EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Steele	v	Sainsbury's Supermarkets Limited

Heard: At Reading and by CVP **On**: 13, 14, 15 and 16 March 2023 and in private on 20 March 2023

Before: Employment Judge Hawksworth
Mrs A E Brown
Mr P Miller

Appearances
For the Claimant: In person
For the Respondent: Ms C Scarborough (counsel)

RESERVED JUDGMENT

It is the unanimous decision of the tribunal that none of the claimant's complaints succeed:

1. The claimant's complaint of direct race discrimination in relation to his grievance complaint in June 2019 was presented outside the time limit, and it is not just and equitable to extend time to allow that complaint;

2. The claimant's other complaints of direct race discrimination fail and are dismissed;

3. The claimant's complaints of direct age discrimination fail and are dismissed;

4. The claimant's complaints of victimisation fail and are dismissed.

REASONS

Claim, hearing and evidence

1. The claimant, Mr Steele, is employed as a Trading Assistant for the respondent and has been employed by the respondent since September 2014.

2. The claim form was presented on 25 May 2021 after Acas early conciliation from 15 May 2021 to 17 May 2021. He claimed direct race and age discrimination and victimisation.

3. The respondent presented its response on 20 July 2021. The respondent defends the claim.

4. There was a preliminary hearing at which there was a discussion to clarify the complaints.

5. The final hearing took place on 13, 14, 15 and 16 March 2023. There was a deliberation day on 20 March 2023. The final hearing was scheduled to take place over six days but for judicial resourcing reasons the allocation had to be reduced to four hearing days and a deliberation day. Everyone attended the hearing in person on 13, 14 and 15 March 2023. There were travel difficulties on 16 March 2023 and the parties attended the hearing by video (CVP) for closing comments.

6. After reading the witness statements which had been exchanged by all witnesses, we heard evidence from the claimant on the afternoon of 13 March and on 14 March 2023. The respondent's witnesses gave evidence on the afternoon of 14 March and on 15 March 2023, in the following order: Mr Tiffin, Mr Stafford, Ms Needle, Mr Fossick, Mr Churchill, Mr Kelly, Ms Browning.

7. Both parties made helpful closing comments at the end of the hearing.

8. There was an agreed bundle of 415 pages. Page references in this judgment are references to the agreed bundle. On the first day of the hearing, the respondent provided late disclosure of three documents. The first two documents were a decision-making summary and notes of the appeal outcome meeting relating to the claimant's grievance in May 2021. They were numbered 416 to 421. A copy of a flexible working policy was added as pages 422 to 428. On the morning of the second day of the hearing the respondent disclosed a disciplinary case report which it had not been able to locate earlier because the employee's name had changed. We added this at pages 429 to 432. These documents were added by consent. They were short and related very clearly to the issues we have to decide. We gave the claimant the opportunity to comment on the documents.

9. We reserved judgment and met in private on 20 March 2023 for deliberation.

The Issues

10. The issues for us to decide were clarified at a preliminary hearing on 14 February 2022. A copy of the case summary and list of issues is attached as an appendix.

11. We heard evidence, made findings of fact and reached conclusions on these issues.

Findings of fact

12. In this section, we say what happened in the claimant's case. Where the parties disagree about what happened, we have to decide what we think is most likely to have happened, based on the evidence we heard and the documents we read.

13. Mr Steele started working for the respondent in September 2014. At the time he was 46 years old. He is still employed by the respondent working three night shifts a week.

Issue a) Mr Steele's complaint about workload in 2015

14. In October 2015 Mr Steele made a complaint that he was being required by the night shift manager to undertake more heavy lifting work and to achieve higher performance targets than other members of staff. He emailed the HR manager Karen Smith on 25 October 2015 to raise his concerns (page 51). This email was alleged by Mr Steele to be a protected act.

15. Mr Steele raised two concerns in the email, in summary these were:

    15.1 'I am being persistently bullied by one of your night shift managers to perform to a much higher level than other colleagues through their demands to pressure me into working in two heavy areas during one shift';

    15.2 'The same night shift manager announced and disclosed personal details regarding the birth of my daughter without any permission from either me or the mother … [with] no regard for personal or sensitive information.'

16. Mr Steele described the expectation on him to work harder as a 'discriminating approach'. He concluded by saying he was appalled with the bullying culture adopted by the manager, and that he would not tolerate his forms of victimisation and unprofessionalism with regards to sensitive personal information. We find that the email did not contain any allegation of a breach of the Equality Act 2010.

17. In his evidence before us, Mr Steele said the reason why he thought he was being placed in roles requiring more heavy lifting was because he 'looks like a big strong guy'. He accepted that his physical size was not to do with his race or age.

18. Mr Green, the deputy store manager, carried out an investigation into the claimant's complaint. He met with the night shift manager on 30 October 2015 (page 52). Mr Green met with Mr Steele on 13 February 2016 to tell him the outcome of the investigation (page 54). He outlined a number of steps to be taken to address the concerns raised:

    18.1 The productivity tool summary sheet would be reviewed (to check allocation of roles and targets);

    18.2 the night shift manager would be asked to move people to ensure a fair spread of roles across the shift, and this would be reviewed;

18.3 the night shift manager would be given feedback about how Mr Steele felt.

Issue b) Mr Steele's request to change his working pattern in 2017

19. On 12 February 2017 Mr Steele emailed Ms Smith to ask if he could change his working pattern. He wanted to switch one of his shifts from Friday night to Wednesday night, because of caring responsibilities. He wanted the new working pattern to start from 8 March 2017 (page 403). He addressed his email to Ms Smith because there had been a change in night shift manager and he was not aware who his new manager was.

20. Ms Smith replied to Mr Steele on 14 February 2017, and spoke to the two new night shift managers. On 17 February 2017 one of the new managers, Steve Tiffin, spoke to Mr Steele about his request. Mr Tiffin asked Mr Steele about his caring arrangements, and explained that business requirements would have to be considered to decide whether the change of shift by Mr Steele, an experienced member of staff, could be accommodated.

