EMPLOYMENT TRIBUNALS

Claimant: Mr M M Hussain

Respondent: Tesco Stores Limited

Heard at: Manchester **On:** 24-28 April 2023 and 2 May 2023

Before: Employment Judge McDonald
Mrs J K Williamson
Mr I Taylor

REPRESENTATION:

Claimant: In person
Respondent: Ms Niaz-Dickinson (Counsel)

JUDGMENT having been given orally on 2 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

WRITTEN REASONS

Introduction

1. The case is about 17 allegations of less favourable treatment. As the preliminary hearing on 8 July 2021 conducted by Employment Judge Horne clarified, the claims being brought are of direct race and direct religious discrimination. The claimant's allegation is that he was treated less favourably because of his British Asian Ethnic origin and his Muslim religion. That means the claim can only succeed if we are satisfied first that he was treated less favourably than an actual or a hypothetical comparator when it comes to a particular allegation, and second that that less favourable treatment was because of his race or religion. What that means if that unfair treatment per se will not mean that an allegation succeeds.

2. The background to the claim is the disciplinary action followed by dismissal of the claimant on 29 June 2020 following findings of misappropriation of a company vehicle by taking unscheduled stops; misappropriation of the company SDS device and misuse of company colleague discount.

3. The claimant was initially dismissed but reinstated following an appeal. He returned to work on 2 September 2020. Two other colleagues were dismissed for similar reasons. The claimant and one other colleague appealed but it was only the claimant who was reinstated. The claimant says he was treated less favourably on his return to work after reinstatement because of race and or religion.

Preliminary Matters

4. At the start of the first day of the hearing we dealt with the preliminary mattes set out below.

Mrs Williamson

5. One of the panel members, Mrs Williamson, disclosed that she had worked for the respondent for four years between 1989 and 1993. The Employment Judge raised this matter with the parties at the start of the hearing. Mrs Williamson confirmed that she had never worked in the geographical area in which the store with which the case is concerned was located, and she did not know or had never had any contact with any of the witnesses named. Neither the claimant nor Ms Niaz-Dickinson for the respondent raised any objection to Mrs Williamson continuing to hear the case.

Additional documents

6. The respondent asked permission to introduce three new documents into the Tribunal bundle. They were the documents relating to the Bronze training undertaken by the claimant when he became a Dot Com Driver; the Code of Conduct relating to the use of the colleague Clubcard and a call log. The claimant confirmed that he had no objections to those documents being added to the Tribunal bundle. They were added as pages 1063-1123. On the morning of the second day Ms Niaz-Dickinson asked for permission to add two further pages to the bundle. These were the letter inviting the claimant to an investigation meeting on 8 June 2020 and to the reconvened investigation meeting on 15 June 2020. The claimant raised no objection, and these were added at pages 1124-1125 of the bundle.

Witnesses

7. The claimant explained that one of his witnesses, Mr S Khan, would not be in attendance. We explained that we would read his statement but could only give it such weight as we considered it appropriate given he was not in attendance to be cross examined.

8. For the respondent, Ms Niaz-Dickinson explained that there was a statement in the witness bundle from Victoria Rebank. This was because one of the allegations (allegation 10) appeared to the respondent to relate to Ms Rebank rather than to Victoria Haworth and Denise Barlow as the claimant suggested. Ms Niaz-Dickinson was therefore not intending to call Ms Rebank unless it appeared that the claimant was in fact making allegations against her.

The Issues

9. The issues in the case were identified by Employment Judge Horne at the preliminary hearing on 8 July 2021. At paragraph 23 of his Case Management Order sent to the parties on 10 August 2021 there are 17 acts of alleged less favourable treatment identified.

10. The table of incidents is at Annex A to these reasons. These include beginning the disciplinary investigation against the claimant, requiring him to attend a disciplinary meeting and dismissing the claimant. They also include the incidents subsequent to the claimant returning to work in September 2020. The claimant resigned on 17 September 2021. There is no claim in relation to that resignation which took place after the claimant had filed his claim form on 26 April 2021.

11. The issues therefore are whether each of the incidents of less favourable treatment was an act of direct race discrimination or because the claimant is British Asian or because he is a Muslim.

12. The claimant had identified three actual comparators in relation to less favourable treatment (1), (2) and (3) (i.e. the disciplinary investigation and the dismissal). The relevant comparators were white drivers who also visited friends or family when driving but were not disciplined. The named comparators were Andy Biggs, Jonathan Westwell, James (surname unknown), Kevin Atkinson, Dominic (surname unknown) and Brett Storms.

13. The claimant began early conciliation on 13 February 2021 and issued his claim on 26 April 2021, the ACAS early conciliation certificate having been issued on 23 March 2021. That means that any incidents prior to 24 December 2020 are potentially out of time.

<u>The claimant's application to amend to a claim of victimisation in breach of s.27 of the Equality Act 2010.</u>

14. On Day 6, immediately before the Tribunal was due to deliver its oral judgment, the claimant applied to amend his claim to add a claim of victimisation in breach of s.27 of the Equality Act 2010. After hearing the parties' submissions, we refused that application. We gave oral reasons. They are provided in writing in Annex b to this judgment.

Evidence and submissions

15. There was an agreed bundle which at the start of the hearing extended to 1062 pages. As detailed above, some documents were added to the bundle during the hearing. In this Judgment references to page numbers are to page numbers in the bundle.

16. After discussing preliminary matters, the Tribunal took the remainder of the first day to read the witness statements and documents referred to in those witness statements.

