# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Can

**Respondent:** Thursdays UK Limited

**Heard:** **In Sheffield** **On:** 8, 19 September 2023

**By CVP** 21 September 2023

**Before:**
Employment Judge JM Wade
Mr D Wilks
Mr L Priestley

**Appearances**
For the claimant: Mrs Can, wife
For the respondent: Mr A Powis, solicitor

# JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's Equality Act complaints are dismissed for the reasons below.

# REASONS

Introduction, allegations and the law

1. The Claimant (who is of Turkish nationality and a Muslim) presented the following claims in a claim form presented on 19 April 2021 concerning a brief period working as a chef at the respondent's Sheffield restaurant/store:

    1.1. Direct discrimination based on race and religion or belief under **section 13** of the Equality Act 2010 ("**EA 2010**")

    1.2. Indirect discrimination on the grounds of race and religion or belief under **section 19** EA 2010;

1.3. Harassment under **section 26** EA 2010;

1.4. Victimisation under **section 27** EA 2010;

1.5. Compensation for discriminatory treatment under **section 13** EA 2010;

2. The factual allegations to decide (clarified during three case management hearings were):

2.1. On 19 October 2019, Matthew Bailey said to the Claimant "come on eat the bacon"

2.2. At some time between October and December 2019, Matthew Bailey told the Claimant he is "not a chef", "fuck you", "why don't you just fuck off".

2.3. In and around November 2019, Matthew Bailey made comments to the Claimant about working in Greece and Turkey and what the foreigners did to him.

2.4. In early December 2019, Mate Oksai said to the Claimant that "All Turkish are the same. Killed a lot of Hungarians and Angora".

2.5. On 13 December 2019, Matthew Bailey made comments about the Claimant's wife and accused the Claimant of intimidating him.

2.6. On 15 or 16 December 2019, Matthew Bailey made comments to the Claimant about Turks and Muslims and swore in the Claimant's face.

2.7. On 1 October 2020, Matthew Bailey made comments to the Claimant about the fact the Claimant was not a chef because he had not been asked to work during the lockdown.

2.8. On 1 October 2020 Craig Benson told the Claimant he knew nothing of his complaint but later told the Claimant he had disciplined Matthew Bailey.

2.9. On 1 October 2020 Craig Benson asked the Claimant to change his job to one of Cleaner.

2.10. On 9 October 2020 incorrect information was written in an email about the Claimant concerning sickness and matters relating to his wife.

2.11. On 19 October 2020 Craig Benson had instructed HR to deal with the Claimant's complaint but failed to let the Claimant know he had done this during their meeting of the same date.

2.12. In and around December 2020 Craig Benson asked the Claimant to compete online training courses in English.

2.13. In and around February 2020 the Claimant was invited to disciplinary and dismissed

2.14. On 17 February 2020 the Claimant's dismissal appeal was not upheld.

3. Allegations 1 to 7 were alleged as direct race/religion discrimination, alternatively harassment; allegations 8 to 14 were pursued as direct race/religion discrimination; allegation 12 also as indirect race/religion discrimination; and allegations 10 to 14 also as victimisation.

4. As to victimisation, the claimant's case on protected acts to decide was, did he:

   4.1. On 10 December 2019 report that he had suffered harassment to the kitchen supervisor, Khalid and then to the kitchen manager Mr Nashwan Fadhle?

   4.2. On 7 September 2020 raise his issues with Matthew Bailey at a welfare meeting with Craig Benson ?

   4.3. On 19 October 2020 raise those issues again with Mr Benson at a further welfare meeting.?

5. The claimant's ACAS certificate recorded conciliation commencing on 18 February 2021 with the certificate issued on 11 March 2021.

6. Section 123(1) of the Equality Act 2010: "Proceedings on a complaint within section 120 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. Section (s123 (3)(a) EA 2010) provides that "conduct extending over a period is to be treated as done at the end of the period".

7. The Equality Act time limit is extended by the ACAS conciliation provisions, in accordance with Section 140B.

8. Time runs from the date of the alleged discriminatory act (but that lack of knowledge is relevant to the grant of an extension) - see Mr GS Virdi v Commissioner of Police of the Metropolis and another [2007] IRLR 24 EAT.

9. Forensic prejudice is properly to be considered in assessing the prejudice to each party from an extension of time – see Wells Cathedral School Ltd v Souter EA 2020 000801 JOJ.

10. Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132 made clear that the Tribunal is entitled to consider the merits of a claim in the exercise of its discretion.

11. The Act confers the widest possible discretion on the Employment Tribunal in determining whether or not it is just and equitable to fix a different time limit Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640. That said the power of the Tribunal is a discretion, to be exercised judiciously, assessing relevant factors and the weight to be given in each case. The onus is on the Claimant to persuade the Tribunal that it is just and equitable to extend time. Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.

12. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see Afolabi -v- Southwark LBC 2003 EWCA Civ 15.

