Case Number**: 2206382/2021**

EMPLOYMENT TRIBUNALS

Claimant | Respondent

Mr S Dhir **v** **Hugo Boss UK Limited**

Heard at: **Birmingham** On: **9, 10, 11, 12 May 2023**

Before: **Employment Judge Kenward**
Mrs N Chavna
Mrs B Hicks

Appearances
For the Claimant: **In person**
For the Respondent **Mr D Soanes, Solicitor**

WRITTEN REASONS

JUDGMENT and oral reasons having been given at the hearing on 12 May 2023, with Judgment having been sent to the parties on 15 May 2023, and written reasons having been requested on 24 May 2023 in accordance with rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

1. The Judgment of the Tribunal was that the complaints of unfair dismissal, discrimination and for notice pay were not well-founded and were dismissed. The complaint of unlawful deductions from wages had previously been withdrawn and was dismissed om withdrawal.

2. The Claimant was employed by the Respondent as an Assistant Manager at its Birmingham Bullring retail store at the point in time when his employment came to an end on 26 July 2021 as a result of his resignation with immediate effect. The Claimant's case is that his resignation amounted to a constructive dismissal giving rise to a complaint of unfair dismissal and in respect of not having been paid notice pay. He also complains that his treatment amounted to race discrimination.

Proceedings

3. An ACAS certificate was issued on 25 August 2021 in respect of early conciliation which began with ACAS being notified of the prospective Claim on 10 August 2021. Proceedings were commenced on 24 September 2021 by an ET1 Form of Claim in which the complaints which remained as live complaints were those of unfair dismissal, race discrimination and non-payment of notice pay.

4. The Particulars of Claim described the Claimant as a British Indian of central and southern Asian origin having a non-white skin tone and accent.

5. The live complaints and List of Issues to be determined by the Tribunal were confirmed in the Case Management Order made by Employment Judge Wilkinson on 12 September 2021.

6. There was some further discussion of the issues at the beginning of the case. In the event that the Tribunal decided that the Claimant was dismissed, the Respondent was not seeking to put forward a potentially fair reason for that dismissal. However, the Respondent was seeking to argue, if necessary, that the Claimant might have been fairly dismissed, in any event. Clearly this would involve needing to identify a basis upon which the Claimant might have been fairly dismissed. The basis for this was only identified at the end of the case, namely that, as he was on a written warning, and there was some evidence of continued non-compliance with processes and procedures, there was a possibility that he might have been dismissed later for being in breach of that warning. It was also agreed that, in considering the unfair dismissal and race discrimination complaints, the Tribunal would also need to consider, in the event that either complaint was upheld, whether there had been compliance, by the Claimant and / or Respondent, with the applicable ACAS Code of Practice on Disciplinary and Grievance Procedures. It would also potentially be necessary to consider the issue of any contributory fault in relation to the unfair dismissal case, should it become relevant. Finally, it was also identified that some of the events being relied upon as giving rise to race discrimination had occurred outside the primary three-month time limit, so that there was a jurisdictional issue which would potentially need to be considered as to whether the acts concerned were part of conduct extending over a period with the end of that period being within time, or, if not, whether it would be just an equitable to extend the time limit in respect of any complaints which were otherwise out of time.

7. In evidence the Tribunal was referred to a bundle of documents (initially of 658 pages) with additional documents referred to during the hearing. The Tribunal also considered Statements of Evidence and oral evidence from the Claimant and from five witnesses on behalf of the Respondent, namely Mr Lee Broomhead, Mr David Sumner, Ms Caroline Bull, Ms Beena Rameshwar and Mr Samir Ahsan.

Findings of fact

8. The Respondent is a company which runs a number of retail outlets selling clothes. At the time of the Claimant's resignation, it employed nearly 1,000 people. The Claimant's employment started on 18 April 2016. He was initially employed as a Supervisor at the Respondent's outlet in Selfridge's in Birmingham, although he also seems to have held other positions at various points. By November 2018 he had been promoted to an Assistant Store Manager on a salary of £20,000. On 14 August 2019 he was transferred from Selfridge's

to the Respondent's store in the Birmingham Bullring when his salary became £22,000.

9. The first complaint about by the Claimant in relation to his constructive dismissal complaint is that of his Area Manager, Mr Barry Grant, unfairly blaming him for not doing numerous jobs, with the date given for this as September 2020. By this point in time, the Store Manager, Mr Jaswinder Kumar, had been absent due to sickness since 10 July 2020. This was an absence which was to last for most of the rest of the year. This is not really dealt with in the Claimant's Statement of Evidence. When this was put to the Claimant in cross-examination, he seemed to refer to Barry Grant making monthly store visits and setting tasks. It then seemed to be clarified with the Claimant that he was referring to paragraph 7 of his Statement although this refers to September 2019 rather than September 2020, but this date may be wrong as the Claimant is referring to Jaswinder Kumar having been on sick leave for several months. It appears, from the dates given for the Store Manager's absence (page 253 in the trial bundle), that this absence was in 2020 rather than 2019. The issue being raised at paragraph 7 was that Mr Barry Grant had apparently given the Deputy Manager, Mr Mohammed Hussain, tasks to do, having addressed some concerns with him, but these tasks were not discussed with the Claimant, so when the Claimant was asked on a later visit as to the reason for these tasks not having been actioned, he had informed Barry Grant that he was not aware of the task concerned.

10. In earlier cross-examination, the Claimant had explained that Barry Grant would do a floor walk with the manager on duty in the store, but that Mohammed Hussain's heart was not in the job and there had been tasks that were not done as Mohammed Hussain did not delegate them to the Claimant. However, the evidence of the Claimant was that he had apologised to Barry Grant for jobs not being completed and told him as to the issue with Mohammed Hussain. In any event, the Claimant accepted that, thereafter, he would have been aware of any tasks.

11. As such, the Tribunal was not satisfied on this evidence that, in September 2020, Barry Grant had been unfairly blaming the Claimant for not doing numerous jobs.

12. In September 2020, the stock-take results for the store in Birmingham Bullring had been very poor. This resulted in various e-mail exchanges between Mr David Sumner, the Stock Control and Loss Prevention Manager of the Respondent and Mohammed Hussain, with Barry Grant copied. An e-mail of 10 November 2020 suggests that the store had consistently been posting losses of this nature despite several visits from David Sumner and the Area Managers at the time. It was suggested that the management team in the store needed to get control of the situation so as to be aware of all movements in and out of the store and to stamp out any stock variances.

13. However, the stock-take results in February 2021 were to show the situation getting worse, with the Bullring store being the only store of concern in September 2020 not showing some improvement by February 2021.

14. In February 2021, the store was still closed as part of the lockdown that was in place. Arrangements were in place for a skeleton staff presence, partly to facilitate virtual selling. Under these arrangements, for a couple of days in the week, the Claimant would have been working in the store on his own.