17. The claimant explained that his witnesses were only able to attend on the morning of the second day because they needed to take time off work to do so. Ms Niaz-Dickinson confirmed that she was happy to cross examine those witnesses first and then cross examine the claimant.

18. On day 2 we heard first from the claimant's witnesses: Mohammed Abidul Islam ("Mr Islam"); Mrs Muksheena Shahin ("Mrs Shahin"); and Raheem Ali ("Mr Ali"). Each swore to the truth of their written statements and were briefly cross examined by Ms Niaz-Dickinson. Mrs Shahin and Mr Ali were re-examined by the claimant. Shahrukh Khan ("Mr Khan") did not attend to give evidence and so we gave his written statement as much weight as we considered appropriate.

19. For the remainder of the second day and the morning of the third day we heard the claimant's evidence. He was cross examined by Ms Niaz-Dickinson and answered questions from the Tribunal.

20. At the start of the second day the claimant asked that when it was his opportunity to cross examine the respondent's witness, Mr Shahin ask the questions on his behalf. The claimant explained that he had difficulties in asking questions of the witnesses in Tribunal. Ms Niaz-Dickinson did not object in principle, but submitted that when it comes to cross-examination of the respondent's witnesses only one of the claimant or Mr Shahin should ask questions at one time. We agreed with that. We adopted the approach of Mr Shahin asking the questions with the claimant giving him the written questions to ask and/or providing him with additional questions orally. Mr Shahin confirmed that he was not representing the claimant as such so did not, for example, re-examine him at the end of his evidence. The claimant at times took over cross-examination himself. We are satisfied that through a combination of these measures the claimant was able to fully participate in the hearing.

21. On the afternoon of the third day we started hearing the evidence from the respondent's witnesses. We heard evidence from Victoria Haworth ("Mrs Haworth"). We also started to hear evidence from Laura Fitzjohn ("Miss Fitzjohn"). By the end of the third day it was clear that we were not going to be able to hear all the remaining respondent's witnesses on the fourth day and so we released Emma Collins and Dominic Hampson until the fifth day (Friday 28 April 2023).

22. On the fourth day we heard the remainder of Miss Fitzjohn's evidence and the evidence of Jacqueline Cook "("Mrs Cook"), Denise Barlow ("Mrs Barlow"), Daniel Hodgson ("Mr Hodgson") and Beverley Finnegan ("Mrs Finnegan"). On the morning of the fifth day we heard the evidence of Emma Collins ("Miss Collins) and Dominic Hampson ("Mr Hampson").

23. We finished hearing evidence by 11.45 a.m. on Day 5. We directed that Ms Niaz Dickinson send her written submissions to the claimant by 13.15. That took into account that the claimant and others attended Friday prayers from 12.30-13.15. We heard oral submissions from Ms Niaz-Dickinson at 14:30 followed by the claimant's oral submissions (read by Mr Shahin). The Employment Judge asked questions to clarify those submissions.

24. When submissions ended at 17:15 the Tribunal indicated that it would give oral judgment at 14:00 on Day 6. On Day 6 at 14:00 the claimant made his application to amend referred to above. Having decided to refuse that application the and given oral reasons for that refusal we then gave oral judgment on the claim. The clamant asked for these reasons in writing.

Relevant Law

25. The complaints of race discrimination and religion or belief discrimination were brought under the Equality Act 2010 ("the 2010 Act"). Section 39(2) prohibits discrimination against an employee by dismissing him (s.39(2)(c) or by subjecting him to a detriment (s.39(2)(d)).

The Burden of Proof

26. The 2010 Act provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

27. Authoritative guidance on the effect of the burden of proof in the predecessor legislation to the 2010 Act was given by the EAT in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205** and approved (with slight adjustment) by the **Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] ICR 931**. Further guidance was given by the EAT in **Laing v Manchester City Council [2006] ICR 1519**, which was approved by the Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] ICR 867**. The guidance in **Igen Ltd v Wong** and **Madarassy** was in turn approved by the Supreme Court in **Hewage v Grampian Health Board [2012] UKSC 37; [2012] ICR 1054**.

28. In **Royal Mail Group v Efobi [2021] UKSC 33**, the Supreme Court confirmed that under the 2010 Act the position remains as it was - the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the Tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. Along with those facts which the claimant proves, the Tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. The initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent. It is well established that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination - they are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

29. The **Igen** guidance states when the burden has passed, not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment. However, that explanation need not be "adequate" in the sense of providing a reason which satisfied some objective standard of

reasonableness or acceptability – it does not matter if the employer has acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic (**Efobi** at para 29).

30. In **Hewage v Grampian Health Board 2012 ICR 1054, SC**, Lord Hope endorsed the view of the EAT in **Martin v Devonshires Solicitors 2011 ICR 352, EAT**, that it is important not to make too much of the burden of proof provisions. The burden of proof provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation but they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law.

Direct discrimination

31. The definition of direct discrimination appears in section 13 of the 2010 Act and so far as material reads as follows:

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

32. The concept of treating someone "less favourably" inherently requires some form of comparison, and section 23(1) provides that:

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

34. It is well established that where the treatment of which the claimant complains is not overtly because of a protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken.

Equality Act 2010 Time Limits

35. The time limit for bringing a claim under the 2010 Act appears in section 123 as follows:-

> **"(1) subject to Sections 140A and 140B 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**.
>
> **(2) …**
>
> **(3) for the purposes of this section –**

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

Continuing Acts

36. In **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96** the Court of Appeal confirmed that in deciding this question:

'The focus should be on the substance of the complaints … was there an ongoing situation or a continuing state of affairs in which [officers] … were treated less favourably? The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts'.