13. In exercising discretion under Section 123 (1)(b) the Tribunal must consider the length of and reasons for delay, and consider the prejudice to both parties.

14. Section 33(3) of the Limitation Act 1980 contains a helpful checklist of other matters which might need to be considered (in personal injury and other claims with longer time limits), but also for me to bear in mind if relevant:

    14.1. the extent to which the cogency of the evidence is likely to be affected by the delay;

    14.2. the extent to which the party sued had cooperated with any requests for information;

    14.3. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;

    14.4. the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Legal issues

15. In orders sent to the parties on 12 October 2021 the Employment Judge identified the following issues additional issues:

    15.1. Who does the Claimant seek to rely on as a comparator?

    15.2. Whether it would be just and equitable for the Tribunal to extend time for those claims that the Claimant has presented out of time?

    15.3. If the PCP is the requirement to undertake training courses in English, did or would that PCP put persons of the Claimant's racial group or religion at a particular disadvantage when compared to other persons and if so did that PCP put the Claimant at that disadvantage?

15.4. Was the PCP (understood to be the requirement to undertake training courses in English) a proportionate means of achieving a legitimate aim?

15.5. Was it intended that [any proven] conduct would violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (s26 (1)(b) EA 2010); or

15.6. Did [any proven conduct] have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (s26 (1)(b) EA 2010)?

15.7. If the [proven] conduct did have the effect of violating the Claimant's dignity etc, in the circumstances of the case was it reasonable for it to have that effect(s26(4) EA 2010)?

15.8. Did [any proven] conduct amount to a detriment

15.9. If so, did the Respondent subject the Claimant to that treatment because he had done a protected act?

<u>Hearing and Evidence</u>

16. The claimant was not able to give evidence by video link or in person because he resides in Turkey and is unable to obtain enter the UK lawfully at present; Turkey is not a state from which video evidence could be heard. The claimant had the opportunity to observe the hearing but did not do so.

17. At a hearing in July of this year (the fourth hearing in this case) to determine the respondent's strike out application, the Employment Judge refused the application on the basis that a fair hearing could still take place (even if the claimant did not attend), because the respondent witnesses could attend and be asked questions by the claimant's wife, Mrs Can, and the Tribunal could place such weight on the claimant's written statement as appropriate and hear submissions on that. There being no changed circumstances, the Tribunal was not in a position to depart from the previous direction of the Employment Judge that a final hearing take place (nor would we have wished to finally determine this matter given the length of time over which it had posed a strain for all involved).

18. Mrs Can opposed conversion of this postponed hearing to CVP on the basis of technology sufficiency. She then told us she had read out the respondent's statements to the claimant on the first evening by video call. We limited questions from Mrs Can to the respondent's witnesses to matters contained within the claimant's statement.

19. Mrs Can, having attended four hearings, had had every opportunity, had she and Mr Can so wished, to submit a statement containing her own knowledge of matters; she chose not to do so, and nor did she seek to be sworn in to give evidence. It was simply not fair in those circumstances for her to expand his case at this hearing on the basis of her own beliefs, when there had been clear directions for the exchange of statements with which the respondent had complied.

20. The Tribunal explained via our clerk that we would read until 12 noon on the first day. The claimant's statement was six pages and 22 paragraphs. The hearing bundle was 354 pages. This was largely comprised of the respondent's comprehensive notes and documentation of all the relevant interactions. The claimant and his wife secretly recorded one meeting and the respondent's notes (without recording) were a faithful summary. There was nothing to suggest that any of the respondent's documentation could not be treated as reliable – quite the opposite impression was given. The respondent's managers were acting in good faith and carefully in line with procedures and with compassion.

21. We directed that Mrs Can could commence questions for the respondent's witnesses and she said she wished Mr Benson to go first. We directed that we would hear Mr Benson first - that was not being the respondent's preference. Mr Benson no longer works for the respondent. Mrs Can was not prepared to question other witnesses after Mr Benson, and we stood down to give her the opportunity to prepare overnight.

22. On day 2 we heard the remaining four respondent witnesses: Mr Oksai, who is Hungarian and no longer works for the respondent; Mr Bailey who does work for the respondent still, and similarly Ms Austin and Mr Quinn, albeit their job titles have developed since their statements were prepared for an aborted final hearing in April 2022 – the claimant had returned to Turkey on 1 February 2022.

23. Our assessment of the evidence is as follows. On the main allegations the claimant's statement was exaggerated and overly dramatic, in comparison with the straightforward and contemporaneous documentation. We consider the statement has been written with the lens of hindsight. We did not have confidence in its contents without corroboration.