21. Mr Steele was unhappy about the discussion with Mr Tiffin. He felt he was being interrogated about his caring responsibilities. We find that Mr Tiffin asked Mr Steele about his responsibilities so that he could understand what he needed and see if the business could accommodate this.

22. Mr Steele understood that Mr Tiffin had refused his request. We find that Mr Tiffin had not actually refused the request but had flagged up that business requirements would need to be taken into account when considering whether it could be granted.

23. Mr Steele emailed Ms Smith again on 19 February 2017 (page 402). She replied the following day to say she was sorry the request hadn't been resolved. She asked Mr Steele to leave the matter with her (page 401).

24. In the meantime, Mr Tiffin had checked and decided that the change requested by Mr Steele could be allowed, because the respondent often had staff working overtime on Wednesday nights. We find that Mr Tiffin spoke to Ms Smith and senior managers in the store and that he then made the decision to allow the change. A contractual change form setting out the change was signed on 5 March 2017 and was in place by 8 March 2017 as requested by Mr Steele (page 405).

25. The respondent had a flexible working policy although Mr Steele was not aware of the flexible working policy when he made his request (page 422). The policy provided that:

    25.1 the line manager would discuss the request with the employee to get a better idea of what changes the employee was looking for (page 425);

    25.2 relevant business factors would be taken into account when considering requests (page 423);

    25.3 from making the request to the end of an appeal (if required), the process could take up to 3 months from start to finish (page 424).

26. We find that Mr Tiffin dealt with Mr Steele's request in accordance with this policy and much more quickly than the maximum timeframe it suggested.

Issue c) Mr Steele's grievance about racial abuse and the disciplinary in 2019

27. On 23 June 2019 Mr Steele made a complaint by email to one of the night shift managers that he had been subjected to aggressive and threatening behaviour and racial abuse by a colleague during a night shift on 18/19 June 2019 (page 59). Mr Steele said that his colleague had sworn at him several times, including saying 'Why don't you have a fucking wash, you dirty cunt?'. In his complaint, Mr Steele explained why he felt this comment to be racial abuse; he said he was from an Anglo-Indian background, and said the colour of his skin, 'by the way is not dirty, it is just not white'.

28. Mr Steele's complaint was investigated by Karl Stafford, a retail manager. He invited the claimant to come to a meeting on 25 June 2019 to discuss his complaint and consider how it could be resolved (page 62). At the meeting, Mr Stafford suggested mediation between Mr Steele and his colleague, saying that this was how the respondent usually tried to resolve 'disputes with work colleagues shouting at each other'. Mr Steele was unhappy about the incident being described in this way; he felt he had been shouted at, but had not shouted back. Mr Steele said he did not want mediation and the only resolution he wanted was for his colleague to be disciplined. After this meeting, the claimant was not provided with any update about his complaint. The respondent's policy says that cases of discrimination and harassment are normally dealt with using a formal approach (page 334).

29. Mr Stafford took statements from three colleagues who saw the incident. They all said that Mr Steele and his colleague were both shouting and swearing, and that they were equally abusive to one another (page 65). The witness statements were not available to us because the respondent changed its HR system and some documents had not migrated over to the new system. Mr Stafford decided that there was potential misconduct by Mr Steele and his colleague, and that the respondent's conduct procedures required that they should both be subject to disciplinary investigations.

30. Mr Steele was invited to an investigatory meeting with Mr Stafford which took place on 10 July 2019 (page 67). During the meeting Mr Steele suggested that a statement should be taken from a fourth colleague who saw the incident. Mr Stafford stopped the meeting and went to interview that colleague. He took a note, then returned and reported back to Mr Steele what the fourth colleague had said. Mr Stafford said that colleague did not support Mr Steele's account. That note was not available to us because of the change in the respondent's HR system.

31. At around the same time Mr Stafford held an investigatory meeting with the colleague Mr Steele was complaining about (page 431). There was no record of that meeting before us. We find that Mr Stafford recommended that both Mr Steele and his colleague should be put forward to a disciplinary hearing, but Mr Steele's colleague was on sick leave and his hearing was delayed. There is no evidence before us as to whether any disciplinary hearing took place with Mr Steele's colleague.

32. Mr Steele's disciplinary hearing took place on 24 July 2019 with another retail manager, Nicholas Scott (page 85). Mr Steele was provided with copies of the statements taken from the three colleagues who observed the incident, and the notes of the discussion between Mr Stafford and the fourth colleague (page 84).

33. Mr Scott decided that the claimant had 'no case to answer' in relation to his conduct, and the disciplinary process came to an end. The claimant was not provided with any written confirmation of this outcome and he emailed Mr Scott about this on 1 September 2019 (page 89).

34. It was not clear to the claimant whether his grievance complaint had been concluded or not (page 88). In the same email to Mr Scott, which was copied to his trade union representative, he asked for a formal update on the current status of his complaint. Mr Steele also said that he felt Mr Stafford had condoned the racial harassment that he had complained about, and was just as racist as the colleague who directed a racist comment at him (page 90).

35. On 14 September 2019 Mr Scott replied to the claimant to say that he would not receive any written confirmation of the conclusion of the disciplinary process, as letters were not issued where the conclusion of the disciplinary process was 'no case to answer' (page 91). Mr Scott also said that he did not believe Mr Stafford had been intentionally or accidentally racist towards Mr Steele. He did not provide any update on the status of Mr Steele's grievance complaint.

36. Mr Steele replied to Mr Scott on 18 September 2019 noting, 'You do not want to provide a formal update to the current status of my complaint' (page 93). Mr Steele did not ask again for an update. There was no evidence of any further correspondence between Mr Steele and the respondent about his grievance.

37. In his evidence to us, Mr Stafford said that he had not upheld Mr Steele's grievance, because there was nothing to suggest that Mr Steele's colleague had demonstrated any racial aggravation, and no racial language was used. He based this decision on the lack of intention of the person making the comments. He said that in reaching this decision, he also relied on the witness statements from the four colleagues who had witnessed the incident.