37. In considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents' **Aziz v FDA 2010 EWCA Civ 304, CA**.

38. Acts which the Tribunal finds are not established on the facts or are found not to be discriminatory cannot form part of the continuing act: **South Western Ambulance Service NHS Foundation Trust v King EAT 0056/19**.

Just and equitable extension of time

39. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) of the 2010 Act, 'there is no presumption that they should do so…a tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds.

40. In **British Coal Corporation v Keeble [1997] IRLR 336** the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. Those factors are in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

41. In **Southwark London Borough Council v Afolabi [2003] ICR 800, CA**, the Court of Appeal confirmed that, while that checklist in S.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

Findings of Fact

Background Facts

42. We will not set out the background findings of fact in detail. In brief, at the time of the incidents which this case is about, the claimant was employed by the respondent as a Dot Com driver at its Haslingden store. His role involved making deliveries to customers within the timeslots they had selected.

43. In terms of relevant policies, gross misconduct is explained in section 11 of the respondent's disciplinary policy at page 181. It sets out a non- exhaustive list of serious breaches of Tesco rules that are likely to constitute gross misconduct. It includes deliberate disregard or abuse of Tesco procedures (with misuse of the colleague Clubcard being given as a specific example), and any other action which on a common-sense basis is considered a serious breach of acceptable behaviour.

44. We find that in 2015 the claimant had undergone Bronze training consisting of a number of modules dealing with use of his Dot Com driver van. It also included company procedures and customer service modules. Of relevance to this case is the key point at page 1085 that "you should never take a Dot Com van home, either during or at the end of your shift".

45. The events giving rise to this claim began (and for the most part took place) during COVID and therefore were impacted by lockdowns. We find that because there were very few public places open drivers were during this time allowed to take the van home if, for example, they needed the toilet. We find the clear understanding from management was that such stops would be brief and intermittent. We do also find that the concept of downtime existed in the sense that a driver was allowed to stop if there was a gap between their deliveries. While that was accepted as a legitimate practice, it was not accepted that downtime also meant creating or earning time at the end of a shift by way of reward because a driver had managed to get through their deliveries in advance of their schedule.

46. When it comes to the 17 allegations, we have found that the most convenient way to set out our reasons is to set out our findings of fact and conclusions about each allegation in turn.

Allegation 1 – The beginning of the disciplinary investigation (first week of June 2020)

Findings of fact

47. We find that in the first week of June 2020 Damian Ruddall, a Dotcom driver at the Haslingden Store told Daniel Hodgson, Dotcom Team Leader at that store that 3 of the drivers had not clocked off, meaning they were still showing as working when they were not. Mr Ruddall named the drivers as the claimant, Mr Khan and Mr Iqbal. Mr Hodgson's evidence was that Mr Ruddall said this was not fair.

48. Mr Hodgson raised the matter with Miss Fitzjohn, the Dotcom Manager at the Haslingden Store. It is not part of this case that that was in itself an act of discrimination. We do not speculate as to the motives for Mr Ruddall raising this matter with Mr Hodgson – what we do find is that given the nature of the allegation

brought to her attention Miss Fitzjohn had no real option as a manager other than to investigate. We accept her evidence that she decided to check the tracking records for the claimant in the hope that they would disprove the allegations being made against him. Those tracker records showed various matters relating to usage of the van, including what were called “unscheduled stops”. Some of those were acceptable, for example when there was a breakdown or when there was a gap between deliveries. However, the issue which Miss Fitzjohn identified when going through the claimant's tracker records was that there were significant unscheduled stops at or very near his home. Briefly, for the claimant it showed that he had spent a lot of time with his van parked up at addresses close to or at his home totalling in the region of 1,000 minutes over a period of six or at most seven weeks.

49. When Miss Fitzjohn investigated the matter she also found a problem with the claimant's signing of his SDS. This was the handheld device which the drivers used to confirm their schedule of deliveries and to confirm that a delivery had been dropped off with a customer within the relevant timeslot. There was meant to be a signature on the SDS to acknowledge when each delivery had been made to a customer. Miss Fitzjohn’s evidence, which we accept, was that the claimant's SDS was perfect in that it showed him making all drops at the correct time. That was clearly inconsistent with the tracker evidence which showed him not at the locations where the drops should have been made at the relevant time. As the claimant accepted in his investigatory interview, what he was doing was signing the SDS with a squiggle at the time when he was meant to have delivered to each customer even though when he was doing that he was actually at home or at other locations.

50. For the other two named drivers, i.e. Mr Khan and Mr Iqbal, the tracker evidence showed (and they also accepted when investigated) that what they were doing was making their delivery drops earlier than scheduled and then taking downtime at the end of the day. Effectively, they took downtime by way of an early finish as a “reward” for having completed their runs earlier than scheduled. They spent time, although considerably less time than the claimant, parked up sometimes in the same car park. What neither they nor the claimant did when finishing early was to return to the store to potentially fulfil other tasks or to let managers know what they were doing.

51. In relation to the two other drivers, Miss Fitzjohn also (when investigating the allegation that they had not clocked off) found that there was CCTV evidence that they had not been doing so.

52. What that meant was that in the first week of June there were two allegations against the claimant which Miss Fitzjohn decided required a formal investigatory meeting. These were misappropriation of company vehicles (i.e. taking the van home) and the mis-signing of the SDS device.

