EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000190/2022

Held in Inverness on 14, 15, 16, 17 and 18 August 2023

Employment Judge M Robison
5 **Tribunal Member J Lindsay**
Tribunal Member J McCaig

Mr A Santorum	**Claimant** **In Person**
Asda Stores Limited	**Respondent** **Represented by** **Mr P Sangha** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair constructive dismissal and the claim for direct discrimination are not well-founded and are dismissed.

REASONS

20 **Introduction**

1. The claimant lodged a claim with the Employment Tribunal on 19 November 2022, claiming unfair constructive dismissal, breach of contract and discrimination because of religion or belief.

2. Following several case management hearings, which included dealing with an 25 unsuccessful application by the claimant to amend, this hearing was listed to take place in person (hybrid) in Inverness for five days from Monday 14 August 2023.

Application to postpone

3. On the first morning, the claimant made an application for a postponement of the hearing. That application was refused for the following reasons.

4. The claimant stated that he had not received the proposed witness timetable until 9 August 2023 and two of the four witnesses that the respondent had said they would call had changed. The claimant was concerned that he had not had sufficient time to prepare questions for them. We advised the claimant that we would not be hearing evidence from the respondent's witnesses until Wednesday, so that gave him further time to prepare. Further, he was advised that he could ask for time after their evidence in chief if he wanted more time to prepare his cross examination.

5. The claimant also complained that the respondent had added almost 150 pages to the final file of documents which likewise he did not receive until 9 August. He advised that he had not seen around 50 of the pages before, and in respect of others he said that these would be relied on by the respondent only. The claimant was advised that he would be given more time on that first day to consider the documents lodged.

6. The claimant advised that in January 2023 he had requested the "book of events" which is a log of security incidents or occurrences; and that he had requested other documents in June, neither of which had been produced. Mr Sangha for the respondent advised that the respondent took the view that it would be disproportionate to lodge such a lengthy document, but that they would produce any pages relating to incidents which the claimant specified. We agreed that it would be disproportionate to lodge such a document. We decided that when the claimant was giving evidence, the respondent would be invited to lodge the relevant pages referenced, and in due course certain pages from that book were lodged.

7. The claimant also stated that he had sent to the respondent over 220 pages of documents which he intended to rely on, but the respondent had not included around 60-70 of them in the joint file of productions. We subsequently heard that there had been a misunderstanding about the documents which the claimant wished to have included. The respondent's position was that they could not access all of the documents which the claimant had sent electronically, and that they asked him to resend. The claimant did not accept that he was asked to resend the documents. Given this misunderstanding, the claimant was invited to

lodge a supplementary claimant's file of documents which included these documents. He explained however that while he had attempted to obtain copies of these documents, they had not copied well and some documents were missing. In any event, he said that he was unable to lodge a supplementary file of these additional documents.

8. We said that we would deal with this matter by allowing the claimant, while he was giving evidence, to indicate which documents he wanted to add. Throughout the hearing, the claimant lodged additional documents, to which Mr Sangha very helpfully did not object, and which were copied and distributed by the clerk. Some additional documents were also lodged by the respondent. The joint file of documents relied on expanded from 290 pages to 331. The relevant documents are referred to in this judgment by page number.

9. As it transpired, the claimant was given more time on the first day to prepare, and the Tribunal only heard from his witness Mr J Sutherland, who was only available to give evidence by video on that date. On the second day, we heard evidence from the claimant only. Thereafter we heard evidence for the respondent from Mr T Harvey, the claimant's line manager, Ms D Hill, the claimant's one time colleague, Mr D Phillips, Mr D Nimmons (who gave evidence by video) and Mr B Cartwright, all operations managers.

10. The claimant had forwarded video evidence on which he intended to rely. The respondent and their witnesses had seen the video footage prior to the hearing. Three of the videos were viewed during the course of Mr Sutherland's evidence. When relied on, the content of the videos was described to witnesses.

List of issues

11. Another matter which required to be addressed at the outset of the hearing was the list of issues. During case management a draft list of issues had been prepared, and that was revised as directed. While it was intended that if there were any outstanding concerns about the list of issues these would be dealt with at the outset of the hearing, the claimant accepted that the list of issues prepared by the respondent represented the issues to be determined.

12. It transpired however that there was a misunderstanding about the scope of the list of issues. It became apparent that the list of issues did not after all properly reflect the issues which the claimant had set out in his written case.

13. Reference was made by the Tribunal to notes of preliminary hearings which were intended to make clear that the claimant relied on the background facts to prove either or both his claims for unfair constructive dismissal and direct discrimination because of religion or belief. It was intended that the claimant would not be held to his description of what facts supported his claim for “breach of contract” and those for discrimination which he had set out in the original ET1.

14. Mr Sangha expressed concern about a potential additional point being relied on which had not been included in the list of issues (although about which the claimant had provided further particulars). This related to the claimant’s claim that he was forced to work in departments in addition to security. Mr Sangha was fortunately able to arrange for Mr D Phillips to attend the Tribunal to give evidence about his involvement in this issue.

15. Another issue which arose during discussion related to the claimant’s reliance on a comparator, Mr S Packman. It transpired following discussion that the claimant had misunderstood who was the appropriate comparator, and it was accepted that he was relying on a hypothetical comparator.

16. Consequently the issues for determination by the Tribunal are set out as follows:
    1) Whether or not the claimant was subjected to the following treatment -
        i. Forced to work additional anti-social hours;
        ii. Forced to work compulsory overtime;
        iii. Having rota’d hours changed without notice; or at short notice; or retrospectively;
        iv. Forcing a change of contract of employment in 2019;
        v. Forcing the claimant to work in other departments between 2021 and 2022;
        vi. Misrepresentation by management of working occurrences in order to take disciplinary action against him;

vii. Management knowingly and frequently allowing abuse and violence against the claimant by non-employees;

viii. Refusing to let the claimant wear adequate protective clothing in cold temperatures since January 2021; and

ix. Threatening dismissal and alleging that the claimant had failed to provide right to work documentation in September 2022.