38. Mr Steele was not informed of Mr Stafford's decision or the reasons for it. It seems likely to us that the grievance complaint was overlooked when Mr Stafford decided that disciplinary proceedings should be brought against both Mr Steele and his colleague.

Issue d) The investigation into excessive breaks in April 2020

39. On 28 April 2020 Mr Steele was asked to attend an investigation meeting into allegations that he had been taking excessive time away from the department (page 97). The investigation meeting was conducted by Kay Foster, a customer experience manager. She explained that the

investigation had been prompted because a manager noticed a pattern of behaviour where the claimant left the shop floor between 11.00pm and 11.30pm on his last three shifts. Mr Steele explained that these were bathroom breaks. He did not put forward any medical reason to suggest a need to use the toilet more frequently or at particular times. Ms Foster decided that because of the pattern of absence and the length of time away, the matter should go forward to a disciplinary hearing (page 104).

40. The disciplinary meeting took place on 12 May 2020 with Sarah Needle, a customer and trading manager (page 111). Mr Steele was accompanied by his trade union representative. He raised a concern that the matter had not been dealt with informally, before being considered formally. Ms Needle spoke to the shift managers and confirmed that there had been no informal discussion about the claimant's conduct. She decided that there should be no further action (page 119). She gave guidance around expectations for reasonable time away from the shop floor. She asked HR to send Mr Steele confirmation of the conclusion of the process (page 109).

41. We accept the evidence of Ms Needle that the respondent viewed CCTV from the shop floor and staff areas as part of the investigation into the claimant's absences. The investigation included consideration of CCTV of the shop floor and CCTV of the corridors which included the doors to the staff locker rooms. However, there was no CCTV of the staff toilets or the doors to the staff toilets and no specific monitoring of the claimant.

<u>Issue e) The investigation into the claimant's work on the cheese aisle in July 2020</u>

42. On 8 July 2020 Mr Steele was invited to an investigation meeting with Joe Cansell, a customer experience and trading manager (page 121). The investigation was into an allegation that the claimant had not finished unpacking a cage of cheese and had left at the end of his shift without communicating this to his managers. This was contrary to an instruction given at the start of the shift (page 131). Mr Cansell decided that the allegation should go forward to a disciplinary hearing (page 134).

43. The disciplinary hearing took place on 14 July 2020 with Karl Stafford (page 137). Mr Stafford was the manager who had dealt with the claimant's grievance and investigation in 2019. At the meeting Mr Steele explained that he had not heard the instruction to inform managers if tasks could not be completed before the end of the shift. Mr Stafford decided that Mr Steele's actions were not deliberate and that he should be given the benefit of the doubt. Mr Stafford felt that the respondent's procedure had not been followed (page 151). He accepted the suggestion made on behalf of the claimant that this was a performance/capability issue rather than a conduct issue. He decided that no further action should be taken under the conduct process.

<u>Issues f) and g) Mr Steele's grievance about the high-vis vest incident in March 2021</u>

44. On 4 March 2021 the team the claimant worked with was provided with high-vis vests which had a message to promote social distancing. Because of supply difficulties during the pandemic, only one size of high-vis vest was available, and staff were told to bring them in for every shift. The manager, who was new, said that if anyone attended without their vest, they would be sent home without pay to get it.

45. On 6 March 2021 Mr Steele raised a grievance about this new manager (page 158). Mr Steele said that she had put pressure on him to complete his work and that she had suggested that he had not rotated products properly. Mr Steele pointed out that she had made a mistake about this. Mr Steele said that this was harassment and discrimination.

46. Mr Steele updated his grievance to include another incident on 7 March 2021 when the same manager sent Mr Steele home after he attended for work without his high-vis vest. Mr Steele was not paid for this day (page 227).

47. Mr Steele's grievance was considered at stage 1 by Paul Bryan, a store manager. Mr Bryan met with the manager Mr Steele had complained about (page 176). She said that she had sent Mr Steele home when he attended for work without his high-vis vest, because she had understood this was the instruction to managers from the store manager (page 178). She had sent at least one other employee home to get their high-vis vest.

48. Mr Bryan held a meeting with Mr Steele on 23 March 2021 (page 172 and 180). He met with Mr Steele again on 30 March 2021 to go through his findings (page 206). Mr Bryan partially upheld Mr Steele's grievance (page 223). He decided that Mr Steele should not have been sent home unpaid; he should have been given another vest. The instructions given to Mr Steele's manager had been wrong. He decided that Mr Steele should be paid for the day he had missed. Mr Bryan did not uphold the complaint of harassment and discrimination (page 239).

49. Mr Steele appealed against Mr Bryan's decision (page 242). The appeal manager was Nigel Fossick, another store manager (page 246). As part of his appeal Mr Steele asked Mr Fossick to look into the three previous disciplinary allegations against him (page 250). Mr Fossick was given the appropriate permissions by the respondent's HR team to allow him to access previous disciplinaries on the relevant HR system. Normally, managers considering a grievance or disciplinary process only have access to information about that specific process.

50. Mr Fossick conducted a thorough investigation. He reviewed Mr Steele's grievance and Mr Bryan's decision in line with the respondent's policy. Mr Fossick reviewed all the notes from meetings and previous investigations held (page 252). He felt that there were coaching opportunities for managers who had dealt with the previous disciplinary investigations into Mr Steele, but found no evidence of collusion.

51. Mr Fossick met with Mr Steele on 14 May 2021 to explain the outcome of the appeal. Mr Fossick did not uphold Mr Steele's appeal (page 251).

The employment tribunal claim and amendment to the claim

52. On 15 May 2021 Mr Steele notified Acas for early conciliation. The early conciliation certificate was issued on 17 May 2021 and Mr Steele presented his employment tribunal claim on 25 May 2021, alleging race and age discrimination and victimisation.