24. We considered the statements of the respondent's witnesses to largely reflect the contemporaneous material. Mr Benson was straightforward and compelling; as was Mr Oksai, both of whom were not reluctant witnesses at all, despite no longer working for the respondent. Ms Austin, and Mr Quinn were equally witnesses of truth in our judgment; and Mr Bailey similarly so, albeit understandably he was more nervous than others given the allegations against him. Mrs Can's questions challenged all the witnesses on the points she wished to make (other than where the Tribunal directed the question would not help resolve the issues of fact before us). The Tribunal put the allegations – by spelling out the claimant's legal and factual case and asking the witnesses to comment on them.

Findings

Background

25. The claimant was employed by the respondent as a chef with a minimum hours contract at minimum wage of 25 hours. The respondent had written contracts, a grievance policy and a disciplinary policy and management accessed HR and legal advice on matters arising. At interview the claimant had told Mr Benson, the general manager, that he had experienced difficulties at a previous restaurant - a chef had allegedly sexually assaulted a waitress - Mr Benson said that would never happen at his restaurant. This was a likely thing for Mr Benson to say – he took pride in his team of 50 or so people and his management of those people. He was committed and knowledgeable about people management, and he knew how to access help if he needed it. The claimant completed online training modules at the start of his employment in 2019.

26. At the time, October 2019, the kitchen manager was Mr Fadhle, who also interviewed the claimant, and was one of at least two Muslim colleagues, aside from the claimant. The workforce was (and is) also diverse - both as to nationality and faith (or no faith) - we make the latter finding on the basis of industrial knowledge. Nationalities included Somali, Nigerian, White British, Hungarian and more.

27. Food health and safety was a mandatory on line training course, and refresher training in that had to be repeated by employees every year. As a shift leading chef, Mr Bailey was acutely aware of the need to respect, "Dietary Requirements", whether that was faith based or otherwise.

28. The kitchen had several different "stations", on a line and there could be five or more chefs or people working at those stations, sometimes in pairs. They included "window" - final dishes to brand standard to pass out, fryer, boiler and so on. The claimant was trained on each station over a particular number of shifts and training records were kept identifying the trainer and the manager's comments. The claimant did very well on the fryer, trained by others with good feedback; and by the end of October was doing well but was still a trainee. He only worked with Mr Bailey when their shifts overlapped which was not all the time.

29. The claimant commenced work on 3 October 2019. Mr Oksai had started in April that year and Mr Bailey had been a chef there since August 2017 and in September 2018 became "shift leader". Chefs on shift included: the claimant, "Ibbi", and "Edmond".

30. <u>On 19 October 2019, Matthew Bailey said to the Claimant "come on eat the bacon"</u>

31. <u>At some time between October and December 2019, Matthew Bailey told the Claimant he is "not a chef", "fuck you", "why don't you just fuck off"</u>

32. In late October 2019 there were a number of incidents where Mr Bailey's behaviour was brought into question. On or around 28 October he had tripped over a box of stock on the floor, asked who put it there , words like - "did you see what that did" may well have been said - and in pain and frustration vented at the claimant, being forceful about the need not to leave things on the floor. "Khaled" had intervened to say "leave it" or words to that effect. The claimant went to a manager, Mr Pickard. Mr Pickard told the claimant to go outside and then told Mr Bailey to go and apologise; the claimant was hostile when Mr Bailey went out, so Mr Bailey went back to ask Mr Pickard to join them and peace was made with Mr Pickard present as an informal mediator.

33. On 30 October Mr Bailey had then sworn at a team leader about not having enough chicken; and he had sworn ("fuck or fuck off") working with the claimant on the window/broiler about a returned steak; he had not stuck two fingers up at the claimant (we accept his evidence about the hand gesture). By that stage Mr Bailey was also training the claimant - his swearing had upset both front of house staff and the claimant; and his behaviour was affecting the newer chefs' learning - Ibbi, Edmond and the claimant. The team leader formally complained and because of the informal chat on the 28th, Mr Pickard was aware of several matters in quick succession. Mr Fadhle had also had another team member raise similar issues, in addition to the claimant, and had spoken to Mr Bailey about it around this time informally.

34. After advice, a formal investigation took place with Mr Pickard. Statements were taken and he recommended a disciplinary process. On 11 November Mr Fadhle held a disciplinary hearing and decided on a final written warning, explaining to Mr Bailey the respondent's zero tolerance policy. The warning was for "shouting and swearing at fellow team members". Mr Benson was away at that time - November 2019 - and did not know of the warning. Nor did the claimant know of the investigation and process followed.

35. As to the "bacon" allegation, the claimant did not raise this as a complaint to management at the time (and we know he did raise matters affecting him which he found upsetting). We accept entirely Mr Bailey's evidence about it because it is also largely consistent with the claimant's various accounts when he did raise it a year later in October 2020. They had been talking about the high quality of the meat used – including bacon on burgers. The claimant had burgers as his meal (chefs were entitled to a meal on shift). He had told Mr Bailey he could cook bacon and Mr Bailey had said he could try some. He did not pick up bacon to offer it to the claimant seeking to taunt him about his religion. -- which is the inference the claimant seeks to make. Eating was not permitted on shift – only on a break and as part of an ordered meal. This allegation is an elaboration of a conversation. Mr Bailey had been upset in the past to find he had used a tray which had been used for bacon for a Muslim colleague's meal. He was not taunting the claimant with bacon in any way.