2) If so, whether this treatment, taken singly or cumulatively, amounted to a breach of the implied term of trust and confidence.

3) If so, whether the claimant had affirmed the contract.

4) If not, whether the claimant was unfairly constructively dismissed.

5) Whether the belief relied on by the claimant, which related to expressing freedom of speech without retaliation, was a protected belief.

6) If so, was any less favourable treatment, listed above at 1 to 9, because of the protected belief.

7) Whether the claim or claims were lodged out of time, and if so whether it was appropriate to extend time.

Findings in Fact

17. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant and material facts admitted or proved.

18. The claimant commenced employment with the respondent on 22 March 2014 and worked as a security guard until he resigned on 18 November 2022.

Claimant's hours of work, rota changes and additional hours

19. The claimant signed a contract of employment on 22 March 2014 (page 101). That contract includes reference to the "right to amend your working hours and rota changes in operating requirements. You will be given reasonable notice of any such changes. Such changes may include requiring you to work on Saturdays and Sundays, which are normal working days in Asda".

20. The claimant's hours of work were stated to be 21 per week, working Sunday Monday and Tuesday from 0600 to 12.30, amended on 24 March 2014 to Sunday 0600 to 1400 and Monday and Tuesday 0600 to 12.30 (page 102).

21. On 3 March 2015, the claimant's contracted hours were increased to 30, with his rota being Saturday to Tuesday 14.00 to 22.00 (page 122). A further contract change took place from 28 July 2017 (page 123), with his hours remaining at 30 but with the introduction of alternative shift patterns on a four week rolling rota. That included two weeks when his hours would be 14.00 to 22.00; and two weeks when he would work Saturday and Sundays 10.00 to 18.00 and one week when he would work night shift Friday and Saturday 22.00 to 6.00. The claimant agreed to these changes.

22. The claimant was often asked to work more than his contracted hours and he regularly worked more than 30 hours (pages 129 – 137). The claimant was not forced to work over-time but rather did so by agreement following requests from his manager, Mr T Harvey.

23. Changes to shifts, including starts and finish times, took place regularly. Mr Harvey would draft rotas three to four weeks in advance but changes would often require to be made at short notice because of requested shift changes and staff illness.

Change of contract of employment in 2019

24. In mid-2019, the respondent sought to make changes to contracts of employment throughout the business. Employees who agreed to the contract changes were to receive pay of £1 extra per hour. The amendments to contract to be made included the removal of a paid 15 minute break, change to overtime paid hours from 10 am to 6 pm to midnight to 5 am, and more flexibility in regard to hours.

25. A consultation process took place. The claimant attended a consultation meeting on 26 June 2019. In regard to concerns about how the changes would impact on him, it is noted that he "would not be comfortable being in the service family not trained to do other tasks. Explained that security has now been removed from service and is not part of a family where only security exists – no-one worker remove you" (sic). The claimant was given a copy of the new contract to study (page 294).

26. The claimant then met with Alan McIntosh on 19 July 2019. Mr McIntosh noted that the claimant had “concerns around the wording not covering what may happen in the future – working or being made to work too many hours…..Both myself and Terry explained all of the ways the company measures how hours are worked/measured and we are not allowed to force colleagues to work excessive hours” (page 295).

27. He also recorded that the claimant “is still uncertain. He will sign contract but wishes to emphasise that it is under protest. I have said I will take away his comments and get more info if any from Angela/Gordon. Finally I will include Angela so any update can be discussed then”. That record of meeting was signed by the claimant (page 296).

28. Another consultation meeting took place on 27 July 2019. The notes of that meeting, signed by the claimant, record that the claimant “is unsure of the flexibility clause. This was discussed and [the claimant] was still unsure. Angela explained contract [terms and conditions] and that if these were to change that would be a separate consultation with notice as per employment law” (page 297). It was also noted that the claimant “discussed with Alan that he had issues with flexibility of the rota at the moment and in the past. It was agreed that flexibility works both ways. Our colleagues had to be flexible but so does the managers and Asda” (page 298).

29. The 2019 contract, dated 27 July 2019 and signed by the claimant on 30 July 2019, states that “Asda may from time to time change your duties, your role, your job title and/or the department in which you work, either on a temporary or a permanent basis. Unless otherwise agreed, Asda will give you a minimum of four weeks’ notice of any such change” (page 299).

30. Under the hearing “flexibility”, after confirming contracted hours of 30 hours per week, it states “You are required to work the hours at such times as you may from time to time be rostered by Asda. You may be rostered to work on any day of the week, including weekends, bank holidays and public holidays. Asda may at any time change your roster, either on a temporary or permanent basis. This may include changing your shift pattern, the days on which you work the number of

days which you work the length of your shift or your start or finish times. Unless otherwise agreed, Asda will give you a minimum of four weeks' notice of such a change. This doesn't affect your right to request flexible working" (page 300).

31. In September 2019, changes were proposed to the claimant's rota. That change was to revert to the one week contract from the four weekly contract, with hours of work remaining at 30 but working from 14.00 to 22.00 each Tuesday, Thursday, Friday and Saturday. The clamant did not to agree to this change at the time (page 124).

Requirement to work in other departments

32. Following the change to contractual terms, it was confirmed that the claimant was in the security "job family" which was separate from other customer service families. Notwithstanding he was expected to assist other departments doing work for other job families.