53. Mr Steele explained that the reason why he did not at an earlier stage make complaints or bring a tribunal claim about his treatment was that the cumulative nature of the incidents made him realise there was unlawful discrimination, as he looked back on what had happened.

54. At a preliminary hearing on 14 February 2022 the tribunal gave permission for Mr Steele to amend his claim to include a complaint about an investigation which started in December 2021 (issues h and i).

Issues h) and i) the investigation into the claimant's work in December 2021

55. On 1 December 2021 Nigel Churchill, a manager in the store where the claimant works, was investigating an issue about out of date stock on the meat aisle. He reviewed the CCTV recordings for the aisle. He observed the actions of around 6 or 7 staff. He could see that staff on the day shift were carrying out their checks very thoroughly. When he reviewed the night shift he saw a colleague behaving in an unusual manner. Mr Churchill later found out that this was Mr Steele. Prior to this, Mr Churchill was not specifically investigating Mr Steele's conduct.

56. Mr Churchill could see from the CCTV that Mr Steele was zig-zagging from shelf to shelf, apparently without checking products dates or putting products out and at one stage he kicked the wheels of a trolley. Mr Churchill reviewed the CCTV for the whole shift and saw that Mr Steele appeared to be putting products out very slowly. In one half hour period, he put out three cases of products. The average rate is 55 cases per hour.

57. Mr Steele's conduct was not related to the out of date stock issue, but Mr Churchill felt that he needed to investigate Mr Steele's conduct and in particular the slow speed of work. He invited Mr Steele to an investigation meeting on 1 December 2021 to give him the opportunity to explain his actions (page 277). At the meeting Mr Churchill played an extract of the CCTV to Mr Steele, showing him the half hour period where he had put three cases of products out. After a short break, Mr Steele said that he was going from one section to another because customers shop this way, meaning the products can be all messed up.

58. Mr Churchill decided that Mr Steele's behaviour was 'so far removed from required standards' that it should be put forward to a disciplinary hearing (page 284).

59. Mr Steele's disciplinary hearing took place on 29 December 2021 (page 286 and 288). It was heard by Chris Kelly, a store manager. Mr Steele said that he was being victimised, and the respondent had not looked at the speed other colleagues were putting out products. He did not accept that he had done anything wrong. Mr Kelly decided that Mr Steele had not offered a real

reason for his poor performance and should be given a written warning (page 297). The written warning recorded that Mr Steele's performance in the time observed was not up to standards and he offered little mitigation as to why this had occurred. The warning was to remain live for a period of 12 months (page 299).

60. Mr Steele appealed against the written warning on 4 January 2022 (page 301). The appeal was heard on 22 February 2022 by Carla Browning, a store manager (page 306). Ms Browning paused the appeal to allow her to make further enquiries, including as to whether the allegation should be considered as a capability matter rather than as a conduct matter. She concluded that deliberate non-performance could be treated as a conduct issue rather than a capability issue.

61. The appeal resumed on 15 March 2022 (page 317). Ms Browning discussed her further enquiries with Mr Steele and gave him the opportunity to comment. She decided that although there were some things which could have been better explained during the process, replenishing 3 cases in 30 minutes was not acceptable and that the original decision to give a written warning should be upheld (page 323 and page 325).

62. The appeal outcome was communicated to Mr Steele by letter on 28 March 2022.

The Law

63. In this section we set out the legal principles which apply to the claims the claimant is making.

Direct discrimination

64. Race is a protected characteristic under sections 4 and 9 of the Equality Act 2010. Race includes ethnic and national origin.

65. Age is also a protected characteristic: section 5 says that being a person of a particular age group is a protected characteristic.

66. Direct discrimination because of race or age is prohibited. Section 13(1) of the Equality Act says:

> *"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."*

67. Less favourable treatment on grounds of race is unlawful.

68. There is an extra stage which needs to be considered in cases of direct age discrimination. Less favourable treatment on grounds of age is unlawful if the employer cannot justify the treatment. Sub-section (2) says:

> *"If the protected characteristic is age, A does not discriminate against A if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

Victimisation

69. The word victimisation is used in a technical sense in the Equality Act 2010. It means more than singling someone out for unfair treatment. It means subjecting someone to detrimental treatment because they have made a complaint of unlawful discrimination, or because they have done something else in connection with the Equality Act.

70. Section 27 of the Equality Act sets out the protection against this kind of victimisation. It says that it is unlawful to subject someone to a detriment because they have done a protected act. Doing something in connection with the Equality Act or making an allegation that someone has contravened the Equality Act count as protected acts, as explained in section 27:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because –*
>
> *a) B does a protected act…*
>
> *(2) Each of the following is a protected act -*
> *…*
> *c) doing any … 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."*

Burden of proof

71. Sub-sections 136(2) and (3) of the Equality Act provide for a reverse or shifting burden of proof:

> *"(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) This does not apply if A shows that A did not contravene the provision."*

72. This means that if there are facts from which the tribunal could properly and fairly conclude that a difference in treatment was because of the protected characteristic or that a detriment was because of a protected act, the burden of proof shifts to the respondent.

73. Where the burden shifts, the respondent must prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of the protected characteristic or the protected act.

Time limit

74. The time limit for bringing a complaint of direct discrimination or victimisation is set out in section 123 of the Equality Act. A complaint may not be brought after the end of:

> *"(a) the period of three months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable".*

75. Conduct extending over a period (sometimes called a 'continuing act') is to be treated as done at the end of the period (section 123(3)(a)).

76. Failure to do something is treated as occurring when the person in question decided on it (section 123(3))b)). Sub-section 123(4) says that in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

> *"(a) When P does an act inconsistent with doing it, or*
> *(b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

77. Employment tribunals have a wide discretion to extend time under the 'just and equitable' test in section 123(1)(b) and may take into account all relevant factors (*Hutchinson v Westward Television Ltd* 1977 ICR 279 (EAT)). However, 'there is no presumption that the tribunal should [extend time] unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule' (*Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA). This does not mean that exceptional circumstances are required; the test is whether an extension of time is just and equitable.