15. At around this time, there seems to have been a WhatsApp group in operation involving employees from various stores in respect of which Barry Grant was the area manager. Barry Grant seems to have been using the WhatsApp group to encourage competition between stores with regards to achieving sales, particularly given the difficulty of achieving sales under the restrictions in place. Thus, photos of till printouts showing sales, sometimes even small sales, were being posted as WhatsApp messages. The Claimant has provided a screenshot of a printout that he posted showing a virtual sale of £129 (not £179 as referred to in the List of Issues) which seems to have followed another employee posting details of a £2,000 sale. This prompted Barry Grant to post a Tumbleweed GIF (a short video) with the words "*following a £2k sale with £129*". The Tribunal has only been provided with a couple of screenshots regarding these WhatsApp messages. It seems that, with the passage of time, it has not been possible for either the Claimant or Respondent to access a greater number of these messages, or the full exchange which took place over a particular period, so that there is limited material from which to judge the context in which Barry Grant's WhatsApp message was sent. However, the Tribunal accepted the detailed and largely unchallenged evidence that was provided by Ms Carolyn Bull, in her Statement of Evidence, to the effect that this was typical of the sort of exchange which happened on the WhatsApp group where there would sometimes be humorous messages where the humour was at the expense of one of the members of the group, but she describes the context as these being "*jokey messages, playing one store off against another competitively*". She also makes the point that Barry Grant would often seem to favour the smaller stores over the bigger flagship stores. She also gives the example of Chris Dobbin, a white employee in the Grafton store in Dublin, frequently being the butt of such messages if his sales were smaller than those from the Dundrum store in Ireland. No offence seems to have been taken at the message posted by Barry Grant at the time. Indeed, the response seems to have been that "*every sale counts*", which was doubtlessly a point well made, given the difficult trading conditions.

16. On 18 February 2021, the Claimant was on duty with a female colleague from another store. She alleges that inappropriate comments were made to her by the Claimant. She subsequently raised the matter and provided more detail in an interview conducted on 19 February 2021. The Claimant was interviewed regarding the allegations. He denied the allegations. Mohammed Hussain and

another potential witness were also interviewed on the basis that they had also been present in the store on the same day. However, it was established that they were not witnesses to any conversation.

17. Having agreed the notes of his interview, the Claimant then sent a further e-mail to Ms Sarah Akanbi, an HR Assistant, on 2 March 2021, asking for an update regarding the investigation. There is no evidence of Ms Akanbi replying to this e-mail. However, at this point in time, the investigation was not yet closed.

18. At 8.25 am on 10 March 2021, the Claimant seems to have been a recipient to an e-mail sent by one of the Respondent's health and safety managers stating that he had been informed by Barry Grant that, on occasion, perhaps one or two days a week, the situation existed in which people were working alone for a period of time which was greater than normal. The e-mail suggested that this was not a problem "*as our stores are low risk environments, particularly* (with) *no members of the public in the stores*". However, it acknowledged that this scenario potentially created other risks, and accordingly attached a document which needed to be completed so that a review could be undertaken as to whether any additional measures needed to be put in place. At this point in time there would have been approximately six to eight occasions when the Claimant had been working alone in the store. He had not raised any issue with Barry Grant about this. He had exchanged text messages with Mohammed Hussain, but the gist of these messages was more in relation to the deflating experience of trying to achieve sales in such difficult trading circumstances.

19. In the meantime, as a result of the poor stock-take results, Barry Grant had decided to conduct a disciplinary investigation into any negligent failure to follow the required processes and procedures. This involved interviewing the Claimant on 10 March 2021. In the course of this interview, the Claimant was asked as to the process for the store doing the weekly unit counts. The Claimant explained that unit counts had been taking place in the previous year but "*if I'm honest with you in the last few months this hasn't been done*". The interview also covered the processes that the management team for the store should have been undertaken. At the end of the interview, Barry Grant told the Claimant that it was clear that there had been a failure in processes being implemented in the store. With the recent stock loss results, he was very concerned as the level of loss was extremely high given the short time-frame, limited trading hours and store closures. He regarded this as very serious and described himself as very concerned. After reviewing the case and hearing the Claimant's answers in interview, he took the decision to suspend the Claimant for the allegation of negligent management processes and procedures which had potentially led to high stock losses. He indicated that there would need to be further investigations into the concerns raised. The next step would involve the Claimant attending an investigation meeting.

20. Similar interviews were conducted with other members of the management team and other employees.

21. On 25 March 2021, Sarah Akanbi wrote to the Claimant with an update regarding the position following his suspension on 10 March 2021 and the further investigations which were being undertaken. This rather suggests that any failure to update the Claimant in relation to the earlier investigation was possibly an oversight.

22. By the beginning of April 2021 Barry Grant had produced a report setting out the findings of his investigation. The top-line findings were that it was clear that processes had not been followed by management such as bag checks, locker checks, with deliveries and inter-store transfers not being booked in on time, and weekly unit counts not being completed. Employees stated that they had been given management access log-in details in order to complete refunds and exchanges. This was against company policy. A ban on inter-store transfers put in place in October 2020 had not been followed. Barry Grant, as the Area Manager, had gone into the store on 25 March 2021 looking for relevant paperwork and forms and had not been able to find anything in the period from 2018 other than documentation about a check completed in August 2020. He acknowledged that, as part of the investigation, the Claimant and Mohammed Hussain had both provided information regarding their suspicions as to internal theft. His conclusions were that it was clear that management had failed in a number of processes which were supposed to combat stock losses which had been going on for long duration of time.

23. As a result, the decision was made for the Claimant to attend a disciplinary hearing. He was informed of this decision on 6 April 2021 by e-mail with the allegation to be discussed being that of negligence in management processes and procedures which had potentially led to significantly high stock loss. The hearing took place 48 hours later, on 8 April 2021. Although the Claimant has complained about a lack of notice regarding the disciplinary hearing, he was asked at the outset by Mr Lee Broomhead, Senior Area Manager, whether he was happy to continue, and confirmed that he was he was.

24. During the disciplinary hearing, the Claimant was asked by Lee Broomhead to provide an explanation for the unit checks not having been actioned on a weekly basis, contrary to company procedure. His reply was that "*if I'm honest there is no excuse, they've just been forgotten about*". He elaborated by saying that "*certain things* (had) *been forgotten about, I won't make something* up". The explanation provided was that of being short-staffed. He was asked by Lee Broomhead whether, as a member of management with a long length of service, he thought that he had followed all of the necessary processes in a correct manner to ensure that the stock loss issues in the store improved. His answer was as below.

"*I personally could have taken more ownership, yes, I should have stepped up a bit more, but if it is not done I just haven't either and it slipped but we have been short staffed…. I was highest taker in store and maybe I was just focused on taking money. Maybe I should have stood back and realized these processes are slipping away*".

25. When asked if this was acceptable as a member of management the Claimant replied that "*I take responsibility and accountability of checks not being done" and "it's not acceptable*".

26. The disciplinary outcome was communicated to the Claimant by letter dated 16 April 2021 which confirmed a final written warning in respect of "*negligence in management processes and procedures which has potentially led to significantly high stock loss*". Arrangements were being put in place for the Claimant to be reinstated back into the business with a return to work scheduled for 20 April 2021.