33. The claimant was asked to assist in other departments on a number of occasions. This included for example tidying shelves, removing cardboard, replenishing stock and collecting trolleys from the car park. This was also a common occurrence at busy times and when colleagues were sick. In addition, colleagues from all departments would very regularly be asked to assist with "Team fresh". This was when the stock was delivered to the store early each morning and would involve restocking shelves. In the main these additional tasks lasted a couple of hours at most. This was standard practice.

34. The claimant was requested to undertake such duties and agreed to do so. He was not forced to do so. From around the end of 2021, when David Phillips came to work in the Inverness store, Mr Phillips would ask the claimant to undertake these other tasks, in common with requests he made of other staff. The claimant did not make any formal complaint about this practice.

Follow up of incidents recorded in the security occurrences book

35. Following an incident which took place on 28 November 2016 and which was recorded in the security occurrences book (page 141) after which a customer complained, an investigation was undertaken. This relates to an incident when

the claimant accused the customer of shoplifting as a result of a misunderstanding, when the customer continued shopping after purchasing lager prior to the 10 pm cut off.

36. The matter was investigated by Anne Logan who recorded that claimant admitted that he did not follow the correct procedure in regard to this incident, but that this was what all security guards and the section leader did and was condoned as good practice. The outcome of the investigation was that all security guards were to be retrained in all aspects of security and customer interaction (pages 157 – 158). The claimant was not aware that this was a required outcome and he did not receive any training following this incident.

37. Following an incident which took place on 26 September 2019 recorded in the occurrences book (page 160) the respondent received a customer complaint (page 191) which was investigated by Alan McIntosh. This related to an incident when a customer was leaving the store with his child who had grabbed hold of the security barrier. The claimant intervened to prevent damage.

38. The customer complained that the claimant had taken hold of the child's arm and removed it from the barrier. Mr McIntosh concluded that "on investigation it is not possible to see [the claimant] touching the boy on any of the CCTV cameras but his arm does look like it is at the level and areas that the boy was holding the barrier…another colleague states that it looked like he touched the boy but was not 100%. My belief is that although it was brief [the claimant] did touch the boy I think as a reaction to the barrier getting pulled" (page 191).

39. A "counselling" was issued to the claimant, because of the respondent's policy that no member of staff should touch a customer regardless of what they were doing, with an action to do the e learning module on non-violence and aggression again.

40. The claimant complained about how this matter was dealt with and his complaint was investigated by Mr Nimmons in November 2019 (page 195). The claimant's concerns related to what he considered to be a conclusion by Mr McIntosh that he had touched the child, which he equated with assault. Mr Nimmon's position

was that there was a strong possibility that he had touched the child but it was not sufficiently clear from reviewing the CCTV footage.

41. Mr McIntosh had not however accused the claimant of assault. Mr Nimmons stated that had Mr McIntosh believed that then the outcome would not have been "a counselling" but the matter would have been forwarded to a disciplinary hearing for potential gross misconduct.

42. The claimant did not complete the e-module and there were no repercussions.

43. On 29 January 2021 Mr Nimmons noticed the claimant and Mr Sutherland working together and believed that they were not observing the two metre social distancing rule. He asked them to separate and to move to different work stations. He also advised Mr Harvey as the claimant's section leader to raise the matter with him. Following that meeting a "general file note" was completed by Mr Harvey, which states "Social distance This is to confirm I have had the conversation and have had [the claimant] read the guidelines around social distancing for which he understands and will adhere to going forward" (page 203).

44. The claimant made a complaint about this incident by e-mail dated 7 February 2021 to Karen Bowman, divisional manager with the respondent, stating his position that they were already about 2 metres apart. He expressed concern that the file note recorded that "I have constantly displayed no respect for social distancing. I hope you can explain to David Nimmons that a pandemic is not the right situation to use as a bullying tool" (page 306).

45. Mr McIntosh was appointed to investigate this complaint. He interviewed Mr Harvey on 3 March 2021. The witness statement produced (page 207) records that "On 29th January David told me about [the claimant] standing too close to other people. I said I've spoken to him about that before so I'll have to file note him. David printed the social distancing policy which I read out to [the claimant] when I spoke to him. He read it through and signed the file note. I also told him not to stand at self-scan but at the front door. No other discussion took place. How long in the room? About 5 mins."

46. Mr McIntosh also interviewed the claimant on 10 March 2021. The claimant stated during this interview that Mr Harvey had not spoken to him about social distancing before and that he did not agree with Mr Nimmons decision (page 210). The claimant asked him to reverse the decision and invalidate the file note. Mr McIntosh is noted as stating that it was "just a record of a discussion that had taken place and that the file note was the right way to deal with it".

Incidents when the claimant was abused by customers

47. An incident took place on 18 July 2018 which was recorded in the security occurrence book by the claimant as "a barred male was evicted". This was also recorded in the arena reporting system where more serious incidents are recorded. It related to an incident when the claimant approached a known shoplifter and asked him to leave and was then assaulted by him. This matter was reported to the police who interviewed the claimant (page 307 and 308).

48. An incident took place in the summer of 2020 when the respondent was operating a one way in and one way out policy. A customer came in, changed her mind about shopping, and made to go out the "in" route. The claimant then sought to prevent her doing so by putting himself in her way, when she rammed him with a trolley.

49. The claimant recorded an incident which took place on 20 February 2021 in the security occurrence book as follows "male who refused to wear a face mask walks around the store then throws paper at security guard" (page 317). He also recorded this on the arena recording system.

50. The claimant did not make any formal or informal complaints about how managers had dealt with these incidents.

Incident when the claimant was requested to remove his jacket

51. During January 2021 the claimant was wearing a ripped jacket which had "security" hand-written on the back. Mr McIntosh was concerned that it was tatty and not a good image. He asked Mr Harvey to tell the claimant to remove his jacket. The claimant understood that he was not to wear a jacket at all because

he was told that he could not wear his own jacket. He was very cold and temperatures dropped on occasion in certain places to 10 degrees.