Conclusions

78. We have applied these legal principles to the facts as we have found them, to reach our conclusions on the issues we have to decide. We have started by considering the complaints of direct race and age discrimination. We go on to the complaints of victimisation. We turn at the end to the question of time limits.

<u>Direct race/age discrimination</u>

79. In relation to each of the claimant's complaints of race and age discrimination, we first remind ourselves of our findings of fact and whether we have found that the respondent did what the claimant alleges it did. Next, we decide whether we have evidence from which we could conclude that there was discrimination, such that the burden of proof shifts to the respondent. If the burden does shift to the respondent, we decide whether the respondent has satisfied us that the treatment was in no sense whatsoever because of race or age.

80. We have dealt with some of the complaints together, where they are related.

Issue a) The Claimant was required to undertake more heavy lifting work and to achieve higher performance targets than other members of staff by the Night Shift Manager around October 2015

81. We have found that the respondent agreed to take steps to address Mr Steele's complaint that he was required to undertake more heavy lifting. The manger was asked to ensure a fair spread of roles across the shift. We have not found that the claimant had higher performance targets.

82. There is no evidence from which we could conclude that allocating the claimant more heavy lifting work was anything to do with age or race. The claimant thought it was because he looked big and strong, and he accepted that this was nothing to do with race or age.

83. Although allocating more of the heavy duties to Mr Steele might have been unfair treatment of Mr Steele, that is not the legal test we have to consider. We have to consider whether there is evidence from which we could conclude that this treatment was because of race or age. As there is no evidence from which we could conclude that, the burden of proof does not shift to the respondent in relation to this complaint.

Issue b) The Respondent refused to allow the Claimant to adjust his working hours (due to family caring obligations) for reasons not detailed within the company policy on or about 12 February 2017

84. We have found that Mr Tiffin did not refuse to allow the claimant to adjust his working hours. There was a period of a little over two weeks between the claimant's first conversation with Mr Tiffin on 17 February 2017 and his request being allowed on 5 March 2017. Mr Steele was permitted to change his shifts by the date he had requested. His request was dealt with very promptly and in line with the respondent's policy.

85. The first conversation Mr Tiffin had with the claimant was to understand more about his request. It was not to do with race or age. Even if we had found that Mr Tiffin initially refused the claimant's request before being asked by Ms Smith to reconsider, we would not have found Mr Tiffin's first decision to have been related in any way to race or age.

86. This complaint fails on the facts, because there was no refusal to allow the rqeuest. In any event, the way in which Mr Steele was treated in connection with this request was not to do with race or age.

Issue c) The Respondent failed to properly investigate or take action in relation to an alleged incident of racial discrimination towards the Claimant in relation to a dispute between the Claimant and his colleague on 18 June 2019

87. We have found that Mr Steele complained of racial abuse by a colleague on 23 June 2019. The claimant was not provided with an outcome to his complaint, despite the complaint being of a type which the respondent's policy said would normally be dealt with using a formal approach. The claimant chased up the outcome to his grievance in emails to Mr Scott in

September 2019 and requested a 'formal update' but no response was provided on the complaint.

88. We could infer from the failure to provide a proper response to Mr Steele's complaint of racial abuse that the way the complaint was dealt with amounted to race discrimination. The formal approach provided for in the policy was not followed. We could infer from this that the respondent was reluctant to properly address the complaint because it related to race.

89. In light of this conclusion, we have decided that the burden of proof on this complaint of race discrimination shifts to the respondent. We look to the respondent to provide a cogent explanation for the way in which the grievance was dealt with, an explanation which is not in any way related to race.

90. The respondent gave the following explanations for the way in which the grievance was dealt with:

    90.1 Mr Stafford decided that the person who made the comment did not intend it to be racist (he did not consider the effect on Mr Steele and whether that was a reasonable response);

    90.2 this was supported by the evidence given by four colleagues who had witnessed the incident;

    90.3 it was not possible to provide Mr Steele with the outcome of his grievance because that would mean providing him with personal information about the colleague he was complaining about.

91. The conclusion that there was no racial aggravation and no racial language omitted consideration of the effect on Mr Steele. Mr Steele had specifically set out the words used and had explained why he thought those words related to the colour of his skin. Further, we do not understand why Mr Steele could not have been provided with an outcome to his grievance, even if the outcome could not go into detail about what steps were being taken in respect of his colleague. Failing to provide any response gave the impression that the grievance complaint had not been considered.

92. For these reasons, we conclude that we are not satisfied on the evidence we have seen that the respondent has discharged the burden of proof in relation to this complaint, because of the lack of cogent explanation for the decision that the claimant had not been subject to racial abuse and the lack of cogent explanation as to why the claimant was not told of the outcome of this complaint.

93. On the face of it, our conclusions at this point mean that this allegation of race discrimination should succeed. However, we are conscious that the statements of the witnesses and the person complained about on which the respondent relies to support its explanation were not available to us, because of a change in HR system. We need to consider this point further in the context of whether this complaint was brought within the required time limit. We return to this below.

94. As to the complaint of age discrimination, we have decided that there is no evidence from which we could conclude that age played a part in this treatment. The burden of proof does not shift to the respondent in respect of the complaint of age discrimination. There is nothing to suggest that the failure to investigate the claimant's complaint was anything to do with age.

Issue d) The Respondent covertly monitored the Claimant on CCTV when entering and exiting the bathroom, and subjected him to disciplinary action in relation to his use of the bathroom on or about 28 April 2020

95. We have not found that the respondent monitored the claimant entering and exiting the bathroom (covertly or otherwise). We have found that the reason that the disciplinary process was triggered was because a manager noticed that he claimant was absent from the shop floor for a period of around half and hour at the same time on three consecutive shifts. The investigation was into the claimant's absence, not his bathroom breaks.

96. The matter was investigated by a manager who had not had any involvement with any previous complaints by or concerning the claimant. The disciplinary manager accepted the claimant's explanation about the absence, and provided him with guidance around expectations.

