At the time of the vacancy, he had been at the store for about two months. Ms Hodges had been there was longer because she was in post when he arrived.

164. Secondly, Ms Hodges had a track record as working as a maternity cover manager. Ms Brown had worked with Ms Hodges as a manager. In the view of the Tribunal, the reason why Ms Brown encouraged Ms Hodges but did encourage the claimant is that she knew Ms Hodges and had experience of her performance in a managerial role. Ms Hodges had a track record. None of this applied to the claimant.

165. Finally, there was no evidence pointing to racial motivation. The claimant seemed to think that Ms Brown had taken against him. However, if that was the case and that she was involved in some form of conspiracy to exit him (and for the avoidance of doubt the Tribunal found no evidence of this), this did not fit well with her, in effect, missing an opportunity to transfer him out of her store.

166. Accordingly, the tribunal found that the reason why the claimant was not appointed and was not encouraged to apply was not because of his race.

167. The second act of discrimination was being passed over for promotion as Catford manager in November 2018. The claimant applied for this role and so the act of discrimination was the failure to appoint.

168. Although the claimant applied late, he was nevertheless given an interview. This was inconsistent with any bias or agenda against him because of his race or, indeed, for any other reason.

169. There was nothing to suggest that the successful candidate had anything other than a clean disciplinary record. In contrast the claimant was subject to a final written warning that had been reduced to a single warning on appeal.

170. The Tribunal considered the interview records and concluded that the performance of successful candidate at interview was materially superior to that

of the claimant, for instance, in respect of the comments made about working with volunteers.

171. The Tribunal found that the reason the successful candidate was appointed, and the claimant was not, was that she performed better at the interview. This was consistent with the fact that the claimant had at the time a poor disciplinary record.

172. The third alleged act of race discrimination was that the respondent had passed over the claimant for promotion to the role of assistant manager of Walworth Road in November 2018. The claimant's case was that the role was not advertised. The respondent's case (via Ms Hemmings's evidence) was that it was advertised at the same time as the Catford role. The tribunal preferred the respondent's evidence as Ms Hemmings would have personal knowledge of what adverts were sent out. Ms Hemmings's evidence was plausible and consistent. Further, there seemed to be no rationale when two managerial positions came vacant around the same time, to advertise one and not the other.

173. The tribunal found that the claimant did not apply for the Walworth Road vacancy when it was advertised. Accordingly, there could be no less favourable treatment as he had chosen not to apply and was therefore not passed over for promotion. The Tribunal did not find that the claimant's claim of direct discrimination was made out.

174. As the tribunal was in all three cases of alleged harassment, able to make clear positive findings, it was not necessary, to go through the burden of proof provisions.

<u>Victimisation – section 27 Equality Act 2010</u>

175. The claimant's earlier race discrimination employment tribunal claim amounted to a protected act.

176. The Tribunal went on to consider the alleged detriments (i) the allegations as to the television which resulted in the final written warning, and (ii) placing him on a PIP (both of which were reliable in the alternative as acts of harassment).

177. The essential question in a claim for victimisation is what motivated the decision-maker. When considering the employer's motivation, the protected act need not be the only reason for the employer's conduct. In *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, the House of Lords instructed tribunals to look for the core reason, the real reason, for the employer's action. In *Nagarajan v London Regional Transport* [1999] IRLR 572 the House of Lords told tribunals to ask if whether the protected act had a significant influence on the employer's decision making, whether consciously or sub-consciously. In *Villalba v Merrill Lynch* & Co Inc [2007] ICR 469 the Employment Appeal Tribunal stated, 'If in relation to any particular decision, a discriminatory influence is not a material influence or factor then in our view, it is trivial.' According to the EHRC Code, a protected act need not be the only reason for detrimental treatment.

178. There is no need for conscious motivation. The Tribunal does not need to distinguish between conscious and sub-conscious motivation when deciding if a respondent has victimised a claimant. The question is whether the discriminator sub-consciously permitted the protected act to determine or influence their treatment of the complainant.

179. The Tribunal firstly considered the television allegation. The claimant had accepted that he had acted foolishly. Further, the claimant had failed to understand, or affected to fail to understand, the reasoning behind the respondent's procedures. In the view of the tribunal, this is why he fell onto back on another explanation - the earlier race tribunal complaint.