36. In and around November 2019, Matthew Bailey made comments to the Claimant about working in Greece and Turkey and what the foreigners did to him.

37. Mr Bailey had apologised to all staff for his outbursts above, including to the claimant. He continued to work professionally after that. He talked about working in Greece previously to the claimant. That is the extent of it. He did not complain to the claimant about Turks, or "foreigners", nor did he abuse, much less "continue" to abuse to the claimant with "little comments about Muslims and foreigners". This is untrue.

In early December 2019, Mate Oksai said to the Claimant that "All Turkish are the same. Killed a lot of Hungarians and Angora".

On 10 December 2019 report that he had suffered harassment to the kitchen supervisor, Khalid and then to the kitchen manager Mr Nashwan Fadhle?

On 13 December 2019, Matthew Bailey made comments about the Claimant's wife and accused the Claimant of intimidating him.

On 15 or 16 December 2019, Matthew Bailey made comments to the Claimant about Turks and Muslims and swore in the Claimant's face.

38. The claimant and his wife were having difficulties in the community where they lived. The claimant's wife has a heart condition, and he had obtained a right to remain visa with permission to work in the UK as her carer.

39. In December there had been some kind of upset with colleagues and the claimant had reported that to Mr Fadhle. Mr Fadhle conducted a welfare/informal meeting with him on 10 December. We find that note (page 108/109) wholly reliable about events at that time, and instructive. Mr Fadhle had clearly acted entirely properly and with integrity in disciplining Mr Bailey in November. It is entirely likely he would act similarly in relation to any matters raised with him about Mr Bailey's conduct – or that of others – if it was in any sense in breach of the respondent's policies on zero tolerance.

40. It is absolutely clear from the note that management were concerned for the claimant's welfare. Mr Fadhle reassured him of management support in that meeting. He asked him how his shifts were and the claimant said he just wanted more hours. He was asked if anything bothered him and he said "what I feel is because I'm Turk and they don't know me personally I feel there is not enough warm or friendly". Mr Fadhle replied – "but as long as every one of them has a respect line to treat others"..and the claimant replied, "yes". He was asked if there was anything he wanted from the managers and he said, " what I need from others is respect my age as much as I respect them and this is a Turkish mentality". The claimant was 44 at the time. Others in the kitchen were younger.

41. The claimant had explained his issues outside work and Mr Fadhle gave him a booklet - Hospitality in Action – and said he wanted the claimant to give them a call and seek advice, and the claimant said he would. They agreed they would sit down again in another three to four weeks. The claimant was asked if he

wanted to add anything, and he said he was happy with management and their care for him.

42. In December Mr Oksai did talk to the claimant about the 1400 to 1600 wars. The chefs did chat about all sorts of matters from time to time. They were a very diverse team which had been working well. Mr Oksai is passionate about history. English is his second language, learnt largely at school. He was a thoughtful and compelling witness. He is younger than the claimant. We accept his oral evidence. He did not lean on a table, put his face close to the claimant, and say "why are you threatening my friend Matthew" [Mr Bailey] and then go on to say "you Turks are all the same, it was your lot that killed Hungarians and Angoran people years ago".

43. He did say a lot of Hungarians were killed when talking about the Ottoman wars - 1400 to 1600. He did not say "you Turks are all the same".

44. We further find Mr Bailey did not make the alleged comments about the claimant's wife, as alleged, nor accuse the claimant of intimidating him in December. The claimant's evidence has been confused about this and there was no contemporaneous evidence about it. It was raised for the first time on 1 October 2020 – some 10 months' later and the claimant said it was before he got his sick note and that he raised it with [Mr Fadhle]. At that time Mr Fadhle knew Mr Bailey was on a written warning. If something so unpleasant had been raised with him it is inconceivable, given zero tolerance and his documented approach in November, that he would not have recorded it. In the round we find it unlikely for there to have been the events as described in the claimant's paragraphs 8 and 9.

45. We also accepted Mr Bailey's evidence about it – the last time they worked together pre pandemic things were fine. It is not necessary to decide whether the claimant himself made comments about his wife to Mr Bailey (which was Mr Bailey's evidence).

46. He was subsequently absent from work certified as unfit because of "mental health issues" from 17 December 2019 to 23 March 2020. He reported none of the December allegations as alleged (that in the context that his wife has said they have family access to HR and legal advice).

47. From 23 March 2020, with the onset of the pandemic, the claimant provided no further fit notes and received furlough pay from the respondent in respect of April onwards following the closure of the hospitality sector.