52. The claimant had access to padded yellow knee thigh length jackets which were located at or around the front door security guard "podium". He was also entitled to obtain gloves from the upstairs store which contained extra uniforms etc. He did not make any formal or informal complaints about this.

DBS recall check and request for right to work documentation

53. The claimant worked in the security department which is subject to Disclosure and Barring Services (DBS) checks for safeguarding purposes. As part of this, a repeat DBS check must be conducted every three years. This is known as a "recall". DBS checks are conducted by a third party company but are processed via the respondent's HR shared services (HRSS).

54. The recall process was implemented by the respondent in August/September 2022. The claimant was therefore asked to provide the relevant documentation to complete his DBS check. On 8 September 2022, documents were provided by the claimant and sent to HRSS by Gail Tailor.

55. On 10 September HRSS advised they were unable to complete the checks as the documents were not valid according to the acceptable document listing. The e-mail stated as follows:

"Unfortunately we are unable to process the request due to the following reason: AS – as the utility bill provided is more than 3 months out of date and is therefore not acceptable the letter from the bank is not accepted as it needs to be a bank statement rather than a letter showing information and a document showing the candidates right to work is also required. Please find attached a list of acceptable documents. The passport provided is acceptable as long as the candidate can also show their right to work in the UK. Please attach the required documentation/information as soon as possible. We will review this ticket in 7 days. If we do not receive a response, this will be escalated to you GSM".

56. There being no response, a follow up e-mail was sent on 24 September 2022 to Ms Taylor and copied to the general store manager (GSM), Craig Paterson (page 244).

57. The claimant then provided a bank statement and recent utility bills, but did not provide any additional documentation showing his right to work in the UK.

58. On 7 October 2022 a recorded conversation took place with the claimant to explain that the documents previously provided by him were not sufficient and again the claimant was provided with a copy of the acceptable document list. It is noted that "we wish to get you across the line with this…ultimately there will be a point in time where you may have to pause working".

59. The claimant was informed that, without the necessary checks being completed, he would be unable to work in security. He was asked to provide the documentation required within 7 days. The documentation was not provided within this time frame. The claimant did not take issue during this meeting with the documentation requested and gave the impression that he would provide it.

60. On 4 November 2022, the claimant submitted his notice to Mr Paterson by e-mail in the following terms: "Dear Mr Paterson, please accept my notice on leaving my position as security guard in the Asda store in Inverness. My last day as an employee being 18/11/22, in full accordance with the terms of my contract. I would like to take this opportunity to remind you that I still have 7 months of outstanding holiday pay as well as 1 week of pay in arrears" (page 290).

61. On 5 November 2022 Mr Paterson replied stating, "I'm sorry to read of your notice [from] the company and will certainly be disappointed to see you leave. I have forwarded your e-mail to Terry who will touch base to talk through with you directly. Should there be anything further that I can help with directly, please let me know" (page 289).

62. On 5 November 2022, Mr Paterson forwarded this to Mr Harvey and requested that he "please try and make contact and talk through with [the claimant] to see if there is anything we can do" (page 289).

63. The claimant was on annual leave until 18 November 2022. He had no further conversation with Mr Harvey or any other relevant member of management.

Claimant's belief

64. The claimant believes in freedom of speech and in particular that "everyone should have the right to express themselves without retaliation and should have the right to learn and expand yourself in every direction".

65. None of the relevant members of staff employed by the respondent was aware that the claimant held this belief.

Tribunal's deliberations and decision

Observations on the evidence

66. We noted that the claimant was accepted as a valid and respected employee. We accepted that the claimant's concerns were genuine, and that he particularly resented any criticism of his practices, especially when it was suggested that he needed to undertake re-training in non-violence and aggression. The claimant did however have a clean disciplinary record.

67. We noted that two of the incidents relied on were the result of customer complaints which the respondent investigated, and the third was a reminder about social distancing, which was a relatively common occurrence at the time. In respect of two of the incidents where he complained, these complaints were investigated appropriately. He said that he had complained about additional hours in 2016 but he "didn't see the point" of making further complaints. He raised concerns in 2019 during the consultation about the contract change, and it was noted that he signed the contract "under protest", but he otherwise voiced no criticisms.

68. While the claimant clearly resented many of the respondent's practices he did not make other formal complaints or grievances and he continued to work from 2014 until 2022. Although he was clearly aggrieved, and may have had the impression that he was communicating his concerns (and indeed his belief) to management

through his actions, the evidence which we heard does not support that interpretation of events.

69. We conclude that the claimant failed to appropriately communicate his concerns to management throughout his employment, and in regard to his decision to resign, the respondent could have no reason to suspect that he was finding his position untenable. He did not even make those concerns known when he resigned and the respondent would be unaware of his concerns until he lodged this claim.

70. We were of the view that the claimant interpreted certain actions and behaviours in a particular way and those actions and behaviours were understood differently by others, but since he made no formal complaints, the respondent could not know of his concerns.

71. We also heard evidence from Mr J Sutherland, a former employee. While we accepted that he too had concerns about the respondent's working practices, again these were from his perspective and we understood that he did not make any formal complaints during the course of his employment either.

72. For these reasons, where the evidence conflicted, we preferred the evidence of the respondent's witnesses.

Unfair constructive dismissal

73. The claimant in this case claims breach of contract supporting a claim for unfair constructive dismissal. To succeed, the claimant must show that any breach is a fundamental breach going to the root of the contract, that is it is not a minor breach. Following discussion during the hearing it became clear that the claimant's claim amounts to an argument that there has been a breach of the implied term of mutual trust and confidence.