180. The tribunal had found that the respondent's treatment of the claimant in respect of the television did not amount to an act of race harassment. The tribunal had found the allegation to be accurate, the investigation reasonable, and the sanction if anything, lenient. However, the test for a victimisation claim was different. The tribunal must decide to what if any extent the claimant's race discrimination complaint influenced the respondent's conduct in respect of the television incident.

181. There was no obvious link between the protected act and Ms Brown's allegation, the investigation and the sanction. Ms Brown was not involved in the previous Employment Tribunal case which related to a different store. In the view of the Tribunal, the respondent had provided a perfectly good explanation as to the allegation, the investigation and the sanction. The claimant had failed to follow his manager's instructions and the respondent's procedure and sought to obtain personal financial benefit.

182. The Tribunal accordingly found that the protected act had no influence on the respondent's conduct in respect of the television allegation and investigation

183. The Tribunal next considered if the protected act had any influence on the decision to place the claimant on the PIP.

184. The Tribunal had found that the decision to put the claimant on a PIP was in itself reasonable. At the time, the claimant was on two warnings following serious issues. A number of members of staff and volunteers had made complaints about the claimant. The claimant had failed to recognise his culpability in the vulnerable volunteer incident and therefore had given the respondent no indication that he would not behave in this way again. The tribunal found that in placing the claimant on the PIP, the respondent was giving the claimant a chance to prove himself.

185. The respondent did not give the claimant the benefit of the four-week PIP, as a decision was made after to progress to a hearing after only three and a half weeks. The tribunal considered whether this indicated any bias or agenda on the respondent's part.

186. The Tribunal could not find any evidence of any such bias or agenda, and indeed found evidence to the contrary. If the respondent had wanted to exit the claimant from its business, there were a number of opportunities where it failed to take

advantage. Ms Brown dismissed the handbag allegation against the claimant. Despite the serious nature of the findings against him concerning the television, he was not dismissed and the final written warning was reduced on appeal. Following the threat to the vulnerable volunteer, a matter in the Tribunal's view which would easily amount to gross misconduct, he was not dismissed but given a final written warning. In both cases the respondent , in effect, gave him another chance. This was not consistent with the respondent victimising the claimant because of a past Employment Tribunal race claim. The idea of bias against the claimant by the respondent was also inconsistent with the fact that the PIP included positive findings. It was not one-sided, and the claimant was given credit where due.

187. Accordingly, as the decision to place the claimant on the PIP was itself reasonable and there was there were a number of indications that the respondent had sought to give the claimant the benefit of the doubt on previous occasions, there was no reason to find that the protected act had any influence on the decision.

188. Accordingly, the victimisation claim was not made out.

Unfair dismissal – section 98 Equality Act 2010

189. The first issue was what was the reason for the dismissal? The reason for dismissal is the "set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee" (see *Abernethy* v *Mott*, *Hay and Anderson* [*1974*] *ICR 323)* .

190. The respondent relied in the alternative on conduct and performance, both of which are potentially fair reasons. The tribunal firstly had to determine the reason operating in the respondent's mind when it terminated the claimant.

191. At the time of dismissal, the respondent stated the reasons were performance and capability. The Tribunal found that this was the best guide to how the respondent characterised its reason for dismissal. The respondent viewed the claimant's conduct as an element of his performance. The two matters were interlinked. The final written warning for misconduct was relevant to performance because the claimant's failure to work well with volunteers was an element of his performance. Working well with volunteers was one of the most important issues in the PIP and it was essential to the respondent's business model and charitable ethos.

192. The tribunal was satisfied that the reason that the respondent placed the claimant on the PIP was there were genuine long-standing and material grounds for concern about the claimant's performance, including his working with volunteers.

193. The claimant's case was that the decision to place him on the PIP was racially motivated. The tribunal had rejected this contention for the reasons set out above. The Tribunal had also rejected his argument that there was a conspiracy for the reasons set out above.

194. Accordingly, the Tribunal found that the respondent had demonstrated that the reason for dismissal was capability and performance. As this is a potentially fair reason for dismissal, the Tribunal went on to consider reasonableness.