<u>On 7 September 2020 the claimant raised his issues with Matthew Bailey at a welfare meeting with Craig Benson (alleged protected act)</u>

<u>On 1 October 2020 Craig Benson told the Claimant he knew nothing of his complaint but later told the Claimant he had disciplined Matthew Bailey.</u>

On 1 October 2020 Craig Benson asked the Claimant to change his job to one of Cleaner.

On 1 October 2020, Matthew Bailey made comments to the Claimant about the fact the Claimant was not a chef because he had not been asked to work during the lockdown.

On 9 October 2020 incorrect information was written in an email about the Claimant concerning sickness and matters relating to his wife.

On 19 October 2020 Craig Benson had instructed HR to deal with the Claimant's complaint but failed to let the Claimant know he had done this during their meeting of the same date.

On 19 October 2020 raise those issues again with Mr Benson at a further welfare meeting – alleged protected act

48. Mr Benson had called the claimant in May, June, July, August and November 2020 chasing up furlough pay for him, training and general catch ups.

49. The respondent undertook a consultation on changing staff contracts for all (reducing minimum hours to 9) and the claimant signed a new contract on or around 7 September 2020. He also had a welfare meeting with Mr Benson in which they discussed the three aspects of his welfare, return to work, his health in the last 12 months and his wife's wellbeing and how that affected him.

50. The claimant wanted to return to work; he mentioned having a problem with "Matthew", and "I don't know what I did". He was asked if he had approached primary care for more support with his wife and he said, "if you are a foreigner in this country it doesn't work and I don't want to be here in this country". He talked about suicide and the medication and care he was receiving.

51. He was asked to provide his diagnosis and he was asked about shifts he would like or that would help with his wife. He was told the restaurant was very busy (by this time with click and collect) and he was asked about whether a morning cleaning role would suit his circumstances.

52. Mr Benson was provided with a confirmation of "agitated depression" diagnosis, and the claimant had a further welfare meeting with Mr Benson on 1 October. He told Mr Benson the employer was trying to get rid of him with a change of hours and change of profession (from chef to cleaner) - the contract he had signed recorded "chef" on 7 September. He raised the new December complaints about Mr Bailey and Mr Oksai (albeit he was not specific about dates). There was discussion of how to take those complaints forward. Mr Benson had not known of the 2019 complaints and told the claimant he had previously been unaware. He asked whether the previous complaint was formal or informal and he offered the claimant a formal grievance. The claimant said previously it had been informal with Mr Fadhle and he wanted to know if something had been done. .

53. Mr Benson then nonetheless undertook interviews on 2 and 6 and 8 October with staff identified by the claimant. He later told the claimant (likely by telephone) there had been a disciplinary in 2019. The claimant may have understood Mr Benson to be saying he conducted the disciplinary himself (but he did not say that because plainly he had not done it). On this allegation, Mrs Can said during the hearing there was an email in which Mr Benson had said he had undertaken the disciplinary hearing, but it was not in the bundle. She said she would produce it the next day. She did not.

54. Mr Benson then took advice, recorded by the adviser in an email on 9 October, which said this: [the claimant] is currently signed off sick because of depression.. ...his sick note is coming to an end – Mr Benson has advised he will need to return to attend his shifts next week...has made multiple attempts to commit suicide, has many personal issues at home, with his wife being terminally ill, and has also been arrested a few times in the past few months; during welfare meetings ..talks about having hallucinations...[mr Benson] is quite concerned about his capability... has also raised allegations he was bullied in the kitchen therefore will not return until he can work alone. ...mainly stated sworn at by a fellow team member during shift, [Mr Benson] had already looked into this matter and completed the necessary investigations...currently, he has found..."

55. Mr Benson did say the claimant's wife was terminally ill. The claimant told him it was a serious heart condition for which there was no treatment. He therefore believed the claimant's wife was terminally ill and relayed that information in good faith. The claimant had included in his visa application that his wife had a serious heart condition and referred to him being with her ...for the days she had left, or words to that effect, which Mrs Can said in the hearing was "overly dramatic". Mr Benson's good faith impression was not at odds with an impression the claimant had himself created in a different context and it is likely he created the same impression with Mr Benson. It is unlikely Mr Benson mentioned fit notes, because the claimant was on furlough and had not provided a fit note. The note taker may have misunderstood the position – this was not Mr Benson's note. However, there was a telephone conversation with the claimant on the 8th of October, and Mr Benson was just relaying in good faith what he believed – this is apparent from his email to the claimant on 9 October 2020. In this email he requested a fit note recommending adjustments to enable him to return. That may be the information he had relayed to the adviser.