27. When the Claimant returned to work, he gathered evidence to the effect that various processes and procedures had not been followed by the managers who had been placed in the store on a temporary basis to cover for his absence and to re-open the store after the relaxation of lockdown rules.

28. On 20 April 2021, the Claimant had appealed against the final written warning. In addition to stating that the store had been under-staffed and under-supported, the only other point being made was that Mohammed Hussain and the Claimant had made Barry Grant aware of what was going on in the store in August and September 2020 respectively.

29. The appeal hearing took place on 29 April 2021 and was conducted by Mr Samir Ahsan, the Finance Director. The notes of the appeal hearing suggest that there was no meaningful reference at this stage by the Claimant to procedures not having been followed by the managers who had been in the store on a temporary basis when the claimant was suspended between 10 April 21 and 20 April 2021. Towards the end of the hearing, Samir Ahsan asked the Claimant, "*bearing in mind (the) investigations that have happened*", what he would "*expect as* (an) *appropriate sanction in terms of not following correct procedures which you were aware of*". The Claimant's reply did not seek to suggest that he was not guilty of the allegation being considered. Rather he said that "*personally think I should have a written warning not final written warning*". He then stated that "*I feel trapped, I'm finding mistakes now that will be on my head and I will get the blame when we have a stock-take as we know stock already missing*".

30. Following this meeting, the Claimant seems to have brought well-being concerns to the attention of Sarah Akanbi. One of his concerns seems to have been that of the outstanding outcome into the investigation regarding the alleged inappropriate comments.

31. Sarah Akanbi replied on 30 April 2021 stating that this investigation had been concluded and the Respondent considered the matter closed as of 8 March 2021. It appears that the reason for the investigation being concluded was that it had been decided that it was not possible to establish exactly what was said having interviewed the two other members of staff who had attended the store on the day and having checked the CCTV footage of the incident. However, since the complaint suggested a breakdown in the working relationship between the complainant and the Claimant, in the circumstances it was suggested that a mediation meeting might assist. However, the complainant had declined the offer of mediation.

32. On 11 May 2021, the Claimant then submitted a formal letter of grievance. Much of the grievance letter concerns the disciplinary decision, notwithstanding the fact that the disciplinary appeal hearing had already taken place, albeit the decision was still awaited.

33. The main point being made related to observations made by the Claimant following his return to work on 20 April 2021 with these observations being set out in some detail in the form of a series of bullet points for five separate dates between 20 April 2021 and 30 April 2021. Essentially, the Claimant was suggesting that various processes and procedures for which he had been disciplined for not undertaking had also not been undertaken during the period after the re-opening of the store when he was still suspended from work. He was suggesting that there was disparity of treatment because no action was being taken against the managers who had been running the store whilst he was suspended. His grievance letter asked: "*is it something I'm doing wrong or is it the colour of my skin?*". In evidence, the Claimant accepted that this was the first occasion on which he had sought to raise the issue of discrimination.

34. These were matters which had been within his knowledge at the time of the disciplinary appeal hearing, and it would have been open to him to raise these matters during the hearing on the basis of his argument that there appeared to be disparity of treatment, insofar as disciplinary action was not being taken against the managers who been running the store whilst he was suspended. In his grievance letter, he added that evidence could be provided regarding all of this information on request. The evidence which it seems that the Claimant had amounted to a large number of photographs that he had taken on his mobile phone showing parts of the Bullring store, for example fitting rooms with stock or boxes in an untidy state, and showing various items of paperwork, not all of which seemed to be up-to-date or fully completed. In fact, the Tribunal ended up concluding that the further evidence was of limited assistance given that it was not ultimately disputed that some processes and procedures had not been followed in the period immediately after the reopening of the store and prior to the Claimant's return to work. The issue to be considered was the explanation for this. Moreover, since the evidence was in the possession of the Claimant, and

he was the one who knew what this evidence was, there would have been nothing stopping the Claimant producing the evidence at the disciplinary appeal hearing, and there was nothing stopping the Claimant producing the evidence at the subsequent grievance meeting.

35. The grievance letter then had a heading in respect of additional information with a number of matters being raised which did not relate to the disciplinary procedure, one being the delay in telling him the outcome of the investigation into the alleged inappropriate comments. The next point related to having been sent an e-mail about lone working on 10 March 2021 when he had already been working alone for three weeks. Another matter raised was the WhatsApp message from Barry Grant.

36. The Claimant also referred to a telephone conversation with Barry Grant regarding a call from a client at another of the Respondent's stores which had resulted in the Claimant effectively achieving a sale for that other store, which had caused Barry Grant to laugh. The Claimant also raised an issue regarding Barry Grant not authorising the transfer of an item from another store to the Bullring store, when he seemed to be willing to authorise transfers the other way. The Claimant also referred to an exchange he had had with one of the employees he was managing at the store, Mr James Rogers, where it appeared to him that James Rogers was being disrespectful and he was concerned that there may have been a conversation between James Rogers and managers at other stores regarding the Claimant. These last three matters were not raised as specific complaints as part of the Claimant's Tribunal case.

37. Having set out these various matters, the Claimant then made the point that "*I would also like to add if CCTV needs reviewing to see evidence of some of the points raised it will need to be reviewed ASAP due to the 30-day backup as I came back into the business on 20.04.21*". It did not seem to the Tribunal that most of these were matters where one would expect an employer to be reviewing CCTV for the purposes of carrying out any investigation, but ultimately this was a decision for the person investigating the grievance.

38. The Claimant ended his grievance letter by making a general reference to the effect of the Equality Act 2010 making it unlawful to discriminate against employees.

39. The Claimant was invited to a grievance meeting by letter dated 20 May 2021. The letter specifically stated that the purpose of the meeting was to allow him to explain his grievance and discuss possible resolutions. It further stated that, "*if you wish to rely on any documents, please send copies to me, if possible, in advance of the meeting*". The ball was in the Claimant's court if he considered that there was evidence which he could provide which would assist the investigation of his grievance.

40. The grievance meeting took place on 26 May 2021 and was conducted by Ms Grace Twyman, the Respondent's Head of Retail Operations. At the outset, she discussed with the Claimant the fact that he had an ongoing appeal in relation to having been through a disciplinary process and it was therefore outside the scope of the grievance hearing to discuss matters relating to the disciplinary outcome or appeal. There is no evidence that she would have realised that the Claimant had not really raised the issue in the disciplinary appeal process as to disparity of treatment in terms of others not being subjected to disciplinary action, beyond the Claimant referring to ongoing non-compliance in the store.