74. When a breach of the mutual trust and confidence term is found, such a breach is however "inevitably fundamental" ((*Morrow v Safeway Stores plc* 2002 IRLR 9 EAT).

75. When considering whether there has been a breach of the implied term of term of trust and confidence, the requirement is to consider whether the respondent conducted itself in a matter which was calculated, or if not, which was likely, to destroy or seriously damage the relationship of trust and confidence between the employer and the employee, where there was no proper and reasonable cause for the respondent's behaviour (*Mahmud v Bank of Credit and Commerce International SA* 1997 IRLR 462 HL*).*

76. In regard to a breach of that term, it might be that an individual incident is not sufficient to breach the implied term, but a series of incidents taken together and considered cumulatively could be sufficient to amount of a breach, where there was a last straw which, although minor, contributed to the overall breach *(Lewis v Motorworld Garages Ltd* 1985 IRLR 465 CA*; Waltham Forest v Omilaju* 2004 EWCA Civ 1493*).*

77. In this case the claimant relies on the last straw, namely the threat of dismissal should he fail to produce right to work documentation which he claims is not in any event required. He claims that this follows a series of incidents which either singly or taken together, amounts to treatment which was calculated or if not likely to destroy or seriously damage the relationship of trust and confidence.

78. In a claim for unfair constructive dismissal, the claimant must have resigned in response to the breach, and not for another reason. Where an employee continues working for any length of time without leaving, he will lose his right to claim breach of contract and will be regarded as having elected to affirm the contract (*Western Excavating Ltd v Sharp* 1978 IRLR 27*).*

79. We considered each of the allegations made by the claimant in turn to determine whether the incidents were in themselves a breach of the implied term, or whether considered cumulatively there was a last straw and breach of the implied term. We also considered whether, even if it could be said that the implied term had been breached, the claimant had confirmed the contract by staying in employment.

Allegation 1 - Forced to work anti-social hours

80. We noted that although the claimant's rotas changed over the years, he agreed to changes made in 2015 and 2017. We noted that the claimant was contracted to work what would be described as anti-social hours given that, for example, some of his shifts were from 2 pm to 10 pm, and at some point at least included night shifts. To the extent that he complains that he was required to work anti-social hours in general, then he had not valid complaint, because this is what he signed up for.

81. We understood the claimant to complain that he was frequently required to work both Saturday and Sunday, but we find that he was either contracted to do so, or that he agreed to do so. We did not find that he was forced to do so. He also complained that his rota which required him to work Saturday and Sundays at times impacted on his annual leave and might mean that a seven day holiday was reduced to six. However, we noted from the 2017 rota which he lodged that accommodation was apparently made to avoid such an eventuality, on that occasion at least.

Allegation 2 - Forced to work compulsory overtime

82. It is apparent from the documents lodged that the claimant frequently worked over his contracted hours. That in itself of course does not show that he was forced to work overtime. Indeed, on the evidence we heard we accept that the claimant agreed to work additional hours when he was requested to do so.

83. Mr Harvey said that he was always short staffed and looking for colleagues to do additional hours, sometimes at very short notice. We heard from Mr Nimmons that he did not consider it would be possible to force anyone to do overtime if they did not want to and that was the policy of the respondent, as communicated to the claimant in the one to one in 2019. Mr Nimmons said that he was informed when any colleagues had worked excessive hours which were hours in breach of working time regulations but that the claimant had never come to his attention in that regard.

84. The claimant said that he complained about this to Mr Harvey and to Mr McIntosh in 2016. The claimant said that when he complained about working too many hours that the response was to increase his hours. However that is not apparent from his record of hours worked. Indeed figures for 2016 show that his hours vary widely but for six months from June to October are relatively stable around (and on occasion below) his contracted hours of 30 per week (page 135-136).

85. Mr Harvey did not recall the claimant complaining but in any event the claimant said that he did not make further complaints, because he “didn’t see the point”, and he did not lodge any formal complaint or grievance.

Allegation 3 - Having rota’d hours changed without notice; or at short notice; or retrospectively

86. Although the claimant’s contracts over the years indicated that certain notice of shift changes was to be given, this was liable to be overridden where parties agreed.

87. We heard that rotas were submitted by Mr Harvey three or four weeks in advance, and we heard that Mr Nimmons considered rotas two weeks in advance to ensure that the staffing complement proposed was within the budged allocated for the store. We heard too from Mr Harvey that changes were made to these initial rotas, frequently and at short notice in an attempt to accommodate requests for changes from other members of staff and staff illness, for example.

88. The claimant also complained that rotas were changed retroactively or retrospectively. We understood that to mean that that he was asked to change his shift times (presumably at very short notice) and that it was only after he had worked those altered hours that he made the necessary changes (otherwise he would have been underpaid based on the initial official recorded rota). We accept that happened on occasion.

89. We conclude therefore that changes were made to the rota with very little notice, however we conclude that any changes were with the agreement of the claimant.

90. While he may have believed that he was required to do so, the claimant was not forced to work additional hours, or anti-social hours, or change his shift at short

notice. Although the claimant may have perceived that he was being forced to work more than his contracted hours, or to change his shift times at short notice, he made no complaint after 2016 to Mr Harvey, or to his line managers, and he made no complaint to central HR. The only concerns which he raised were when he had the one to one consultations about the changes to the contract in 2019, and although he references concerns about the past, he gave no specifics and the focus was apparently on the future. He otherwise made no specific formal complaint and he did not lodge a grievance.

91. We conclude that there is no breach of contract because the claimant agreed to any changes to his hours. This could not amount in itself to a breach of trust and confidence, especially where the claimant made no official complaint about the practices.