53. At the same time Miss Fitzjohn received instructions from the hub to investigate potential misuse of the claimant's colleague Clubcard. Colleagues have a Tesco Clubcard which gives them access to discounts. In the claimant's case the hub which monitors CCTV centrally had identified that the claimant's Clubcard was being used by various individuals. That generated a report which was sent to the store and which was then allocated to Miss Fitzjohn as the claimant's manager to investigate. The CCTV extracts did show (as the claimant again accepts) that

various members of his family were using the Clubcard. Miss Fitzjohn decided this was also appropriate for an investigatory interview.

54. The claimant and the other dismissed drivers alleged that the practices they were engaged in (especially of going home or going to other drivers' houses) was something that all drivers engaged in. We did not have the relevant tracker data for all other drivers in the Bundle but did have it for those drivers specifically named as comparators by the claimant in this case. The claimant's case was that it was only the 3 British Asian drivers of Muslim religion who had been dismissed for this practice. It is not the case, however, that only employees sharing the claimant's race and religion were subjected to investigation. We find that the respondent also investigated the tracker records of white drivers. Although it was not clear on the evidence whether any drivers had been investigated at the same time as the claimant, Mr Khan and Mr Iqbal, or whether those investigations were triggered solely by the claimant's appeal and that of Mr Khan, Miss Fitzjohn's evidence (which we accepted) was that she had investigated the drivers named and interrogated their tracker date.

55. Mrs Finnegan's evidence was that there was a wider investigation, and it does seem to us that some of the drivers investigated were not named by either the claimant or Mr Khan, including Jonathan Westwell. Drivers such as Brett Storey and James Ashworth were clearly named in the appeal. We find that for all these white drivers were investigated by Miss Fitzjohn.

Conclusions

56. When it comes then to the first allegation, which is that the decision to begin the disciplinary investigation into the claimant was less favourable treatment because of race or religion, we find that the claimant has not proven facts from which we could conclude that that decision was less favourable treatment because of race and religion. The evidence we have seen relating to the actual comparators named by the claimant showed that investigations were also carried out into them. There was no less favourable treatment at that stage. As we have said, it seems to us that Miss Fitzjohn had no option, given the nature of the allegations made, but to investigate and subsequently to require the claimant to attend a disciplinary meeting.

<u>Allegation 2 – The requirement for the claimant to attend a disciplinary meeting</u>

57. Miss Fitzjohn held a formal investigation meeting with the claimant on 8 and 15 June 2020. By that time the three separate allegations against the claimant had been confirmed i.e. the time spent at home, the misuse of the SDS device and use of the claimant's colleague Clubcard by the claimant's friends and family. The claimant did not deny acting as alleged and accepted he had done wrong. There was clearly therefore a basis for Miss Fitzjohn to require the claimant to attend a disciplinary hearing.

58. Given the seriousness of the allegations, which in relation to the Clubcard was a form of fraud, and the evidence that the claimant may have been trying to cover up what he was doing by signing the SDS at times when he was not actually making deliveries, we find that Miss Fitzjohn's decision to refer the matter to a disciplinary process was eminently reasonable and in fact one which Miss Fitzjohn had little

choice but to make. That was because the respondent's disciplinary policy identified the matters which she had uncovered as potential gross misconduct.

59. The claimant's case, however, is that he was treated less favourable than his named white comparators in being required to attend a disciplinary hearing. That requires us to turn to the treatment of those actual comparators.

The comparators

60. We heard a significant amount of evidence about the relative positions of the claimant and his named comparators when it came to the number of stops each made and the amount of time each spent at home. Their position was also compared with that of Mr Khan and Mr Iqbal. That was because the claimant's case was that the treatment of Mr Khan and Mr Iqbal supported his claim that drivers sharing his race and religion were treated less favourably than white drivers by being referred to a disciplinary hearing.

61. To summarise, what we find is that the conditions at the relevant time meant that drivers could get ahead of the delivery schedules. That was partly because the traffic was light because of the COVID restrictions, and partly because customers were more likely to be at home during this period to accept an earlier than scheduled delivery. That resulted in drivers having more downtime. The evidence shows that some of the drivers (other than the three who were dismissed) used that time to go home or meet up. However, the two drivers who were dismissed with the claimant did, we find, take matters further than other colleagues about whom we heard evidence. That was, in terms of Mr Khan and Mr Iqbal, starting their runs early to frontload their deliveries which meant they could get through their deliveries quickly in order to create additional downtime. In the case of Mr Khan and Mr Iqbal, they spent that downtime either at home or parked up in a car park. In the claimant's case he spent the majority of that time at home, particularly because his wife was pregnant.

62. The respondent established the position of the claimant, Mr Khan and Mr Iqbal by a detailed scrutiny of the tracker data for them. We have considered whether, as the claimant submitted, there was evidence that Miss Fitzjohn was more thorough in her scrutiny of the three British Asian drivers who were also Muslim than she was of the white comparators. We find that she was not. We accept the claimant was able to identify one or perhaps two entries which Miss Fitzjohn may have missed on other drivers' trackers which suggested that a driver was spending time at home or at another driver's house. We do accept her evidence that this was human error. We found her to be a credible witness. Even if added into the mix, however, those one or two additional entries would not bring the extent of home visits for the comparators to anything like that of the claimant.