56. Mr Benson then met with the claimant on the 12th and 19th of October. On the 12th the claimant said the police, council and community treated him as an enemy because he was Turkish and they "checked the law to get rid of me". Mr Benson made clear the claimant's complaints could and would be investigated as a formal grievance – the claimant wanted to ask his wife about that. He later said he wanted someone independent and unconnected with the branch to investigate and Mr Benson handed that to Ms Austin – who was such a person. When he was asked for suggestions, the claimant suggested working separate shifts from Mr Bailey or Mr Oksai - he had previously said he did not want to work with them.

57. At the 19 October meeting Mr Benson agreed a return to work for the claimant as a prep chef working in the early morning - the claimant described the other people at work as fine because "they don't swear". The claimant wanted seven day working.

58. They compromised at 4 x 4.5 hour training shifts starting on 22 October 2020 starting at 7am, and then regular hours. The claimant was happy with that. He returned to work for two weeks, saw Mr Bailey briefly and Mr Bailey did not say that the claimant " was not a chef" and "he had been at work all the time through lockdown". Mr Bailey had returned to work for about six weeks when it was permitted in the first lockdown for click and collect.

59. On 19 October Ms Austin had invited the claimant to a meeting after his shift at a different location on 22 October to discuss his grievance. He did not attend. They later corresponded after she had clarified he would be paid for his attendance and a new date was fixed for 6 November.

<u>In and around December 2020 Craig Benson asked the Claimant to compete online training courses in English.</u>

<u>In and around February 2020 the Claimant was invited to disciplinary and dismissed</u>

<u>On 17 February 2020 the Claimant's dismissal appeal was not upheld.</u>

60. In early November 2020 a further lockdown/closure was announced and the claimant returned to furlough, as did Ms Austin. The grievance meeting on. 6 November was postponed for that reason and Ms Austin said she would be back in touch once the stores were permitted to re-open.

61. The respondent's head office had previously issued an instruction that furloughed staff were to complete training during furlough (as permitted by the government scheme) and from November onwards Mr Benson chased his furloughed staff, including the claimant to complete online training, if they had not done so by October 3rd. The training was in: personal resilience, mental health support, conflict management, health and safety in a food environment, and disability awareness. Each course would take around 20 minutes for a someone proficient in English. The aim was to use furlough to enhance staff skills in managing themselves in the workplace, and being aware of support in place at work. These were legitimate aims.

62. The claimant and Mr Benson discussed the training by telephone before 22 November. Mr Benson had sent out WhatsApp reminders to staff (but the claimant was not on that group at that time), but they were also notified by "Hot Schedules" messages that the training had to be completed.

63. He named and shamed those who hadn't completed their training, sequentially extending the deadlines. He rang the claimant again in December to chase the training compliance; the claimant gave the same excuse for not doing it – it was

management training – and Mr Benson gave the same instruction – all staff had to do it.

64. After three months the claimant was the only person who had not completed all his training and had been put on the WhatsApp group. Many of the fifty or so staff did not have English as a first language. The claimant completed one course on 22 November on "academy". That was less than 50% of the courses required. He was required to complete other courses including dispute resolution and equality (as were all staff). When Mr Benson called him to remind him in January to complete all training, his position was again that it was management training and not for him and that he was not being paid to do it.

65. Mr Benson explained the position and then decided that because the claimant was simply refusing to do as he was asked, a disciplinary investigation was required. He asked Mr Gold to conduct an investigation. Mr Gold called the claimant and confirmed his wife was present to take notes – she was – on 4 February. Mr Gold took notes and then emailed the claimant with those notes. The call was over half an hour.

66. The claimant accepted he had been called the previous week and been told to do the training by Mr Benson. He had also logged onto the system on 2 February and looked at the respondent's discipline and grievance policies but still not completed the training. His position with Mr Gold was that it was management training (Mr Benson had told him everyone had to do it – and everyone else had done it) - and he was just a chef.

67. The claimant then asked about Mr Gold about his complaint about Mr Bailey. He said, now we've done the manager training we know that's not right (ie for Mr Fadhle to have progressed the earlier complaint and not to have told him of the previous disciplinary outcome for Mr Bailey). Mr Gold gave an explanation and said he would come back to him after further investigations.

68. He did then email the claimant with the chain of events concerning his 2019 complaint, and it being raised again in 2020. Mr Gold explained that as the claimant had not attended the meeting with Ms Austin at Meadowhall the grievance couldn't be continued. The claimant was told that in accordance with the respondent's grievance policy, had the claimant raised a formal grievance in 2019 and an outcome had come from that, he would have been entitled to know about it. As it was, he did not then raise a formal grievance, but Mr Fadhle had progressed the matters on his behalf including to a disciplinary and he was not therefore entitled to know the sanction.

69. Having given that explanation Mr Gold then decided to refer the matter for a disciplinary decision to Mr Benson. On 8 February the claimant was invited to a disciplinary meeting on 11 February with Mr Benson, the investigation comprising Mr Gold's note of their conversation on the 4$^{th}$.