41. Thus, Grace Twyman went through the elements of the grievance which did not relate to the disciplinary sanction. The Claimant was claiming that he was being treated differently by being singled out and bullied by Barry Grant. The two matters he referred to were the WhatsApp message and the telephone call. When asked for further examples he said that "*no, that is all*". He then went on to deal with the issue regarding his conversation with James Rogers from which he had understood that "*they are all talking about me*". He then suggested that he felt like he had been disciplined for negligence around management procedures when this had also been happening when he was absent from the store, and made the point that the people managing the store in the week before his return were "*all white*". Asked if he had "*anything else on discrimination", he replied "not really, no evidence*", whilst making it clear that he regarded the difference between his treatment and that of those running the store in his absence as amounting to discrimination. When asked if he had anything else to add, he made reference to Barry Grant having said during the course of the investigation that he could not find a rubbish log which the Claimant was able to produce at the grievance meeting. He also referred to having the locker checks with the last date for which a check had been signed being for 4 November 2020. He also referred to doing a unit count when he returned in April 2021 and finding that there were 27 suits and 6 overcoats missing which he had reported to David Sumner who had suggested that it was a system error from the previous stock check, which caused the Claimant to be concerned that he had been disciplined for the system error.

42. The grievance meeting ended with Grace Twyman saying that she would take time to consider all of the points and details raised and would get back to the Claimant in writing with her outcome. Clearly, if the Claimant considered that there were other points or details which he needed to raise, then he should have realised that he needed to do so at this point, as Grace Twyman was now going to be considering her decision.

43. As part of the grievance investigation, Grace Twyman then interviewed Barry Grant on 7 June 2021 regarding the issues of lone working, the WhatsApp message and the running of the store between 10 April and 20 April 2021. He could not specifically remember the WhatsApp message but made it plain that "*it*

would have been more of a joke and it's quite common we all put them" (seemingly referring to the GIF sent). He further stated that it was "normal for everyone to post sales and we respond". He said that it was "*absolutely nothing personal and quite normal*" and the Claimant had given no indication that he was offended at any stage. He made the point that this was partly being driven by a competitive spirit in relation to sales, with the Claimant participating in this competitive spirit and Barry Grant supporting him and congratulating him in relation to the fact that the Claimant seemed to be doing well in terms of virtual sales. He described the unusual circumstances regarding the running of the store from 12 April 2021 because it involved reopening the store after the lockdown and having to staff it with whoever was available from other stores. He had understood that locker and bag checks were going well but daily counts were not up to standard and he had followed up on this. However, he made it clear that it was unrealistic for everything to have been implemented completely correctly from the start and the same expectation would not have been made on "*day 1*" of Jaswinder Kumar, in other words the store's existing management. Barry Grant also referred to having undertaken training with the Claimant on his return to the store during which the Claimant had asked to speak to him in the office "*and apologised for the previous mistakes that he had made and just wanted to move on*". The Claimant was asked about this in questions by the Tribunal and accepted that this conversation had taken place and that this was the position in respect of his working relationship with Barry Grant as at the point in time when he returned to work.

44. On 17 June 2021 the Claimant received a response to a data subject access request that he had made on 21 May 2021. On the face of it, the letter sought to comply with the various requests made by providing a memory stick containing the data requested, but also explained that, for example, no medical records were held separately for the Claimant and he would need to be more specific regarding his request for CCTV camera footage "*that may have myself in question*". The Tribunal was not provided with any further evidence from which to be able to form any conclusion other than that the response to his request was an appropriate response.

45. Samir Ahsan had taken some time in arriving at his decision in relation to the Claimant's disciplinary appeal, but he had also been considering the disciplinary sanctions imposed on Mohammed Hussain, Jaswinder Kumar and another Supervisor in the store). He produced a document dated 18 June 2021 which seems to have been intended as an internal briefing report. It contained a comprehensive overview of the situation regarding the running of the store up to the point of the Claimant and the other members of the management team being subject to the disciplinary proceedings. The issue as to the running of the store in April 2021 had not really been raised with him. He accepted that there were mitigating circumstances to consider such as low staffing levels, a lack of documented feedback from management on failures, and inadequate opportunity

or time to improve and correct failures. However, as all of those involved had sufficient experience and knowledge. it was still reasonable to expect that the process and procedures should have been completed, even without feedback. If inadequate staffing was an issue, then it was still reasonable to expect that the processes and procedures were completed to a greater extent than had been the case. He did make the point that currently there were less members of staff in the Bullring and the processes and procedures were being completed. In consideration of the mitigating factors, he reduced the sanctions imposed on all four of those who had been disciplined, with the Claimant's sanction being reduced to that of a first written warning. That imposed on Mohammed Hussain was reduced from dismissal to a final written warning.

46. The outcome was communicated to the Claimant by letter dated 29 June 2021. The letter explained that the sanction of a written warning was appropriate due to the "*acknowledged failings in your role as assistant manager*".

47. On 1 July 2021, the Claimant was provided with a letter setting out the grievance outcome. Effectively the grievance was treated as relating to three matters, namely lone working, victimisation by being treated differently by Barry Grant in relation to a WhatsApp message and inter-store transfers, and being treated differently to the managers who ran the store during the week after re-opening.

48. In relation to the issue of lone working, it was accepted that the Claimant had undertaken approximately six to eight shifts over a period of three to four weeks which would have involved lone working. This was against the background of the third national lockdown in February 2021 and the unique situation which it involved and only lasted until the store closed on 11 March 2021 because of the disciplinary investigation. Grace Twyman was satisfied that lines of communication were encouraged. The Claimant had not raised any mental health concerns until the investigation meeting on 10 March 2021.

49. In relation to the communications from Barry Grant which had been the subject of complaint, the decision was to the effect that the WhatsApp message had not been sent with any malice or with the intention of treating the Claimant differently and that the telephone communications had been described by Barry Grant as being supportive and involving responding positively to the Claimant's efforts in driving sales. The position in respect of inter-store transfers between the Birmingham stores was that no inter-stores transfers had been allowed after November 2020 as a result of concerns in relation to process.

50. The issue in respect of processes and procedures not being followed during the period that the store was open between 12 April 2021 and 20 April 2021 was not dealt with in any detail. This might have been dealt with in more detail by explaining the extent to which there was evidence of processes and procedures not having been followed and / or the rather different circumstances in which the managers were running the store which, as the Tribunal accepts, meant that it

was a legitimate management decision not to be taken disciplinary action against the managers who were covering the store. However, the Claimant does seem to have been provided with the record of the investigation interview which had taken place with Barry Grant which explained the relevant and different circumstances. The letter itself limited itself to explaining the arrangements in place for putting temporary managers in place depending upon their proximity, availability and flexibility, with reference to those managers having participated in a training day on 7 April 2021 ahead of the store re-opening, with it being suggested that there was nothing to support the allegation the Claimant had been racially discriminated against. It was further suggested that, during the grievance hearing, the Claimant had been unable to substantiate any evidence of this allegation.

51. Clearly, the Claimant might have been able to produce evidence of processes and procedures not being followed. However, he did have the opportunity to provide this evidence and had not done so. Moreover, he had been asked in the grievance meeting if he had anything else on discrimination and had replied that he did not.