Allegation 4 - Forcing a change of contract of employment in 2019

92. The claimant advises that he signed the contract changes “under protest”. It is noted that he signed the contract on 30 July 2019 after three consultation meetings.

93. The claimant however relies on this as an event which supports his argument that there has been a breach of trust and confidence, because he signed the contract under protest. Even however if this change could have amounted to a breach of contract or contributed to a breach of the implied term, he continued to work for more than three years after his complaint and he made no further complaint between 2019 and 2022 regarding the matter. He must therefore be taken to have accepted the changes to his contract, that is he must be taken to have affirmed the terms of the new contract.

94. We accepted Mr Sangha’s submission that the claimant has waived any entitlement he may have had to resign in response to the changes to his contract in 2019, due to working under the terms of this new contract for over three years.

Allegation 5 - Forcing the claimant to work in other departments between 2021 and 2022

95. We have found that colleagues from one department were often asked to assist in other departments, including those in separate job “families” like security. This

was a common occurrence to deal with busy times and when colleagues were sick. The claimant complained that Mr Phillips in particular, who came to work in the Inverness store in late 2021, would ask him to undertake alternative duties. We have found that managers, including Mr Phillips, would ask the claimant to assist, as they did other colleagues, in other departments. This was standard practice.

96. The claimant was requested to undertake such additional duties and agreed to do so. The claimant was treated no differently in this regard than any other colleague. While the claimant may have believed that he was required to undertake such tasks, he was not forced to. He did not make any complaint, either formal or informal, to management or HR about this practice.

97. It cannot be said therefore that to ask the claimant to undertake these additional duties, when this was common practice and the claimant agreed to do so, was a breach of the implied term of trust and confidence.

Allegation 6 - Misrepresentation by management of working occurrences in order to take disciplinary action against him

98. The claimant relied on three particular incidents to support his contention that the respondent had “misrepresented” incidents with the intention of taking disciplinary action against him.

99. Two of these incidents, in 2016 and 2019, related to investigations following customer complaints. One of the incidents related to a direction from the assistant store manager in regard to social distancing which took place in 2021, and which was investigated following the claimant’s complaint.

100. The claimant said that he was not aware of the requirement following the 2016 incident that he was to undertake training and Mr Harvey confirmed that no training took place. There were therefore no repercussions for the claimant.

101. The claimant complained about the outcome of the 2019 incident, which was that he was issued with a “counselling” which resulted in a requirement to complete an e-learning module on non-violence and aggression. Following investigation of his complaint, Mr Nimmons confirmed that a “counselling” is not considered by

the respondent to be a disciplinary action. His position was that had there been a belief that he had assaulted the child then he would have faced a disciplinary hearing and a charge of potential gross misconduct. We note that the claimant has equated "touching" with assault but we did not agree with his view that these two things should be equated. The claimant's complaint about the outcome was investigated.

102. Although the respondent insisted that this was not disciplinary action, we did note that a "disciplinary counselling form" was issued and this was "to be completed for minor acts of misconduct where formal action is not necessary". So while this was clearly not formal disciplinary action, it was at least informal disciplinary action in respect of a "minor act of misconduct". We did however note that the claimant did not complete the training module and he was not sanctioned for that.

103. The 2021 incident was also investigated after the claimant complained about the outcome. He did not agree with Mr Nimmons or Mr Harvey that he had on that occasion or on previous occasions not observed social distancing rules. Mr McIntosh's conclusion was that the outcome was a record of a discussion in a file note. There was no sanction or other repercussions for the claimant.

104. The respondent was under an obligation to investigate customer complaints. A manager is entitled to raise concerns if he is of the view that procedures are being breached. The outcome of the investigations related to the need to reinforce correct practices. The claimant was not formally disciplined.

105. Even if this conduct could be said to be liable to damage the relationship of trust and confidence, we find that there was "reasonable and proper cause" for the actions of the respondent in each of these circumstances. In any event, the last of the incidents relied on was in 2021, so that the claimant must be taken to have affirmed the contract.

Allegation 7 - Management knowingly and frequently allowing abuse and violence against the claimant by non-employees

106. The claimant relied on three incidents in support of this contention. These were an incident on 18 July 2018, one in the summer of 2020 and a third on 20 February

2021. These were recorded in the security occurrences book. The claimant now complains that these incidents were observed by management but that nothing was done. The claimant was concerned that the respondent's policy, which is deter rather than detain, meant that he could not defend himself.

107. The respondent's witnesses said they did not recall these incidents. The respondent has a system for recording these incidents, including the arena system for recording more serious incidents which might involve the police. The fact that they were recorded in the security occurrences book does not mean that they would or should be further investigated. The 2018 is an example where the claimant was interviewed by police after he himself reported the matter.

108. The last incident referenced was February 2021. Although the claimant suggested in evidence that a customer had wiped his face and hands with a disinfectant wipe and thrown it at him, we noted that this is recorded in the occurrences book by the claimant at the time as "throwing a paper" at the security guard.

109. Mr Sangha submitted that there was nothing more that the respondent could have done; and that the respondent cannot be said to have knowingly and frequently allowed such events to happen with the intention of breaching the implied term of trust and confidence.

110. The claimant did not complain about these incidents to management, beyond recording them in line with procedures. Given that the respondent has a system for recording and dealing with such incidents, and the claimant did not complain to his line manager, or more senior managers and did not lodge a grievance or raise concerns formally, it cannot be said that the way these matters were dealt with was intended or even likely to damage the employer/employee relationship.

111. Again the last of the incidents relied on was in 2021, so it could be said in any event that the claimant must have affirmed the contract.

Allegation 8 - Refusing to let the claimant wear adequate protective clothing in cold temperatures since January 2021

112. While there is no dispute that the claimant was asked to remove a jacket in January 2021, that related to concerns that the jacket was shabby and unsuitable. We accept that was a reasonable request.