97. There is no evidence from which we could conclude that the decision to start disciplinary proceedings on this occasion or the steps taken under the process were because of race or age. The burden of proof does not shift to the respondent in respect of this complaint, either in relation to race or age discrimination. If we had found the burden to have shifted, we would have accepted that the respondent's explanation for the instigation of this disciplinary action was nothing to do with race or age.

Issue e) In or around 8 July 2020, the Respondent required the Claimant to undertake more heavy lifting work and to achieve higher performance targets than other members of staff and concerns about the Claimant's productivity issues by treating them according to procedures in relation to Conduct rather than issues of Capability or Performance

98. We have not found that the respondent required the claimant to undertake more heavy lifting work or to achieve higher performance targets on this occasion. We have found that that this disciplinary process was prompted by the claimant failing to notify his manager that he was unable to finish a task before his shift had ended.

99. The matter was investigated by a manager who had not previously been involved with complaints by or concerning Mr Steele. The disciplinary manager was Mr Stafford who was involved previously as investigation manager. On this occasion Mr Stafford accepted what was said by the claimant and decided that no further action should be taken. He gave Mr Steele the benefit of the doubt.

100. Again, there is no evidence from which we could conclude that the decision to conduct disciplinary proceedings on this occasion or the steps taken under the process were because of race or age. The burden of proof does

not shift to the respondent in respect of this complaint, either in relation to race or age discrimination. If we had found the burden to have shifted, we would have accepted that the respondent's explanation for the instigation of this disciplinary action was nothing to do with race or age.

Issue f) The Respondent threatened, on 4 March 2021, to send the Claimant home for failure to wear a high visibility vest despite not providing a vest of a suitable size; and

Issue g) The Respondent refused to allow the Claimant to work and/or pay the Claimant in relation to failure to wear a high visibility vest on 7 March 2021

101. We have found that the claimant's manager told all her staff that they would be sent home to get their high-vis vest if they attended work without it, and that only one size was provided because of supply problems during the pandemic. We have also found that on 7 March 2021 the claimant was sent home without pay when he attended work without his high-vis vest. We have found that the respondent accepted the claimant's grievance about this, and said that he should not have been sent home. Mr Steele was later reimbursed the deducted pay.

102. There is no evidence from which we could conclude that the decision to issue the instruction on 4 March 2021 or to send Mr Steele home on 7 March 2021 was because of race or age. There had been a miscommunication of instructions about this within the management team. Another employee was treated in the same way. The respondent accepted the claimant's grievance about this and rectified the pay issue.

103. The burden of proof does not shift to the respondent in respect of this complaint, either in relation to race or age discrimination. If we had found the burden to have shifted, we would have accepted that the respondent's actions in relation to the high-vis vests was nothing to do with race or age.

Issue h) Nigel Churchill, a deputy store manager for the Respondent, required the Claimant to undergo a disciplinary process in respect of breach of company procedures on or about 1 December 2021; and

Issue i) Chris Kelly, the Respondent's store manager (in collaboration with Nigel Churchill) required the Claimant to undergo a disciplinary process in relation to breach of replenishment procedures, poor productivity and/or breach of health and safety standards on or about 29 December 2021

104. We have found that the reason that the disciplinary process was triggered on this occasion was because a manager was looking at CCTV of the shop floor for a reason unconnected with the claimant. He observed the actions of around 6 or 7 other staff before observing the claimant. He considered that the claimant's conduct and speed of working was not in line with required standards. Mr Steele was not being unfairly singled out by Mr Churchill. His performance as seen on the CCTV was much slower than expected. Other colleagues observed on the CCTV by Mr Churchill were not acting in this way. Mr Churchill played Mr Steele a thirty minute clip of the CCTV, but he

did not unfairly limit his observations to this one period, he reviewed the CCTV for the whole shift.

105. Neither the investigating or disciplinary managers had any involvement with any previous complaints by or concerning the claimant.

106. There is no evidence from which we could conclude that the decision to conduct disciplinary proceedings on this occasion or the steps taken under the process were because of race or age. The burden of proof does not shift to the respondent in respect of this complaint, either in relation to race or age discrimination. If we had found the burden to have shifted, we would have accepted that the respondent's explanation for the instigation of this disciplinary action was nothing to do with race or age.

107. We also accept the explanation of Mr Kelly that the reason a written warning was issued was because Mr Steele offered little explanation as to why he had performed so slowly in the time observed and did not accept that he did anything wrong. This was not to do with race or age.

Victimisation

108. We have next considered the complaint of victimisation, that is the complaint that Mr Steele was subjected to detrimental treatment because of his complaint of 25 October 2015.

109. We first have to decide whether the email of 25 October 2015 was a protected act, that is whether it was:

    109.1 for the purposes of or in connection with the Equality Act 2010, or

    109.2 making an allegation that the respondent or an employee of the respondent had contravened the Equality Act 2010.

110. We carefully considered the email of 25 October 2015 in full. We found that there is nothing in the email which references or could be understand as referencing the Equality Act 2010. There is no reference to race or age discrimination, or to discrimination because of any other protected characteristic. Although it is not necessary to refer to the Equality Act itself or to use the language of the act, there must be something done for the purposes of or in connection with the act for the email to count as a protected act.

111. The focus of the email was bullying, health and safety and disclosure of sensitive personal information. Those are not complaints about conduct under the Equality Act.

112. We have concluded that the email of 25 October 2015 was not a protected act within the meaning of section 27. That means that the complaints of victimisation cannot succeed.

113. For completeness, we record that Mr Steele's email of 23 June 2019 in which he complained of racial abuse was a protected act. It included an

allegation from which it could be understood that Mr Steele was saying that there had been racial harassment which contravened the Equality Act.