63. Of the named comparators, James Ashworth and Kevin Atkins were not required to attend a disciplinary hearing. We accept that that was because their trackers showed no or absolutely minimal visits home. They were not therefore in the same material circumstances as the claimant, who had both significant time spent at home as well as two other allegations – the SDS allegation and the Clubcard allegation – against him.

64. In relation to Damian Ruddall and Andrew Biggs, they each had a small number of stops at home and none of the length of the claimant. They also provided an explanation for those stops, giving reasons for needing to go home such as to pick up medication. Neither had additional allegations against them. Again, we find that they were not material comparators to the claimant – they were not in the same material circumstances as him.

65. When it comes to Brett Storey, he had longer stops at home. Miss Fitzjohn's evidence (which we accept) was that as he had only been employed for around five months, she decided that it was not appropriate to refer him to a disciplinary hearing. The evidence showed that he had been told by a more senior driver it was ok to go home. Miss Fitzjohn therefore decided to issue him with a "next steps" letter rather than require him to attend a disciplinary hearing. There were no allegations against him of amending his SDS and none relating to Clubcard misuse. Again we find he was not in the same material circumstances as the claimant. If we are wrong about that we do not find that the claimant has proven facts to show that the less favourable treatment of referring him to a disciplinary hearing when Mr Storey was not was due to race or religion. That decision was made by Miss Fitzjohn. The evidence (including the claimant's own evidence) showed a good working relationship, indeed a close one, between him and Miss Fitzjohn and no evidence of her acting in a discriminatory way towards the claimant in the five years they had worked together preceding the incidents giving rise to allegations 1, 2 and 3.

66. It was also suggested by the claimant that the process used by Miss Fitzjohn was more onerous in relation to him, Mr Khan and Mr Iqbal. For example, the claimant and the two drivers dismissed with him had two investigation meetings for periods which the claimant submitted were significantly longer in terms of time than those carried out in relation to the comparators. We find that is a matter of fact. Again, however, we find that they are not in the same material circumstances. The allegations in relation to the claimant and the two other drivers included not only the allegations relating to stopping at home or meeting up but also allegations relating to clocking off in the case of the other two drivers and in relation to the SDS and the Clubcard in relation to the claimant. It is even arguably not less favourable treatment for someone subjected to a disciplinary hearing to be given more time to put their case forward.

Conclusion

67. What we find therefore is that this difference in treatment did not amount to less favourable treatment. The comparator cited were not in the same material circumstances as the claimant. Again, if we are wrong about that we find that any less favourable treatment was not because of race or religion.

<u>Allegation 3 – Mrs Cook deciding to dismiss the claimant</u>

68. The decision to dismiss the claimant was taken by Mrs Cook, who was the Lead Manager at the Haslingden Store. She decided to dismiss the claimant after conducting a disciplinary hearing on 29 June 2020. It seems to us that Mrs Cook was perfectly entitled to dismiss the claimant given the evidence against him and the fact that he accepted the allegations against him. Those allegations clearly fell within the definition of gross misconduct in the respondent's Disciplinary Policy For the

avoidance of doubt, we do not find the subsequent decision by Mrs Finnegan to allow the claimant's appeal and reinstate him meant that Mrs Cook's decision to dismiss was in some way tainted by discrimination or wrong. It seems to us rather than Mrs Finnegan took a pragmatic decision that since the claimant was a good worker, he should be given another chance.

69. When it comes to this allegation, the only white comparator subjected to a disciplinary hearing was Jonathan Westwell. He was not dismissed but was given a final warning. We have to consider whether he was in the same material circumstances. We find he was not. The instances of his going home were far less than the claimant in number and duration and there were no other allegations against him. We do not find he is an appropriate comparator.

Conclusion

70. We find there was no less favourable treatment of the claimant compared to Mr Westwell when it came to the decision to dismiss the claimant. For the avoidance of doubt, we find that there was no less favourable treatment when it came to the way that the other two British Asian drivers of Muslim religion were treated. They also (unlike Mr Westwell) had additional allegations made against them.

Summary of conclusions on Allegations 1-3

71. In summary then, dealing with allegations 1, 2 and 3, what we find is that there was no less favourable treatment because of race or religion. Those claims therefore fail.

Allegations 4-17

72. We now turn to allegations 4-17. These are the allegations relating to matters which took place after the claimant had been reinstated. The decision to reinstate was taken by Mrs Finnegan following a first appeal hearing on 16 August 202 and a second appeal hearing on 29 August 2020. In her grievance appeal outcome letter Mrs Finnegan confirmed that she was overturning the claimant's summary dismissal and instead issuing him with a final written warning (p.391). She explained that she found that Mrs Cook's decision to dismiss was fair. However, she allowed the appeal after taking into account the claimant's unique situation during lockdown with a heavily pregnant wife at home. We accept that the outcome letter accurately reflects her view of the situation, i.e. that the claimant's actions had caused a breach of trust but that she was willing to give him the opportunity to rebuild that trust by working in the store (i.e. not as a driver, at least initially).

73. By way of introduction to our findings and conclusions on these allegations, we do accept that matters had changed as between the respondent and the claimant and (to some lesser extent) between Miss Fitzjohn and the claimant by the time the incidents at 4-17 in the List of Issues began in September 2020. That is not, we find, because the respondent was treating the claimant less favourably but rather as a natural consequence of what had happened. Despite the reinstatement, what had been shown by the investigation and disciplinary process was that the claimant had abused the trust of the respondent while he was a Dotcom driver. It was inevitable, therefore, that there would be some recalibration of the relationship between him and

Miss Fitzjohn as his manager, who had previously fully trusted him. In practice, one consequence of this was that the claimant was no longer a Dot Com driver, instead he was employed in the pod i.e. filling a van and then driving it to the pod in the store's car park from which customers picked up their Click and Collect deliveries.