70. Also on 8 February Mr Benson had communications with the claimant about his wife attending the telephone disciplinary as a reasonable adjustment, and that was permitted. The claimant then emailed referring to a grievance hearing and Mr Benson wrote to confirm that could and would be progressed separately if the claimant wanted to progress it to a meeting, but the disciplinary would still go ahead. Mr Benson had also spoken to Mrs Can the day before to make sure she would be there to represent and support the claimant.

71. At the disciplinary meeting there was no better explanation given by the claimant for not doing the training. Mrs Can spoke vehemently on his behalf, explaining that he could do the training with her support but after believing they were management ones and losing confidence he would not attempt the other ones. He was asked why he had not communicated that in December or January and Mrs Can explained that it was, in effect, demeaning for him to do so, referring to Turkish culture. After further appropriate enquiries Mr Benson then went away to think about his decision. He reconvened the next day and told the claimant his decision was immediate termination. The termination gave a right of appeal and the claimant pursued that in a lengthy letter to Mr Quinn.

72. In the appeal letter the claimant alleged victimisation by Mr Benson, in "conjunction with the protected characteristics regarding race, religion and beliefs". He set out again the 2019 complaints about Mr Bailey and Mr Oksai, the two week return to work, and further alleged that Mr Bailey had seen him in October 2020 as they crossed over when the claimant was leaving and Mr Bailey was arriving and Mr Bailey had laughed and said he had worked the whole lockdown and the claimant was furloughed because he wasn't a chef. He said the hours 7 am to 11.30 when other prep chefs came in at 9 am were about keeping him away from Mr Bailey.

73. He further said he felt the dismissal came about due to failure by TGI's management to address my complaint regarding racism, harassment, threats of violence and swearing directly at me as well as derogatory remarks regarding my wife.

74. It is clear that this letter was drafted by the claimant's wife, and that it did not bear any resemblance to the welfare and other discussions Mr Benson had had with the claimant in September and October 2020, when the claimant had sought out hours when other people were not around.

75. Mr Quinn then conducted an appeal hearing at which Mrs Can spoke extensively, including not agreeing that the appeal was about the training dismissal, and wanting questions answering about the claimant's complaints. She referred to her "son and nephew who are HR and employment lawyers". In short, very little was said about mitigation to Mr Quinn on not completing training, Mrs Can simply insisted that she had been told not to let the two issues be separate, and they would not participate in the appeal unless the name of the person considering the grievance was provided.

76. Mr Quinn said he would take that away, but that did not mean he agreed that the appeal could be reconvened – he needed to seek advice. He did arrange for Ms Austin to pick up contact with the claimant that same day and offer a grievance meeting. The reply to that was that the claimant would not engage because of his employment status. Ms Austin did manage to arrange a grievance meeting with the claimant and Mrs Can on 22 February by Teams but when asked to set out his grievance the claimant said, "I do not know we are dealing with ACAS now."

77. Mr Quinn conducted an interview with Mr Benson on 18 February to investigate the victimisation allegation, which was fully noted. Mr Benson sent him a timeline of the events and training instructions. Mr Quinn was satisfied there was no reason to change the dismissal decision. He produced a full appeal report, and he confirmed his decision to uphold the dismissal decision in a letter dated 23 February 2022. He sent the report and letter to the claimant.

78. Ms Austin also produced a grievance report identifying allegations that a grievance had not been handled correctly and the claimant had been given contradictory information in the emails with Mr Gold of 6 February (by reference to earlier information given by others). She recorded she had not been able to progress the meeting in the meeting with the claimant and she did not uphold either of the complaints she had discerned from the matter being referred to him and what he had written in emails to management.

79. Finally, as to comparators, this branch has dismissed white British colleagues for failing to undertake mandatory training. This was the respondent's unchallenged oral evidence. As Mr Bailey's final written warning for swearing, a difference between him and the claimant (apart from a difference in the allegations), was that he recognised he had done something wrong and was apologetic through the investigation and disciplinary hearing.

<u>Conclusions on the issues – applying the law to the facts</u>

<u>Who does the Claimant seek to rely on as a comparator?</u>

<u>Whether it would be just and equitable for the Tribunal to extend time for those claims that the Claimant has presented out of time?</u>

<u>If the PCP is the requirement to undertake training courses in English, did or would that PCP put persons of the Claimant's racial group or religion at a particular disadvantage when compared to other persons and if so did that PCP put the Claimant at that disadvantage?</u>

<u>Was the PCP (understood to be the requirement to undertake training courses in English) a proportionate means of achieving a legitimate aim?</u>

<u>Was it intended that [any proven] conduct would violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (s26 (1)(b) EA 2010); or</u>

<u>Did [any proven conduct] have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (s26 (1)(b) EA 2010)?</u>

<u>If the [proven] conduct did have the effect of violating the Claimant's dignity etc, in the circumstances of the case was it reasonable for it to have that effect(s26(4) EA 2010)?</u>

<u>Did [any proven] conduct amount to a detriment</u>

<u>Did the Respondent subject the Claimant to that treatment because he had done a protected act?</u>

80. On our findings albeit the dates do not necessarily align, we proceed on the basis that the claimant has established protected acts, and take the victimisation (and alternative) allegations first, as they are the only complaints presented in time.