114. However, even if we had found that the email of 25 October 2015 was a protected act, or even if the email of 23 June 2019 had been identified as a protected act, we would still not have found any of the complaints of victimisation to have succeeded. This is because we would not have found that the treatment to which Mr Steele was subjected by the respondent was because of any earlier complaint he made. There was no evidence from which we could conclude that it was. The various disciplinary and grievance procedures were largely dealt with by different people, none of whom were aware of the earlier matters. Mr Stafford, the only manager who was aware of the complaint of race discrimination and the only manager who had any real involvement with two different parts of the complaint, reached an outcome which was favourable to the claimant when he was involved with a disciplinary process on the second occasion.

115. We would not have found that there was any evidence from which we could have concluded that either of these emails were the reason for any of the later acts about which Mr Steele complains, such that the burden of proof would have shifted to the respondent. Even if the burden had shifted, we would have accepted the explanations given by the respondent for the treatment which post-dated the claimant's email complaints, as explained in the context of the discrimination complaints.

<u>The claimant's claim in the round</u>

116. The need to focus on a number of individual incidents as we have had to do in this claim can risk leading to a failure to see the claim in the round, or the 'big picture'. We should not treat the individual matters in isolation from one another, because the big picture may shed light on individual complaints. To avoid an overly fragmented approach, we have 'stepped back' and considered the full picture of all the claimant's complaints.

117. We can understand why Mr Steele felt that some aspects of his treatment were unsatisfactory, leading him to draw the conclusion that the actions he complains about were linked. From his perspective, he was subject to four disciplinary procedures for incidents which he thought should more properly have been considered as performance or capability matters, most of which were, on any basis, relatively minor and were progressed without any informal discussion taking place first. The first of these disciplinary investigations started after he made a complaint of race discrimination in respect of which he received no proper response. On another occasion he was wrongly sent home without pay as a result of a mistake in communications between managers.

118. However, looking at the big picture and considering carefully the evidence we have heard and read, we are satisfied that the treatment Mr Steele complains of was not part of a pattern or of a wider campaign against him, either related to race, age or his previous complaints. In reaching this view, we have particularly taken into account the number of managers who were involved in the various procedures, and the lack of any evidence that they

were aware of previous incidents. There was no evidence that the outcome of any of the procedures was pre-determined. The records of decision making at investigatory, disciplinary and appeal stages set out good reasons for the decisions taken. We have also taken into account that Mr Fossick undertook a thorough investigation which included an overview of the previous disciplinary actions. He suggested that coaching for some managers would be appropriate but concluded that the incidents were unconnected. Overall, we are satisfied that the respondent's managers were dealing with each incident as they came up, and not colluding or subjecting the claimant to disciplinary procedures for any unlawful reason.

Time limit

119. Our conclusions up to this point mean that only one of the claimant's complaints can succeed: issue c) as a complaint of race discrimination, namely the failure to properly investigate or take action in relation to an alleged incident of race discrimination. As we have found only one act of potential race discrimination, there is no scope for a series of acts to amount to 'conduct extending over a period' for the purposes of calculating the time limit.

120. In relation to the date on which the failure at issue c) occurred, we have to apply sub-sections 123(3) and (4). The failure occurred after June 2019, when the complaint was first made. By September 2019 the failure to provide the claimant with a response to his complaint was continuing, when the claimant chased it up with Mr Scott. There was no correspondence about the failure after Mr Steele's reply to Mr Scott's email of 14 September 2019.

121. In the email of 14 September 2019 Mr Scott responded to Mr Steele's request for confirmation of the disciplinary outcome and to the complaint that Mr Stafford had been racist. However, Mr Scott provided no update or response to the original complaint. That email was an act inconsistent with properly responding to the grievance (or, alternatively, the email marked the end of the period in which Mr Steele might reasonably have expected a proper response, as he accepted in his reply of 18 September 2019).

122. We have concluded that the failure to investigate occurred on 14 September 2019. The primary 3 month time limit expired on 13 December 2019.

123. We have next considered whether the claim was presented 'within such other period as [we think] just and equitable', which would mean that the complaint would be in time under section 123(1)(b).

124. We have first looked at the length of the delay. The claim form was presented on 25 May 2021, over 17 months after the time limit had expired on 13 December 2019. That delay is a lengthy one in the context of a complaint where the primary time limit is 3 months. There is no extension of time arising from the period of Acas early conciliation. Section 140B works by 'not counting' a period of early conciliation which falls within the three month period under section 123(1)(a). It does not automatically add an

extension equal to the period of early conciliation at the end of the original three month period.

125. As to the reason for the delay, Mr Steele told us that the effect of the incidents was cumulative, that is he gradually realised as more incidents took place that unlawful discrimination might be taking place. That is understandable. We have also taken into account that Mr Steele has not had any legal representation. On the face of it, these factors would be in Mr Steele's favour in relation to extending time.

126. However, Mr Steele specifically identified his grievance in 2019 as race-related, and he set out in an email of 1 September 2019 that he felt he had been subject to race discrimination by Mr Stafford's conduct of the grievance, so this cannot have been one of the instances where it was only afterwards that he began to label the treatment as unlawful discrimination. Also, Mr Steele had assistance from his trade union representative at this time. Those factors weigh against extending time.

127. We next consider the prejudice to claimant if we do not extend time, set against the prejudice to the respondent if we do.

128. There will be prejudice to Mr Steele if we do not extend time. He was the recipient of a highly offensive comment which he reasonably considered to be racist abuse. We have found that the respondent failed to properly investigate his complaint about this, in particular by failing to provide Mr Steele with any outcome. There will be no redress in respect of this failure if time is not extended.

129. We also have to consider the prejudice to the respondent if time is extended. We have found that the burden of proof is on the respondent to satisfy us that the failure to properly investigate the claimant's complaint was not to do with race. It has been difficult for the respondent to gather the evidence needed to meet this burden and the passage of time is likely to have played a part in this. Although Mr Stafford is still an employee and was able to attend to give evidence, a change of HR system has meant that full disciplinary records, witness statements and notes taken in the course of investigating this incident have not been available to us.