74. We now deal in turn with each of allegations 4-17.

Allegation 4 – Emma Collins asked the claimant to carry out a delivery when he had only 20 or 25 minutes left to work.

75. Miss Collins, who was the Petrol Station Manager, accepts that she did do this and also accepted that she was pushy. She said that that was because the customer needed the delivery which is why she did her best to ensure that the delivery took place.

76. We accept her evidence that it was a legitimate aim to try and get customers' deliveries to them, and that was particularly a concern during the pandemic when there were vulnerable people at home who might need the goods which they had ordered to be delivered.

77. We find is that this was a straightforward managerial decision. The claimant and a white colleague both actually went out to make the delivery. Given that, there is no basis for a finding of less favourable treatment because of race or religion. There was no evidence that Miss Collins would have given any different instructions or treated any other driver in a different way to the way she treated the claimant.

78. We find that there was no evidence to support a findings that he claimant was treated less favourably because of race or religion.

Allegation 5 – Miss Fitzjohn had not permitted the claimant to book holidays on the days that he was trying to book them and had accused him of being awkward

79. This took place shortly after the claimant was reinstated. The claimant tried to book annual leave. What we find, based on the evidence from Miss Fitzjohn and the text messages in the bundle, is that the needs of the business simply took priority. The claimant had just come back to work and his request to take holiday immediately could not be accommodated. Instead Miss Fitzjohn worked with the claimant to agree a holiday based on the availability and the rota.

80. When it comes to the allegation that Miss Fitzjohn told the claimant that he was being awkward, we prefer her evidence that she did not. That seems to us to be more consistent with the tenor of the text messages that we saw in the Bundle. We also found Miss Fitzjohn to be a credible witness and her evidence to be reliable.

81. We find that the claimant was not treated less favourably than any other colleague would have been who had asked to book holiday at short notice when the needs of the business dictated that they were need to work.

Allegation 6 – On 18 September Mrs Cook made insensitive remarks when the claimant tried to take the day off to pray and be with his cousin when she lost her baby

82. When it comes to this, we find that on or around 18 September 2020 the claimant's cousin sadly lost her baby. The claimant in his witness statement said that he had called to inform the respondent that he was not going to be in for his next shift. He was in on leave on that day. We find that Jackie Cook was the Duty Manager and that she took the call. The claimant's claim is that she made him feel like he was making it all up, using the loss of his cousin's baby as an excuse for an extra day off work.

83. We find, and Mrs Cook accepted, that she did ask the claimant why he needed time off if his cousin had lost her baby. We do not accept, as the claimant alleged, that Mrs Cook said, "what has that got to do with you if your cousin's lost her baby" or that she asked him where his cousin lived. What we find is that Mrs Cook was, in a difficult situation and clearly one which was distressing for the claimant, seeking to clarify whether the respondent's bereavement leave policy applied. As she accepted in evidence, it was always difficult asking who had died and establishing the relationship with the colleague who was ringing up, but it was something that was necessary to do in order to decide whether the bereavement policy applied. We accept her evidence that that is the approach she would have taken with any colleague who rang up in the same circumstances.

84. The claimant in his evidence said that he was particularly close to his cousin and viewed her as his little sister. He suggested that in his culture families are particularly close in a way that extended families are perhaps not in other cultures. However he did not suggest in his witness statement that he raised this with Mrs Cook when he rang up.

85. In relation to this incident there were also WhatsApp messages exchanged between Miss Fitzjohn and the claimant (page 571). From those what we find is that Miss Fitzjohn communicated her condolences and then asked the claimant what they could do to help. We find that Miss Fitzjohn confirmed the respondent would support the claimant by offering to let him take his holiday and referred him to the policy dealing with such absences.

86. When it comes to both Miss Fitzjohn and Mrs Cook what we find is that they were simply seeking to establish whether the bereavement policy applied, and we do not accept that either made insensitive remarks or that anything they said was different to what they would have said to any colleague who rung up in those circumstances. In other words, in relation to the conversation with Mrs Cook we think that she was simply making enquiries that any reasonable manager would make.

87. Again, therefore, what we find is that there was no less favourable treatment in relation to this incident because of race or religion.

Allegation 7 – Miss Fitzjohn did not give the claimant a login or password to his Tesco account despite it being requested and reminded to do so

88. Miss Fitzjohn confirmed that she remembered the claimant having difficulties logging back into the Tesco intranet after he was reinstated. That was because his account had been shut down when he was dismissed and it was difficult to get it back up and running. However, we find that was not down to Miss Fitzjohn. We

accept her evidence that she had sent off a request to Head Office to seek to resolve the matter – that was a matter which she could not herself solve.

89. In terms of this, therefore, what we find is that there was no less favourable treatment by Miss Fitzjohn. There was no evidence to suggest that had any other colleague asked her to resolve an issue with a login or password that she would done anything other than refer it to Head Office. Even if there was any less favourable treatment, we see no basis on the evidence to say that that was because of race or religion. Again we refer back to our finding, which was that the claimant and Miss Fitzjohn had a good relationship and there was no suggestion that during the five years they had worked together she had treated him in a discriminatory way.