52. Accordingly, the letter concluded by stating that nothing had been found to corroborate the Claimant's complaints of discrimination or unfair treatment and his grievance was not upheld. It was noted that, as there was evidence of a breakdown in the Claimant's relationship with Barry Grant it was proposed to arrange a mediation meeting. The Claimant was also notified of his right to appeal within five days.

53. The Claimant did not appeal within the time allowed. He sent an e-mail on 12 July 2021 which was stated to be regarding the grievance meeting outcome. He began the e-mail by stating that he was not happy that the matter had been dealt with without requesting the evidence he had referred to in his grievance letter. He then raised three points on the basis that these were matters "*that concern me and I wish you to relook at this and maybe get another head office member to oversee this grievance hearing*".

54. The three points being made by the Claimant were made on the basis that they arose from the record of the interview with Barry Grant. The first point related to lone working. The Claimant was suggesting that it did not make sense to be asking an employee to complete a form for the purposes of risk assessing lone working some weeks after the employee had started lone working. The second point was in relation to Barry Grant not remembering the WhatsApp message. For these purposes, it seems that the Claimant was simply attaching a screenshot of the WhatsApp message in issue. The third point related to Barry Grant's replies regarding the arrangements for the temporary managers to cover the reopening of the store with the Claimant making the point that he had already made regarding the other managers not having fully complied with procedures, except on this occasion he seems to have attached evidence in relation to this,

namely a large number of photographs taken on his mobile phone showing the extent to which logs and checks had been completed during the period from 12 April to 20 April 2021.

55. The Respondent replied to the Claimant's e-mail on 14 July 2021 to the effect that he was out of time to lodge an appeal but, on the basis that the Respondent stated that it took complaints of discrimination very seriously, it had asked an independent HR consultant to conduct a review of the case based on the information available and the further evidence provided by the Claimant. It was stated that, once this had been done, "*we will inform you of their findings promptly*". The Claimant took the opportunity to e-mail further evidence on 18 July 2021. On the same date, he also sent an e-mail raising an issue regarding his concern that "*other managers at the same level are on a lot more than me*".

56. On or about 22 July 2021 the Claimant received an offer of employment as an Assistant Store Manager in another Birmingham Bullring retail store. He subsequently accepted this offer of employment, albeit he delayed commencing this new employment until his mental health improved.

57. On 26 July 2021 the Claimant submitted a letter of resignation with his resignation being without notice. The letter stated that "*due to me being mistreated at work my mental health has deteriorated*" and "*I'm resigning because this is the only way my mental health will improve*". The particular allegations of mistreatment being made were listed in seven numbered paragraphs, and included the issues in respect of lone working, the delay in informing him of the outcome of the investigation regarding alleged comments, the imposition of a final written warning, the difference in treatment in comparison with the white managers staffing the store following its reopening, the reply to a subject access request in April 2021, the failure to investigate his grievance sufficiently thoroughly by asking for the evidence that he had indicated he could provide, and the present position in which the store manager was off and there was no deputy manager so that he was constantly "*thinking how am I going to achieve targets and all the procedures*". The letter ended by stating that he had lost trust and confidence in the Respondent and the last straw was reviewing the grievance outcome on 1 July 2021 (some 25 days previously) and realising that it had not been adequately investigated.

58. It seems clear to the Tribunal that the Claimant resigned because he was finding carrying out his role as an Assistant Manager to be adversely impacting upon his mental health, partly as a result of his realisation, through the disciplinary process and subsequent sanction, as to the seriousness of the expectations being made of him. His perception as to the way in which he was being treated by his employer was clearly also a factor. It also seems clear that he delayed resigning until he had lined up another job.

59. Information regarding the outcomes from the review by the external HR consultants was e-mailed to the Claimant on 17 September 2021. This included a number of recommendations regarding areas of improvement. This information seems to have been extracted from a more detailed case review summary provided to the Respondent.

60. In relation to the position regarding the salaries being paid to Assistant Managers. The information provided shows that, in 2018, when the Claimant had not long been appointed as an Assistant Manager, he was the lowest paid Assistant Manager in Barry Grant's area, but there was another White employee on the same salary and the highest paid Assistant Manager was of Asian or Asian British ethnicity. By 2019, when the Claimant was being paid £22,000, the ethnicity of the highest paid assistant manager was described as being any other Black background and the lowest paid assistant manager was White. The figures for 2021 show that most Assistant Managers were now being paid less than the Claimant, including a number of managers whose ethnicity was described as white or British or English. In the circumstances, the Tribunal was unable to conclude that there was any evidence of the Claimant being paid less than any relevant comparators with the reason for any such difference in treatment being that of his race.

Relevant law

61. The List of Issues which had been formulated effectively reflected the relevant law. Where necessary, the Tribunal has further explained the relevant law and the way in which it has applied the relevant law in setting out its conclusions below in relation to particular issues in the List of Issues.

62. In relation to constructive dismissal, section 95(1)(c) of the Employment Rights Act 1996, states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

63. The issues to be decided in a constructive dismissal case have been summarised in "Harvey on Industrial Relations and Employment Law", as set out below.

"*In order for the employee to be able to claim constructive dismissal, four conditions must be met:*

(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

(3) He must leave in response to the breach and not for some other, unconnected reason.

(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract".

64. In Western Excavating (ECC) Limited v Sharp [1978] QB 761, IRLR 27, CA, the Court of Appeal made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of "*reasonable conduct by the employer*".

65. There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee (see Mahmud v. BCCI [1997] ICR 606, IRLR 462, HL)

66. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer is set out in the Court of Appeal judgment in the case of Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and is an objective test.

67. In Lewis v Motorworld Garages Ltd [1986] ICR 157, CA, the Court of Appeal confirmed that the "*breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so*". The question is: "*does the cumulative series of acts taken together amount to a breach of the implied term?*" (See Woods v. W. M. Car Services (Peterborough) Limited [1981] ICR 666).

68. Where the termination of employment amounts to a dismissal, section 98 of the Employment Rights Act 1996 sets out the test for determining whether any dismissal was in breach of the statutory right not to be unfairly dismissed.

69. An employee will also have a statutory and contractual right to notice of any dismissal and to pay in respect of the notice period. A dismissal in breach of the employee's contractual right to notice will amount to a wrongful dismissal.

70. In relation to direct discrimination, section 13 of the Equality Act 2010 is in the terms set out below.

"*A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably that A treats or would treat others*".

71. Section 23 of the Equality Act 2010 is in the terms set out below.

"*On a comparison of cases for the purposes of section 13 … there must be no material differences between the circumstances relating to each case*".

72. When considering the Claimant's complaints for discrimination, the applicable burden of proof is determined by section 136 of the Equality Act 2010. The relevant parts of this section are as set out below.

"*(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".

73. The reversal of the burden of proof and has two parts. Firstly, has the Claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent committed an unlawful act of discrimination?

74. If the Claimant meets the burden of this first part, then the Respondent has to show that they have not discriminated against the Claimant. This is often done by proving a reason for the conduct which is alleged to be discriminatory, and further that the proven reason is in no sense whatsoever connected to the relevant protected characteristic. If the Respondent fails to establish this then the Tribunal must find in favour of the Claimant. With reference to the Respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the Respondent, to support the Claimant's case.

75. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The Court of Appeal in Madarassy v Nomura International plc [2007] EWCA Civ 33, gave useful guidance that despite the two stages of the test, all evidence should be heard at once before a two-stage analysis of that is applied. In Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, the House of Lords recognised that a sequential approach may not always be appropriate as sometimes "*the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue*" as the "*two issues are intertwined*".

76. In relation to discrimination complaints, Equality Act 2010 section 123(1)(a) provides that "*a complaint … may not be brought after the end*" of … "*the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment tribunal thinks just and equitable*". Equality Act 2010 section 123(3)(a) provides that "*conduct extending over a period is to*

be treated as done at the end of the period" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

77. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, Lord Justice Underhill stated that "*the best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time*" and gave a "*non-exhaustive list of factors which may prove helpful in assessing individual cases*" including the presence or absence of any prejudice to either party if the claim is allowed to proceed or not allowed to proceed.

Conclusions

78. In relation to each of the issues raised in the List of Issues, and on the basis of the findings of fact set out above, the Tribunal arrived at the conclusions which are set out.

79. For the purposes of the constructive dismissal complaint, the starting point is whether the respondent committed a repudiatory breach of contract? The Claimant alleges that the Respondent individually and / or cumulatively breached the implied term of mutual trust and confidence, through a number of acts and or omissions which are itemised in the List of Issues. In relation to each item, the Tribunal asked itself whether the factual basis for each allegation is correct, and, if so, if it amounted to a breach of contract, and whether, if there was a breach of contract, it was sufficiently serious to amount to a repudiatory breach. The Tribunal then considered whether, viewed as a whole, and on the basis of its findings in relation to the listed items, it can be said that there was a cumulative repudiation of the contract of employment. In deciding whether there was a repudiatory breach, the Tribunal has reminded itself that it is not sufficient for the Claimant to be able to show that the Respondent acted unreasonably or that there was mistreatment, but the Tribunal has to be able to conclude that the Respondent conducted itself without reasonable and proper cause in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Claimant and the Respondent.

80. *Did, Barry Grant, in September 2020, unfairly blame the Claimant for not doing numerous jobs (Issue 1.1.1)?* Based on the Tribunal's findings set out above, the Claimant has failed to prove the factual basis for this allegation, in particular that he was being unfairly blamed by Mr Barry Grant in September 2020. This issue was simply not covered in any way in the Claimant's Statement of Evidence which would enable the Tribunal to make findings to this effect. The only paragraph which dealt with this issue seemed to be paragraph 7 which was referring to September 2019. Whilst this was probably an error as to the date, the content of this paragraph and the other evidence heard by the Tribunal did not enable the

tribunal to conclude that the claimant was unfairly blamed by Mr Barry Grant in September 2020.

81. *Did Barry Grant fail to carry out a reasonable disciplinary investigation (Issue 1.1.2)?* The purpose of any disciplinary investigation, in the first instance, is for a decision to be made as to whether the matter should be referred for a disciplinary hearing. Based on the admissions made by the Claimant in the course of his interview with Barry Grant, it was a legitimate decision for him to refer the matter for further consideration under the Respondent's disciplinary procedure. In this context, his investigation was reasonable. As such, the Claimant has failed to prove the factual basis for this allegation, namely that there was not a reasonable disciplinary investigation.

82. *Was the Claimant bullied, singled-out and belittled having regard to the matters relied upon in support of this allegation (Issue 1.1.3)?* The matters relied upon are dealt with in the paragraphs below.

83. *Did the Claimant receive negative reactions from colleagues when sharing details of a sale on a WhatsApp group in February 2021 (Issue 1.1.3.1)?* The only reaction about which the Tribunal has any meaningful evidence is that of the Tumbleweed video (or GIF) sent by Barry Grant. The Tribunal accepted the evidence of Caroline Bull regarding the nature of these WhatsApp messages, which was also consistent with the replies given by Barry Grant in interview. Whilst this might have been humour at the expense of the Claimant, in the context in which these messages were being sent, it did not amount to bullying or belittling the claimant, nor did it amount to singling him out, as the Tribunal is satisfied that similar such messages were being sent to other employees (with it being noted that some of the other such employees were not of the same ethnicity as the Claimant) and the claimant would have appreciated the purpose of such messages was to encourage friendly sales competition and to drive sales upwards.

84. *Was the Claimant made to work alone (Issue 1.1.3.2)?* The Tribunal accepted that the effect of the evidence was that the Claimant agreed to work alone and raised no objections. Thus, it did not amount to bullying or belittling the Claimant. Other managers were also at times working alone for the purposes of virtual selling, so this did not amount to singling out the Claimant.

85. *Did Head Office ignore an e-mail sent by the Claimant on or around 26 April 2021 (Issue 1.1.3.3)?* This part of the Claimant's case did not get off the ground as he was unable to produce the e-mail in question. It is in the nature of communicating by e-mail that emails do not always receive replies or get responded to in other ways. As such, on the basis of the mere assertion being made by the Claimant, the Tribunal is unable to conclude that there was any bullying or belittling of the Claimant or singling him out in this respect.

86. *Was it the case that, whilst the Claimant was off on suspension, managers who did not share his race were not following any of the procedures which he was found guilty of, yet they were not subject to disciplinary proceedings or sanctioned in the same way (Issue 1.1.3.3)?* The Tribunal was satisfied that, during the period between 12 April 2021 and 20 April 2021, there was only partial compliance with the relevant processes and procedures, by the managers who were temporarily covering the store from the date of its reopening. However, the Tribunal was satisfied that the circumstances in which there was any non-compliance by these managers were rather different from the circumstances in which the Claimant ended up being disciplined for a level of non-compliance which had been ongoing for a significantly longer period and which had occurred in the context of stock-take results which had highlighted the need for such processes and procedures to be properly implemented and the need to take robust action when the members of the store management who had been in place for some time, still failed to implement these processes and procedures to an acceptable level. The Claimant himself was not singled out, but rather the management team of the store in which he worked and in which he was a manager, was singled out by the Respondent. This was justified, in the sense that the Claimant himself accepted in the course of the disciplinary process that a disciplinary sanction was appropriate. As such, it did not amount to bullying or belittling the Claimant. This action was only taken after the non-compliance had been ongoing for a significant period of time. By contrast, the temporary cover managers had been parachuted into the store in the circumstances where the existing store management had been suspended, and where the priority was getting the store re-opened on 12 April 2021, so that Barry Grant, who was in the best position to judge, considered, as stated in the investigation interview, that it was unrealistic for everything to have been implemented completely correctly from day one, and would not have expected the same of the Claimant or the other regular members of the store management team. The Tribunal was also not satisfied that this amounted to treating the Claimant differently on the grounds of his race. The reason for the treatment of the Claimant was not that of his race, but that of the poor stock-take results, and the evidence and admissions regarding non-compliance with the processes and procedures. The temporary store managers do not amount to appropriate comparators in that the material circumstances were not the same, for the reasons set out above. The reason for these individuals being treated differently was that the circumstances were different. Moreover, it is noteworthy that, at a later point in time, one of those managers, Caroline Bull, was disciplined for similar non-compliance with processes and procedures, which rather suggests that an appropriate hypothetical comparator of different race would not have been treated differently to the Claimant.