113. The claimant appears to have taken the request to remove his jacket literally, and since he says he was advised he could not wear his own jacket, he understood or assumed that meant that he was not permitted to wear a jacket at all.

114. To the extent that was what the claimant believed, that was entirely unreasonable. We did hear evidence that it was very cold at the door, but also that there were plenty of padded jackets available and that gloves could also be obtained from the upstairs store. We heard evidence that there was a heater at the security guard's desk about which oddly the claimant did not seem aware.

115. We did not accept that the claimant was deprived of the ability to wear clothing to protect himself against the cold. No complaint was made by the claimant at the time, he did not complain to his line managers, and no formal grievance was lodged. It cannot be said that the respondent deliberately sought to deprive the claimant of adequate clothing to deal with cold temperatures.

116. Again the allegation relates to events in January 2021, and even if the situation pertained throughout the winter, the claimant must, by November 2022, be taken to have affirmed the contract.

Allegation 9 - Threatening dismissal and alleging that the claimant had failed to provide right to work documentation in September 2022.

117. The claimant was asked to provide documentation which related to a routine review for safeguarding purposes. This was required because the claimant works in security. The claimant provided certain documents but was advised that what he had provided was insufficient. He was advised of this and of the requirement to provide documentation to prove the right to work in this country.

118. Although his passport was deemed sufficient, as an Italian national, he was told that he was required to provide additional documentation to prove his right to work. We did note that it was not apparently made clear to the claimant exactly what documentation was required. We were referred to a DBS list of acceptable identification and it was suggested that the documentation required was listed as "a current passport endorsed to show that the holder is allowed to stay in the UK and is currently allowed to do the type of work in question".

119. The claimant's position was that his passport was sufficient, and that no document with any written endorsement is required because his right to stay in the UK post Brexit has been automatically "endorsed" through the passing of the EU Withdrawal Act. He believes that he automatically has the right to work in the UK by virtue of the fact that he was working in the UK before Brexit. He believes that the respondent is therefore wrong to have required such documentation.

120. Our shared understanding was that a person in the claimant's position would have had to have applied for and been granted settled status under the EU settlement scheme to be permitted to work in the UK after June 2021. We did note that the claimant provided proof that he has lived here for five years. We noted that he was not actually asked for such proof by the respondent, but we understand that this would be required to be eligible for settled status.

121. We did not have any independent evidence about this scheme beyond the claimant's evidence. However, even if the claimant is right, and the respondent has misunderstood the position, we do not accept the claimant's argument that he was threatened with dismissal because he refused or failed to produce the documentation sought.

122. We note in particular that there was no suggestion that the claimant would be dismissed if he did not produce the documentation. The notes of the meeting of 7 October suggest that he was told "we wish to get you across the line with this…ultimately there will be a point in time where you may have to pause working". The claimant seems, unreasonably, to have taken this as a "threat to dismiss him". However there is no suggestion of that in that meeting, only that he might have to "pause" working. Witnesses explained that without the

documentation he could not work in security but alternative employment would have been available. While it appears he was not told that in terms, nor was he at any time threatened with dismissal if he did not produce the documents.

123. However of greater significance is that the claimant does not make clear in the meeting of 7 October either that he does not know what documents they mean; or that he has submitted what is needed; or explain his belief that he was automatically entitled by virtue of the EU withdrawal agreement to work in the UK since he had lived here prior to Brexit. Again even if he is right he gives the impression that he will provide the documentation and does not in the seven days he is given to provide it or explain his position to them either.

124. So even if the respondent is mistaken, the claimant does not bring that to their attention at the time; there is no threat to dismiss; and these actions cannot be taken as an intention to damage the employment relationship, intentional or otherwise.

125. We therefore agreed with Mr Sangha that this was an entirely innocuous act. Such an action cannot be categorised as a last straw because it cannot be said to have contributed, even in a minor and unconnected way, to the breach claimed. It was entirely reasonable for the respondent to request further documentation, and even if they were wrong to require further documentation, it was a misunderstanding which was not brought to their attention.

126. Even if previous instances could be categorised as breaching the implied term (which, given the passage of time the claimant may in any event be said have accepted) then this could not be the last straw because it could not be said that it contributed to the overall breach, even in a minor way.

127. Thus, given our findings, it cannot be said that even taken cumulatively, these actions amount to a breach of trust and confidence. Crucially, the claimant makes no reference to any of these concerns in his resignation e-mail. Even if it was to be accepted that the reason he did not complain was for fear of retaliation, he could have no such fear after he had resigned, particularly given that he was on annual leave during the whole period of his notice.

128. We take the view that individual or cumulatively the conduct complained of cannot be said to be a breach of the implied term, not least because the conduct which is said to trigger the claimant's resignation cannot be categorised as the last straw. That being the case, in any event, the conduct about which the claimant complains last took place at the beginning of 2022, and so the claim which was lodged in November 2022 would be out of time.

129. There is no breach of contract in this case, so there can be no claim for unfair dismissal, which claim must be dismissed.

Direct discrimination because of religion or belief

130. The claimant also claims direct discrimination in breach of section 13 of the Equality Act 2010. Section 13 states that an employer must not discriminate against an employee by treating them less favourably than others in the same or similar circumstances because of a protected characteristic.

131. The claimant claims that he has been discriminated against because of his particular belief. He relies on the treatment narrated above to establish that he has been less favourably treated than a hypothetical comparator because of his belief.

Is the claimant's belief protected?

132. The first thing we must consider is whether the claimant's belief is a belief which is protected by the terms of the Equality Act 2010.

133. Section 10 of the 2010 Act defines the protected characteristic of belief as "any religious or philosophical belief …[including] a lack of belief".