130. We accept that the delay has led to prejudice to the respondent. The passage of time and inability to provide full documentary evidence of the process which is the subject of the complaint has affected the respondent's ability to respond to this complaint. This is important in respect of a complaint where the burden falls on the respondent to show an absence of discrimination.

131. In conclusion, there has been a lengthy delay here without good reasons for the delay. The passage of time has made it difficult for the respondent to discharge the burden on it in the complaint about the June 2019 grievance. Having weighed up the prejudice to the respondent from extending time with the prejudice to the claimant of not extending time, we have decided that the prejudice to the respondent from allowing the complaint to proceed outweighs the prejudice to the claimant from not allowing it to proceed.

Therefore, we do not consider it to be just and equitable to extend time for this complaint of race discrimination.

132. This means that the tribunal does not have jurisdiction to consider this complaints of direct race discrimination, and therefore it does not succeed.

Summary

133. Our conclusions mean that none of the claimant's complaints succeed. Although we understand why Mr Steele was unhappy about some aspects of his treatment, particularly the way the respondent dealt with his grievance in June 2019, none of the treatment he complains about amounts to unlawful discrimination or unlawful victimisation.

134. The claimant remains an employee of the respondent and we hope that with the conclusion of these proceedings both parties will be able to put these matters behind them and continue to work together.

_____

Employment Judge Hawksworth

Date: 27 March 2023

Judgment and Reasons sent to the parties
On: 5 April 2023

For the Tribunal Office

Appendix - Case Summary and list of issues as set out in the case management orders of 20 February 2022

1. The claimant is employed by the respondent, a large supermarket business, as a general assistant. He has been employed since 14 September 2014. Early conciliation started on 15 May 2021 and ended on 17 May 2021. The claim form was presented on 25 May 2021.

2. The claim is one of discrimination on grounds of age and race. The claimant, who was 53 at the time that he presented his complaint, describes himself as Anglo Indian having been born in India. He complains of various acts on the part of the respondent which he considers to amount to direct race or age discrimination, or, alternatively, to victimisation. The respondent denies that the claimant has been discriminated against in the manner alleged.

3. I reviewed with the parties the draft List of Issues helpfully prepared by the Respondent's counsel and the list of issues for determination was identified as follows:

Time Limits (s123 Equality Act 2010)

4. Early conciliation began on 15 May 2021 and ended on 17 May 2021. The ET1 form was filed on 25 May 2021. Does the tribunal have jurisdiction in relation to the Claimant's claims below relating to events occurring before 18 February 2021?

    a. Are such events part of a continuous course of events extending beyond the relevant date? or
    b. Would it be just and equitable in all the circumstances to allow the Claimant to bring these claims out of time?

Direct Race / Age Discrimination

5. Did the Respondent do the following things:

    a. The Claimant was required to undertake more heavy lifting work and to achieve higher performance targets than other members of staff by the Night Shift Manager around October 2015 ?
    b. The Respondent refused to allow the Claimant to adjust his working hours (due to family caring obligations) for reasons not detailed within the company policy on or about 12 February 2017?
    c. The Respondent failed to properly investigate or take action in relation to an alleged incident of racial discrimination towards the Claimant in relation to a dispute between the Claimant and his colleague on 18 June 2019?
    d. The Respondent covertly monitored the Claimant on CCTV when entering and exiting the bathroom, and subjected him to disciplinary action in relation to his use of the bathroom on or about 28 April 2020?

e. In or around 8 July 2020, the Respondent required the Claimant to undertake more heavy lifting work and to achieve higher performance targets than other members of staff and concerns about the Claimant's productivity issues by treating them according to procedures in relation to Conduct rather than issues of Capability or Performance?
f. The Respondent threatened, on 4 March 2021, to send the Claimant home for failure to wear a high visibility vest despite not providing a vest of a suitable size?
g. The Respondent refused to allow the Claimant to work and/or pay the Claimant in relation to failure to wear a high visibility vest on 7 March 2021?
h. Nigel Churchill, a deputy store manager for the Respondent, required the Claimant to undergo a disciplinary process in respect of breach of company procedures on or about 1 December 2021?
i. Chris Kelly, the Respondent's store manager (in collaboration with Nigel Churchill) required the Claimant to undergo a disciplinary process in relation to breach of replenishment procedures, poor productivity and/or breach of health and safety standards on or about 29 December 2021?

6. If such acts took place, were any such acts less favourable treatment?

    a. The Tribunal will decide whether the claimant was treated worse than someone else of a different age/race was treated (an actual comparator). There must be no material difference between their circumstances and the claimant's. The claimant has not identified any actual comparators.

    b. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else of a different age/race would have been treated (a hypothetical comparator).

7. For any act found to constitute less favourable treatment, was that treatment as a result of the Claimant's race and/or age?

Victimisation (s27 Equality Act 2010)

8. Was the Claimant's email on 25 October 2015 to Karen Smith, HR Manager for the Respondent, (in relation to the majority of his work being allocated in the areas of heavy lifting and being required to perform to a higher standard than the other colleagues) a "protected act" i.e. was it:
    a. for the purposes of, or in connection with, the Equality Act 2010; or
    b. making an allegation (whether or not express) that an employee of the Respondent had contravened the Equality Act 2010?

9. In the event that the email, was a protected act, did the Respondent do any of the things set out at paragraph [2] above (except for paragraph [2] (a))

10. If so, in doing so did it subject the claimant to a detriment?

11. If so, was it because the claimant had either done a protected act or because the Respondent believed that the claimant had done, or might do, a protected act?

Remedies

12. The claimant does not say that he suffered any financial loss. He seeks compensation for injury to feelings.

13. For any discriminatory act or acts found to have taken place what is the appropriate Vento band for any award taking into account the seriousness effect of those acts upon the Claimant's life and the way in which the Respondent dealt with the acts?

14. What is the appropriate compensatory award within that Vento band?

15. Should any compensation be reduced on the basis that the Claimant's own conduct materially contributed to the discriminatory acts that occurred?