87. *Did the Respondent breach health & safety procedures in requesting the Claimant to work alone at the Bullring store from February 2021 (Issue 1.1.4)?*

The Tribunal is unable to conclude that there was a breach of health and safety procedures in requesting the Claimant to work alone at the Bullring store from February 2021, given that the Tribunal has not been referred to the procedures which were allegedly being breached. The Tribunal accepts that, as a matter of good practice, if the Respondent was going to carry out an assessment regarding lone working arrangements, it would have made sense to have undertaken this assessment before the lone working started. However, the context was that of wanting to commence some form of business activity through virtual selling, with the Claimant seemingly happy to assist with undertaking this in the circumstances in which he was doing so. In any event, this could hardly be said to be the Respondent acting in a way which was likely to destroy or seriously damage the relationship of trust and confidence given that this was an initiative designed to make his continued employment more viable in the difficult trading conditions which existed.

88. *Did the Respondent drop an investigation into the Claimant making inappropriate comments in February 2021, but then leave the Claimant on tenterhooks until he was finally notified in May 2021 (Issue 1.1.5)?* The factual basis for this allegation is undoubtedly correct in so far as the investigation was effectively closed by early March 2021, but the Claimant was not informed of this until 30 April 2021, which certainly had the effect of leaving him on tenterhooks. The Tribunal was satisfied that it was more likely than not that this was simply an oversight, although it clearly amounted to poor practice on the part of the Respondent's HR team, albeit the tribunal was told that the HR team was a very small team at the time and was effectively overwhelmed by dealing with the issues which had arisen in respect of having a workforce which was not working at the point in time of the lockdown in early 2021. The Tribunal was not satisfied that, on its own, it amounted to a breach of the implied term of trust and confidence. Although it had failed to update the Claimant as to the position, the Respondent was dealing with the matter in a way which was consistent with seeking to maintain trust and confidence, as indicated by its proposal of mediation. It had also been open to the Claimant to chase up the matter in the period after his e-mail of 2 March 2021. In any event, once the Claimant was aware that the matter was closed, the Tribunal is of the view that the delay in informing the Claimant of the position had ceased to be a significant issue for the Claimant, notwithstanding the fact that it was a further issue that he added to his grievance.

89. *Did the Respondent fail to give the Claimant adequate time to prepare for the disciplinary hearing (Issue 1.1.6)?* It is fair to say that the notice that the Claimant was given of two days was fairly short. However, there is no evidence that it was inadequate. He was aware of the issues from the investigation interview which had been conducted by Barry Grant. He did not seek to request more time. When asked at the beginning of the disciplinary hearing if he was happy to continue, he agreed that he was.

90. *Did the Respondent ignore the mitigating circumstances in issuing a final written warning, namely (1) the way the Claimant was trained; (2) the total lack of support from his seniors; (3) the store being short-staffed; (4) colleagues (both those senior and subordinate to the Claimant) not listening to his instructions and / or illustrating a lack of desire to follow standard procedures; (5) a system error which may have distorted the February 2021 stock-take result and (6) his attention being diverted in monitoring an internal theft issue (Issue 1.1.7)?* Ultimately, the Tribunal accepted the evidence of Lee Broomhead, that the very reason that he imposed a final written warning, rather than any more severe sanction, as he did in making the decision that Mohammed Hussain should be dismissed, was because he accepted that there was significant mitigation. As such, it is clear that Mr Broomhead did not ignore the mitigating circumstances of which he was aware or which were brought to his attention. In any event, the sanction which was imposed was then varied on appeal to that of a first written warning, which was the very sanction which the Claimant had agreed during the disciplinary appeal hearing was appropriate in relation to the disciplinary case against him. Moreover, the imposition of this reduced sanction of a first written warning then took into account the mitigating circumstances of which Samir Ahsan was aware or were brought to his attention. In the circumstances, the Tribunal was not satisfied that there was a breach of contract.

91. *Is it the case that the managers who were not of the same race as the Claimant and who covered his store whilst he was suspended, also breached these same procedures but were never disciplined (Issue 1.1.8)?* The Tribunal has already dealt with this issue and decided that there was no breach of contract.

92. *Did Head Office ignore an email sent by the Claimant on or around 26 April 2021 (Issue 1.1.9)?* The Tribunal has already dealt with this issue.

93. *Did the Respondent still subject the Claimant to a written warning on appeal (Issue 1.1.10)?* Whilst this is factually correct, there was no breach of contract. The Claimant's contract of employment allows for the respondent to conduct disciplinary proceedings and there would be no breach of the implied term of trust and confidence in circumstances where the disciplinary proceedings were justified, as the Claimant effectively accepted in suggesting that the appropriate sanction was that which was imposed on appeal.

94. *Did the Respondent largely reject the Claimant's grievance without carrying out a thorough investigation, namely not requesting additional relevant evidence from him (Issue 1.1.11)?* Evidence was requested from the Claimant both in the course of the grievance meeting and in the letter convening the meeting which specifically said "*if you wish to rely on any documents, please send copies to me, if possible, in advance of the meeting*". In any event, the evidence which the Claimant had of non-compliance by other managers was of limited relevance insofar as the real issue to be considered was not whether the managers who were covering the store on a temporary basis had fully complied with the

processes and procedures, since it is clear that there was only partial compliance, but rather any explanation for this not being the case, which was effectively provided by Barry Grant in the course of the investigation interview. The Claimant did subsequently provide the evidence to which he seemed to be referring, which was then taken into account, as part of the review conducted by the external HR consultants. However, the Tribunal was not satisfied that the investigation of the grievance gave rise to a breach of the implied term of trust and confidence.

95. Did the Respondent fail to deal with the grievance appeal (Issue 1.1.12)? The Respondent was entitled to take the position which it adopted, namely that the grievance was out of time. Notwithstanding this, it effectively agreed to consider the issues being raised by the Claimant through referring them to an external HR consultant, so that there would potentially be a more independent outcome. As such, the Tribunal was not satisfied that there was any breach of the implied term of trust and confidence in this respect.

96. *Did the Respondent fail to comply with the subject access request (Issue 1.1.13)?* The Tribunal had insufficient evidence from which to conclude that there was a failure to comply with the request. On the face of it, the reply to the request which was sent either provided the information sought or sought appropriate clarification in relation to the request. In any event, there was no breach of contract.

97. It follows that the Tribunal has not accepted that any of the individual matters relied upon amounted to a breach of the implied term of trust and confidence or a repudiatory breach of the contract of employment.