134. The claimant's articulated his belief in evidence as that "everyone should have the right to express themselves without retaliation and you should have the right to learn and expand yourself in every direction".

135. The EAT in *Grainger plc v Nicholson* [2010] IRLR 4, sets out the test to establish that a belief is a protected belief. We came to the conclusion that the particular belief as articulated by the claimant does not meet the requirements of that test.

136. We accepted that the belief was genuinely held; that it relates to a weighty and substantial aspect of human life and behaviour; that it is worthy of respect in a democratic society, is not incompatible with human dignity and does not conflict with the fundamental rights of others. We did not however accept that the claimant's belief otherwise qualifies as a protected belief.

137. The claimant sought to establish his belief as core to his life style decisions which influences how he acts by reference to an e-mail sent in regard to arranging a table tennis tournament. While no doubt genuine, we did not accept that as sufficient to establish the claimant's belief as sufficiently cohesive or akin to a religious belief. He referenced also the fact that it was his belief in the rights of homeless people to be fed which led to him take money from a barred homeless man and do his shopping for him while he waited at the door, in breach of the respondent's policy.

138. We agreed with Mr Sangha that the belief as articulated by the claimant is an opinion or viewpoint which is not a belief with a similar status or cogency to a religious belief. In particular it cannot be said to equate to a system which governs the entirety of the claimant's life style choices such as to qualify for protection. We consider that it lacks the requisite level of cogency and cohesion which would qualify it as akin to a philosophical belief.

139. Even if it were to be established that the claimant's belief is a protected belief, we concluded that any treatment which the claimant complains about could not be said to amount to direct discrimination in any event for the following reasons.

Less favourable treatment – the reason why

140. Although the test of direct discrimination is ostensibly a two stage test, ie was there less favourable treatment and if so, was it because of a protected characteristic, in some cases it is more appropriate to focus in the first instance on the reason why, that is what is the reason operating in the mind of the perpetrator, whether conscious or subconscious, for treating the claimant that way. Thus in some cases it is appropriate to ask a single question, which is whether the allegedly less favourable treatment was on the proscribed ground (*Shamoon v RUC 2003 IRLR 285).*

141. Although the claimant confirmed he was relying on a hypothetical comparator, taking this approach the focus is not on the treatment of comparators, hypothetical or otherwise, and whether or not they were in the same or similar circumstances, but on the reasons for any treatment which the claimant alleges is less favourable.

5 142. We have concluded above that the treatment which the claimant relies on did not amount of a breach of the implied terms of mutual trust and confidence, and we also conclude that his belief cannot be said to explain the reason why he was treated as he was.

143. The claimant's position was that he was treated as he was because he 10 complained, and he complained because he believed in the freedom to express his opinion. His position was that when he complained there were consequences for him, and he believed that he should be able to articulate his criticisms of policies and of management decisions "without retaliation".

144. The claimant's position was that the incidents which resulted in investigations 15 were misrepresented because of previous criticisms he had made of management. For example, the incident in 2016 came after he says that he had criticised the appointment of a new security guard whom he believed had insufficient experience. He asserted that the incidents he complains about happened after he had voiced criticisms of the respondent's policies and the way 20 colleagues were treated to managers. We did not accept the claimant's evidence about this, not least because two of these incidents followed complaints from customers. We accepted Mr Nimmons evidence that he genuinely believed the claimant was not observing the two metre distancing rule at the time.

145. He claims that he was forced to complete a staff questionnaire but we did not 25 accept that he was forced to do so or that it was not anonymous. We did not therefore accept that it was known that he had given a low score or that the respondent "retaliated" by imposing requirements relating to providing right to work documents. This was a routine measure which was insisted upon by central HR services and not by local managers.

30 146. There is however a central difficulty for the claimant in regard to his claim for direct discrimination. The claimant argued that when he spoke out, the treatment he

received was because of his belief. In order for a person to treat another "because of" their belief, it stands to reason that the discriminator must know that the person holds that belief.

147. All of the respondent's witnesses confirmed that they did not know that the claimant held that belief. He says that they would or should have inferred that from his actions. That is, although he did not tell them about it, it was clear from his actions that he held that belief. There was no evidence however to support the contention that his beliefs were apparent from his actions. We find that the respondent witnesses who were said to have treated him in that way because of his belief did not know that he held that belief.

148. The managers cannot therefore be said to have acted "because of" his belief if they did not know that he held that belief. Although the provisions of direct discrimination do not require knowledge specifically, it is self-evident that a person cannot do something "'because of" a protected belief if they did not know about the belief.

149. Further, the respondent relies on the fact that there are valid business reasons for the treatment, and therefore the reason for the treatment which the claimant complains about has nothing whatsoever to do with his beliefs, protected or not.

150. As discussed above, we have concluded that all of the respondent's conduct is explained by surrounding circumstances, such as the requirements of the claimant's contract, the need to work additional hours, the claimant's agreement to reasonable requests to change his shifts, and to help out in different departments, or the need to investigate customer complaints, or the reinforcement of the respondent's policies and procedures.

151. The claimant clearly has very grave concerns about the practices of the respondent, some of which he described as "illegal". We did not accept that any of the evidence presented by the claimant proved that the respondent had acted illegally either generally or in relation to their interactions with him. We did not accept that his assertion that no DBS checks had ever been done necessarily showed that the respondent had not undertaken checks about him.

152. Although the claimant argued, for time limit purposes, that this conduct amounted to a “continuous act”, we find that none of the conduct can be said to amount to direct discrimination, and consequently we do not require to consider that matter.

153. The claim for direct discrimination must also be dismissed.

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Employment Judge: M Robison

Date of Judgement: 4 September 2023

Date sent to Parties: 4 September 2023