Allegation 8 – On Thursday 8 October 2020 Denise Barlow shouted at the claimant after he and others refused to deliver shopping into a nursing home

90. Our first finding in relation to this is that Mrs Barlow's instruction was not to deliver shopping into a nursing home. The respondent's policy at that point did not require drivers to go into premises like nursing homes.

91. In terms of Mrs Barlow raising her voice to the claimant, we find based on her evidence that she did raise her voice when she was stressed but also because she herself had a hearing impairment which meant that she could not hear unless people raised their voice to her. Her evidence was that she did not routinely work in the Dot Com department, and we accept her evidence that she did not shout at the claimant and would certainly have apologised to anybody had she shouted at them.

92. What we find in this case was that Mrs Barlow went to the canteen to ask a white colleague of the claimant (Mark) who had taken his break, to come back off his break to assist the claimant in loading a van. The claimant's evidence was that the relevant colleague was Paul. It seems to us that when it comes to the discrimination claim that does not make a huge amount of difference because in essence what the claimant is saying is that a white colleague was required to come back off his break and assist him in loading the van. The claimant appeared to accept in cross examination that he had not actually been asked to go into the nursing home.

93. We therefore find that the claimant was not, as he alleges, required or forced to make the nursing home drop. In fact, as we have said, it was a white colleague of the claimant who was asked to help the claimant with the drop and undertook the drop with the claimant. The claimant's own evidence was that Mark subsequently apologised to him for his behaviour on this day.

94. On balance, therefore, we prefer Mrs Barlow's version of events. We find that she did not treat the claimant less favourably – arguably she treated him equally or even more favourably than Mark by requiring the white comparator to come off his break to help the claimant. There was therefore no less favourable treatment because of race or religion.

Allegation 9 – Miss Fitzjohn belittled the claimant in relation to the previous day's incident (i.e. Allegation 8), specifically by telling the claimant that he was embarrassing and that he was a baby

95. We prefer Miss Fitzjohn's evidence in relation to this allegation. We find that she did not do as alleged. The claimant's own evidence was that Miss Fitzjohn said she was going to speak to Mark about what had happened. The claimant accepted in evidence that she had probably done so because Mark then apologised to the claimant. That supports, it seems to us, the respondent's case that this incident did not happen and that the claimant was not being blamed for anything.

96. There was no less favourable treatment as alleged in this allegation because of race and religion.

Allegation 10 – Making the claimant feel guilty for isolating when his daughter had symptoms of COVID-19 (10 October 2020)

97. The claimant's evidence was that he called the Duty Manager on 10 October 2020 to tell the store that he would not be in the following shift because his daughter had COVID-19 symptoms. His evidence was that at that time the Government guidance was to isolate if a member of the family was showing symptoms and waiting for a COVID-19 test.

98. The claimant's evidence was that he had spoken to Mrs Haworth and that she had made him feel guilty for not coming in. Mrs Haworth's evidence weas that it was not she who spoke to the claimant. The absence log showed that it was Mrs Barlow who spoke to the claimant. The call log (page 1123) showed an entry dated 10 October 2020 completed by Mrs Barlow. There was a second entry in different handwriting on 12 October 2020 but that does not seem to us to indicate that the first entry is necessarily in doubt. The claimant's case, however, was that that document had been fabricated and that it was Mrs Haworth that he had spoken to. The claimant suggested, for example, that the telephone number for himself in the top righthand corner of the log seemed to have been written in a different handwriting to Mrs Barlow's. It does seems to us that that was the case, but that does not seem to us to support the claimant's allegation that that document was fabricated. The claimant never gave a clear explanation as to why that would be the case. It was not put to Mrs Barlow that she had fabricated that entry.

99. In relation to this allegation, therefore, we found that Mrs Haworth did not act as alleged. It was Mrs Barlow who spoke to the claimant. We find that she told him what she understood to be the respondent's policy at the time i.e. that a pending COVID test was not a reason for a colleague not to attend the store. Even if she was mistaken in that, there was no evidence to suggest that she would have treated anybody from a different race or religion any differently.

100. There is no basis therefore for a finding of less favourable treatment because of race or religion in relation to this allegation.

Allegation 11 – On 21 October 2020 Miss Fitzjohn caused friction between the claimant and a colleague (James) by suggesting to James that the claimant was taking James' hours

101. Miss Fitzjohn's evidence was that this did not happen, certainly not as alleged by the claimant. She pointed out that James was a full-time employee so there was no question of the claimant taking his hours. She also pointed out that as the

manager of both the claimant and James it would not be in her interest to generate friction between the two members of her team. This was an incident which happened when the claimant was working in the pod.

102. In relation to that we had conflicting evidence as to whether time in the pod was seen as being a benefit or a burden. Miss Fitzjohn's evidence certainly was that working in the pod was not a particularly attractive role and that may well have been the case for those who had previously been Dot Com drivers. In relation to James, it may have been that for him he found working in the pod to be conducive.

103. On balance we find that Miss Fitzjohn did say something to James about the claimant coming back to work. We find that in doing so she was seeking to understand whether James had any difficulty with that. In terms of impact on James's work we find it might have been that there was an impact on James' work if the claimant was coming to work in the pod rather than working as a Dot Com driver as he had before.

104. We accept Miss Fitzjohn's evidence that it would make no sense for her to seek to raise that matter as a way of generating friction between members of her team. We find that if she did raise that matter with James, it was simply a matter of making an enquiry to check that a member of her team was ok with what was happening. It was simply part of Miss Fitzjohn's managing her team.