98. The Tribunal was also not satisfied that the various matters cumulatively amounted to a breach of the implied term of trust and confidence or repudiatory breach of the contract of employment. On the basis of the findings and conclusions set out above, the Tribunal did not consider that the conduct of the Respondent, in the ways complained about by the Claimant, taken as a whole or cumulatively, amounted to the respondent, without reasonable and proper cause, conducting itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. It followed that there was no constructive dismissal. As there was no dismissal, it follows that the Claimant was not unfairly dismissed.

99. As there was no dismissal, and the Claimant chose to resign without giving notice, he was not entitled to any notice pay.

100. It also follows, on the basis of the conclusion that there was no repudiatory breach of the contract of employment, that it is not necessary to decide whether or not the Claimant accepted the alleged repudiatory breach of the contract of employment or resigned in response to any such breach. As such, the the Tribunal does not seek to do so, since making any such determination would depend upon the actual repudiatory breach which had been found to have

occurred. Similarly, the Tribunal hasn't sought to make a decision as to whether the Claimant affirmed the contract or delayed unduly in resigning, since, if it had found that there was a repudiatory breach, it would similarly depend on the date that any repudiation or breach arose, and the extent of any subsequent delay.

101. Similarly, it is also not necessary for the Tribunal to make a finding as to whether the Claimant might have been fairly dismissed in any event (the Polkey issue) or contributory fault. In any event, the Tribunal was not satisfied that it had the evidence which enabled it even to speculate as to a possible future dismissal of the Claimant on the basis of being in breach of a first written warning, which was the basis upon which the Respondent sought to put its case in relation to Polkey. Any finding as to contributory fault would have depended upon the basis upon which the Tribunal had found that there was a dismissal.

102. In relation to the Claimant's discrimination case, the Tribunal has to bear in mind the provisions in respect of the reversal of the burden of proof. These provisions require that, in the first instance, the Tribunal has to ask itself if the Claimant has proved facts from which the Tribunal could conclude, in the absence of any other explanation, that the Claimant was treated less favourably, because of a protected characteristic, namely his race, than any actual or hypothetical comparator upon whom he relies (for which purposes, there must be no material difference between the circumstances of an actual or hypothetical comparator and the Claimant's circumstances). If he does establish such a prima facie case, then the burden passes to the Respondent to provide an explanation for any difference in treatment which satisfies the Tribunal that the reason for the difference in treatment is not that of his race.

103. On this basis, the Tribunal turned to deal with the various allegations of race discrimination made by the Claimant, as set out below.

104. *Was the Claimant bullied, singled out and belittled in the respects alleged (Issue 5.1)?* The matters relied upon by the Claimant in support of this allegation of discrimination are dealt with in the paragraphs below.

105. *Was the Claimant subject to negative reactions when he posted details of a £179 virtual sale on WhatsApp in February 2021 (Issue 5.1.1)?* Although it was stated that the actual comparators relied upon would be confirmed once disclosure had been thoroughly reviewed, this did not happen. In the circumstances, the Tribunal considered this issue by reference to an appropriate hypothetical comparator. The Tribunal has already dealt with the factual circumstances in relation to this issue. The Tribunal did not consider that the Claimant had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination. In any event, the Tribunal accepted the explanation put forward by the Respondent in relation to this treatment. On the evidence that it has, including evidence to the effect that colleagues of a different race were

treated very similarly, and on the basis of the evidence from Caroline Bull and that of Barry Grant in his investigation interview, the Tribunal was satisfied that the treatment of the Claimant was not on the grounds of his race. As stated above, whilst this might have been humour at the expense of the Claimant, in the context in which these messages were being sent, it did not amount to bullying or belittling the claimant, nor did it amount to singling him out, as the Tribunal is satisfied that similar such messages were being sent to other employees including employees who were not of the same ethnicity as the Claimant. As the Claimant would have appreciated, the purpose of such messages was to build a team spirit and improve sales.

106. *Was the Claimant subjected to a final written warning for not following procedures, ignoring the mitigating circumstances, yet other managers who did not follow these same procedures were not sanctioned in the same way (Issue 5.1.2 and 5.2)?* The Tribunal has already dealt with the factual circumstances in relation to this issue and explained the basis upon which it is satisfied that the managers covering the store between 12 April 2021 and 20 April 2021 do not amount to appropriate comparators as the material circumstances were different to those in which the Claimant ended up being disciplined. Thus, the Tribunal did not consider that the Claimant had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination. In any event, the fact that Caroline Bull was later disciplined in relation to the same matter (namely issues of non-compliance) suggests that a hypothetical comparator would have been treated no differently and that the treatment of the Claimant was not on the grounds of his race. In any event, the Tribunal has accepted the explanation put forward by the Respondent regarding its reasons for the treatment of the Claimant, namely that of the stock-take losses and the admissions made by the Claimant both in the course of the investigation interview with Barry Grant and in the course of his disciplinary hearing with Lee Broomhead, based upon which the treatment was not on the grounds of his race.

107. *Was the Claimant paid less than other white Assistant Managers (Issue 5.3)?* The Tribunal has already set out its findings of fact in relation to the information regarding the salaries being paid to other Assistant Managers. Based on these findings of fact, in summary, in 2018, when the Claimant had not long been appointed as an Assistant Manager, he was the lowest paid Assistant Manager in Barry Grant's area, but there was another White employee on the same salary and the highest paid Assistant Manager was of Asian or Asian British ethnicity. By 2019, the ethnicity of the highest paid assistant manager was described as being any other Black background and the lowest paid assistant manager was White. The figures for 2021 show that most Assistant Managers were now being paid less than the Claimant, including a number of managers whose ethnicity was described as White or British or English. In the circumstances, the Tribunal was unable to conclude that there was any evidence

of the Claimant being paid less than any relevant comparators with the reason for any such difference in treatment being that of his race. Thus, the ribunal did not consider that the Claimant had proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination. In any event, the Tribunal was satisfied that the Claimant's race was not a reason for him being paid less than any other individual.

108. It follows that the complaints of race discrimination are dismissed.

109. For the sake of completeness, in relation to the issue of time, the Tribunal was satisfied that all the complaints of discrimination were out of time (except that in relation to pay whether Claimant was effectively relying on a continuing but ultimately non-existent pay disparity). The Tribunal would have extended time in relation to the complaints, on the basis that it was just an equitable to do so, save with regard to the complaint regarding the WhatsApp message, in relation to which the Tribunal was satisfied that the Respondent was unduly prejudiced in dealing with this issue since neither party was able to produce anything other than isolated WhatsApp messages and the Respondent was not able to call Barry Grant as he had left his employment with the Respondent. Moreover, even when interviewed regarding this matter, Barry Grant had struggled to recall the actual WhatsApp message concerned. By contrast, in relation to the issue regarding the imposition of a final written warning, the respondent was able to call Lee Broomhead to give evidence, and his decision in imposing a final written warning was documented in some detail, so that there was no prejudice to the Respondent in dealing with this issue.

110. However, the decision of the Tribunal is that the Claimant's claims are dismissed on their merits.

Employment Judge Kenward
Dated 23 August 2023