81. As to allegations 13 and 14, the reason why the claimant was dismissed is because he did not complete the courses as required – he failed to comply with a reasonable instruction and deliberately so. His mitigation was poor. He was ignoring a repeated and important instruction from the General Manager (which all others acted upon) and in the disciplinary process he and his wife simply sought to deflect blame, and attack the respondent. Any protected acts in December 2019 and September and October 2020 had no influence whatsoever on his dismissal and the outcome of his appeal.

82. It will be apparent from these findings that his direct discrimination complaints related to race and religion also fail - issue 6.6 and 6.7 of Employment Judge Maidment's orders. The chain of events recorded above are not facts from which we could conclude race or religion played any part whatsoever in Mr Benson's or Mr Quinn's thinking. Those facts include that there was no less favourable treatment – dismissal had taken place for a white british colleague (of unknown) religion who had not completed training. The only comparator advanced on behalf of the claimant was during the hearing, when it was suggested that the respondent had not dismissed Mr Bailey. We have addressed the position above – his circumstances were materially different.

83. The reason why the claimant was asked to complete the training was because everyone was required to do it while on furlough. It is fanciful to suggest he was singled out because he had previously complained about treatment.

84. As to the indirect discrimination complaint, it is clear that nationality and/or religion are not a determinant of proficiency (to the extent of being able to complete online training courses) in English. The requirement did put the

claimant at some disadvantage because of his English written proficiency, but we cannot find it put Turkish people in general at such a disadvantage, there being no evidence before us of proficiency in written English amongst that population. We can find, however, that such a PCP would put any person for whom written English proficiency was "semi" as Mr Oksai described it, or any person for whom proficiency was less than a first written language, at a potential disadvantage. Those people included several nationalities employed at the respondent branch who completed the training.

85. If we are wrong on relative disadvantage, we find the requirement to complete the training in English was a proportionate means of achieving a legitimate aim. The respondent's aims are recorded above –they are legitimate aims and would have helped the claimant and others. Balancing the discriminatory effect of the PCP on the claimant, he was dismissed for not completing the training, but that, in truth was not an effect of the PCP. The discriminatory effect of the PCP was the potential need to access support to complete the training, because his language skills made it more difficult (which was raised for the first time in the appeal). Accessing that help is more challenging for some than for others.

86. The claimant could easily have had support from his wife or Mr Benson or other management to do it, had he asked. In the appeal his wife said his pride prevented it, or words to that effect referring to Turkish culture. However, his wife had frequently intervened in matters between himself and management in the past, and has represented him throughout these proceedings. In late 2020, early 2021 when this training should have been completed, the claimant was clearly unhappy - about pay, about being in the UK, and about the matters in his community. He had undertaken mandatory training at the start of his employment – we also note that during the hearing Mrs Can said she had supported him with that.

87. Mr Benson offered support to any staff members who needed it. Staff were paid (through furlough) and training was permitted by the scheme. There had been many paid hours from September to January during which furlough hours could have been used. The claimant and his wife did access the relevant module on 2 February – they just did not complete the training when they could have done in advance of the disciplinary hearing. Had they done so, or even provided a commitment to do so within a period of time, the claimant would not have been dismissed.

88. In our judgment it was appropriate and reasonably necessary to apply the PCP to the claimant, given the extended deadlines and chasing calls from Mr Benson. It was also appropriate and reasonably necessary by the time of the disciplinary to dismiss the claimant and uphold that decision on appeal, bearing in mind there was still no commitment to do the training. The indirect discrimination complaint also fails.

89. As to allegations 1 to 11 - of race/religion harassment or direct discrimination by Mr Bailey, Mr Oksai and Mr Benson , they are, on our findings, dismissed having been presented outside the relevant time limits.

90. There was not conduct extending over a period on the chronology and findings above such as to bring them in time (and no Hendricks style discriminatory state of affairs). There were no reasons for not advancing the complaints in time given the support available to the claimant, and we do not exercise our discretion to extend time. The prejudice to the claimant is little in any event because the allegations are factually universally without merit. We reach the latter judgment given the considerable stigma that attaches to such allegations for the respondent witnesses. The facts we have found are not such that we could conclude either harassment or less favourable treatment because of or related to race and/or religion in the chain of events above. The claimant's race and/or religion played no part in his treatment by his colleagues whatsoever.

Employment Judge JM Wade
21 September 2023

Judgment and reasons sent to the parties on: 10 October 2023

For the Tribunal Office:

Note: Judgments and reasons are published on line shortly after they are sent to the parties.