195. The Tribunal considered whether the respondent followed a reasonable procedure in dismissing the claimant. A Tribunal may not substitute its own view of what constitutes a fair procedure for that of the respondent. It is not enough for the Tribunal to find that it might have carried out a different procedure if it had found itself in the respondent's position. The question for the tribunal is whether the procedure adopted by this respondent came within a range of reasonable procedures available in these circumstances.

196. The claimant contended that the procedure was unreasonable because it was biased against him.

197. The Tribunal's main concern about the procedure was that the respondent cut short the four-week PIP by half a week and the claimant only had the benefit of three PIP meetings. The Tribunal accepted that there were some logistical reasons for this, such as annual leave. The tribunal did not accept that this was a result of bias against the claimant. For the reasons set out above, the tribunal had found that the respondent, had not been biased against the claimant, but, rather, had given him a number of chances and the benefit of doubt on several occasions.

198. Whilst it would unquestionably have been better for the respondent to have given the claimant the full four weeks of the PIP, the Tribunal could not find that this was enough to take the procedure outside of the reasonable range. The claimant was at the time of the PIP subject to two warnings. He had the advantage of three and a half weeks of the PIP with considerable resources and input from management. From the documents, there was no indication that the respondent had short changed the claimant in any other way in which it managed the PIP. The respondent went through each aspect of the PIP in detail at every meeting. Further, the claimant had denied that he needed any further training. This made it less likely that a further 4 days added to the end of the PIP, would have been material. Further, the claimant had the advantage of an independent appeal.

199. Finally, the claimant himself did not rely on this as an unfair aspect of the procedure. He put in a wide-ranging appeal and attended a lengthy appeal meeting where he was given an opportunity to state his case in full. At no point did he contend that the cutting short of the PIP had put him at any disadvantage or was unfair. He did not make this contention to the employment tribunal. The tribunal did not see this point as determinative. However, it indicated that the claimant himself did not view the length of the PIP as unfair, in circumstances where he raised a number of other allegations of unfairness. The tribunal accepted that the claimant was not represented legally, but he did represent that he was an educated person ("LLM, Master of Laws in international law. BA (Hon) International relations and law").

200. As to the procedure in general, the Tribunal found it unexceptional. The claimant had been warned about the possibility of dismissal. Documents were provided in advance of the meeting. He was allowed a companion. He had a dismissal hearing

in front of an independent manager and an appeal hearing in front of a further independent manager. The Tribunal could see no objection to the appeal manager relying on his own experiences of the claimant's working practices because it was the claimant who raised this. Further, the appeal manager openly discussed this at the appeal and permitted the claimant to have his say.

201. Accordingly, the tribunal found that the procedure came within a range of procedures available to a reasonable employer in the circumstances.

202. The Tribunal went on to consider the reasonableness of the decision to dismiss. This question is also subject to range of reasonable responses. The Tribunal may not substitute its view of what it would have done in the circumstances for that of the employer. The question is whether the decision to dismiss Kane within a range of responses available to a reasonable employer in the circumstances.

203. In the list of issues, the claimant took issue with fairness on the basis that:

    a. the sanction was too harsh; and
    b. the television allegation, placing the claimant on the PIP and the allegations by the volunteer were racially motivated.

204. Before the tribunal the claimant also contended strongly that it was unfair that the respondent had taken the final written warning into account. The Tribunal had found that the respondent did take the final written warning into account in its decision to dismiss.

205. The tribunal accordingly considered the relevance of the final written warning when determining the question of fairness, and applied the guidelines set out by the Employment Appeal Tribunal in *Wincanton Group plc v Stone 2013 ICR D6, EAT*

    a. A tribunal should take into account earlier warnings issued in good faith but, if a Tribunal considers the warning was issued in bad faith, it would not be valid and cannot be relied upon by the employer to justify any dismissal.
    b. A Tribunal may not go behind a valid warning to hold that it should not have been issued or that a lesser category warning should be issued.
    c. A Tribunal will not be going behind the warning where it takes into account the factual circumstances giving rise to it.
    d. A Tribunal must remember that a final written warning always implies, subject only to any contractual terms to the contrary [not relevant on these facts], that any subsequent misconduct whatever the nature will usually be met by dismissal and only exceptionally will dismissal not occur.

206. The Tribunal found that this final written warning was issued in good faith, for the reasons set out above. There were at the very least at first sight grounds for imposing it, and there was no question of it being manifestly inappropriate. The respondent reasonably concluded that the claimant believed that he was justified in threatening to punch the volunteer, who was physically small and had significant vulnerabilities, in the face. When challenged about his behaviour, he said, 'I was upset, what did you expect me to do?' He gave no indication that he

had any insight into what he had done wrong or that he would not repeat the behaviour.

207. The tribunal found that the final written warning was relevant to dismissal because failure to work with volunteers was a matter of both conduct and performance. The warning related to poor performance - the claimant's failure to work effectively with volunteers who were fundamental to the respondent's business. The volunteers no longer wanted to work with him and, on his own case, he took no steps to try to improve or resolve the situation.

208. In the view of the Tribunal, the reasonableness of the decision to dismiss came down to a simple question. Did the respondent give the claimant, who was on a final written warning, enough of a chance to improve? Was that decision within the reasonable range?

209. Some of the feedback during the PIP in respect of certain elements was good. However, the dismissing officer took into account the claimant's inability to work effectively with volunteers. The tribunal accepted the dismissing officer's evidence that he felt that there was no chance that this was going to improve because the claimant had failed to accept training and, in terms, blamed the volunteers for his inability to work with them. This was in circumstances in which volunteers were fundamental to the respondent's operation.

210. The claimant, in effect, had not engaged with the need for the PIP, particularly in respect of volunteers. This was demonstrated by his walking out of the meeting when the respondent tried to take him through the PIP, his blaming volunteers, and his failing to accept training.

211. The tribunal had found that the television allegation, placing the claimant on the PIP and the allegations by the volunteer were not racially motivated.

212. Accordingly, the Tribunal found that the decision to dismiss the claimant came within the range of reasonable responses in the circumstances.

213. For the avoidance of doubt, the Tribunal went on to consider the position if it had determined that the three and a half week PIP had taken the procedure outside of the reasonable range. In those circumstances, the tribunal would have had to consider whether the claimant would have been fairly dismissed in any event and/or to what extent and when.

214. The tribunal would have applied the case of *Polkey*. It directed itself in line with the well-known authority of Elias P as he then was *in Software 2000 Ltd v Andrews IRLR 2007 568*. A Tribunal must consider what might have been, had the respondent followed a fair procedure. This inevitably involves a degree of speculation. Nevertheless, the tribunal must speculate – but based on the evidence. It will be a rare case in which there is too little evidence to construct what might have been.

215. On these facts, a fair procedure would have resulted in the PIP being extended by four more days. There would have been a further meeting at which the claimant

would have received further feedback and been told that there was a risk that if he did not make improvements in the coming week, his job was at risk.

216. However, if this had happened, the Tribunal determined that it would have made no difference. On the balance of probabilities, and based on the claimant's own evidence, the claimant would not have changed. The claimant had said he did not need training and any fault lay with the volunteers. He simply did not see anything wrong with his performance and conduct, as shown by his reaction to the final written warning, his walking out of the PIP meeting, and the basis of his case before the Tribunal.

217. Accordingly, had the procedure had fallen outside of the range of reasonable procedures, Tribunal would have found made a 100% Polkey deduction.

Written reasons for dismissal – section 92 Employment Rights Act 1996

218. The claimant made a valid request for written reasons under section 92 by writing to the respondent requesting written reasons and referencing section 92 on 30 April 2019.

219. The respondent replied within 14 days - on 1 May - saying, 'please refer to the letter of termination with reasons.' However, this response the respondent's response referred to the wrong date.

220. Nevertheless, the tribunal did not find that the respondent had failed to provide a written statement under section 92 for the following reasons. Any failure of the respondent to provide a written statement under section 92 was not unreasonable because the claimant had been provided with a substantive letter of dismissal setting out the reasons for dismissal. This letter was detailed, lengthy and set out the employer's thinking and reasons. The respondent's response under section 92 on 1 May referred to this letter. Although the date was wrong, the tribunal or the balance of probabilities found that the claimant was in no doubt that the respondent was referring to the dismissal letter. The tribunal did not find that the particulars were inadequate or untrue because the tribunal had accepted the respondent's reasons for dismissal as accurate and genuine.

221. Accordingly, the respondent did not breach section 93 of the Employment Rights Act.

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Employment Judge Nash

Date: 25 July 2022

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