105. We do not find that that anything Miss Fitzjohn did in this context was less favourable treatment of the claimant. We do not find that that was because of race or religion. The claimant did not prove facts form which we could conclude that that was the case.

Allegation 12 Treating the claimant unfairly by requiring him to do extra deliveries then criticising him for not loading up the shopping for the next deliveries.

106. During the hearing this was identified as being an allegation against Mrs Barlow. We find is that the claimant was required to do extra deliveries. We do not find that he was criticised for not loading up the shopping for the next deliveries. What we find is that at this point getting deliveries out was a particular concern for the respondent with demand for Dot Com and Click and Collect having expanded exponentially. We find that Mrs Barlow would have required any driver who happened to be there to do extra deliveries in order to fulfil and meet customer needs.

107. Again, we do not find there was any less favourable treatment because of race or religion in relation to this allegation.

Allegation 13 – On 25 October Mrs Finnegan criticised the claimant for parking in the top car park

108. This was witnessed by Mr Islam. Mrs Finnegan accepted that this incident happened. What we find is that staff had been made aware that they were not meant to park in the top car park at the store. We find the claimant was not very happy about this because he wanted to be in sight of his car because it had been fitted with two catalytic converters and there had been some thefts of catalytic

converters from the respondent's car park. We find that other staff were also still parking in the top car park and that Mrs Finnegan had spoken to them about not doing so.

109. We find that Mrs Finnegan did make the remark alleged by the claimant, that he could walk in leaving his car at home, but we accept her evidence that she thought the claimant lived close enough to the store to walk in. We accept her evidence that she did not say to the claimant "who do you think you are?" We note the claimant did not complain about this incident at the time.

110. When it comes to the allegation that this was less favourable treatment related to race or religion, we note that it was Mrs Finnegan who had reinstated the claimant after his dismissal. This was put to the claimant, and he was asked how that was consistent with Mrs Finnegan subsequently treating him less favourably. His explanation was that he thought Mrs Finnegan had probably been told to reinstate him but was then trying to get him out. We found that wholly implausible.

111. We accept Mrs Finnegan's version of what happened in this case. We find that this was not less favourable treatment: she would have criticised any other employee who was going against the management's request not to park in the top car park. Again, therefore, this was not less favourable treatment because of race or religion.

Allegation 14 – Miss Fitzjohn wrongly accusing the claimant of arriving late to work

112. We find that Miss Fitzjohn did as alleged ask the claimant on one occasion about being late for work. We accept her evidence that she had been told by the Night Shift Manager that the pod workers (of whom the claimant was one, and of whom there were about three or four) had been late for work. We find she asked the claimant about this and accepted his assurance that he had not been late into work.

113. We accept her evidence that she would also have asked the other members of the pod team the same question put to the claimant. It was part of her duties as a manager to make sure that employees were on time.

114. Again, we find that there was no less favourable treatment and that there was no less favourable treatment because of race or religion.

Allegation 15 – Mr Hodgson had (on 8 November) required the claimant to load two vans before doing his delivery

115. Mr Hodgson accepted that there was a shift when he had asked the claimant to load an additional van to his own. That would make a total of two rather than two vans and the claimant's delivery.

116. Mr Hodgson's evidence (which we accept) was that the claimant happened to be the driver who was available at that time, and the claimant did not object.

117. We find on balance that Mr Hodgson did not treat the claimant less favourably. We find that as with a number of these allegations this was simply a management instruction which would have been given to any of the other drivers who were in place, regardless of race or religion. Therefore, this allegation fails

Allegation 16 Miss Fitzjohn's conduct during a "welcome back" meeting following the claimant's son's admission to hospital with breathing difficulties on 22 November 2020

118. There are in fact two allegations in allegation 16. They both relate to a welcome back meeting on 25 November 2020 and are both made against Miss Fitzjohn.

119. The first allegation is that she did not believe the claimant's explanation for being off work. In relation to this, the specific wording which the claimant suggested that Miss Fitzjohn used was that it was strange that things always happened to the claimant on a Sunday. Miss Fitzjohn denied making that remark.

120. Given the evidence we have heard about the good relationship between the claimant and Miss Fitzjohn, we do find it implausible that she would have made a remark in that tone to the claimant, especially when the context for doing so was discussing a child's illness. There was no evidence that the claimant was disbelieved as to the reason for absence.

121. If we are wrong and Miss Fitzjohn did make that remark, what we find is that she would have made a similar remark to others who had been off on Sundays where there might seem to her as a manager to be a pattern of absence which she might want to investigate.

122. Our primary finding, therefore, is that this incident did not happen. Our secondary finding is that if it did it was not less favourable treatment because of race or religion.

123. Moving then to the second allegation relating to this meeting, this is the allegation that Miss Fitzjohn said that the claimant's baby looked very pale whilst looking at the claimant up and down implying that the claimant was not the baby's father because of his darker skin.

124. In relation to this, on balance we prefer Miss Fitzjohn's version of events. We find that she did not make the comment alleged. We find that that is corroborated by the fact that she denied making that comment shortly afterwards in a conversation with the claimant which she was not aware was being recorded (transcribed at page 530).

125. If we are wrong about that and the word "pale" had been used by Miss Fitzjohn, we find it entirely implausible that Miss Fitzjohn was, by using that term, casting doubt on the parentage of the claimant's baby. As we have said previously, the claimant's evidence was that he and Miss Fitzjohn got on well, so we cannot see why she would have acted as alleged. It seems to us that if she did use that word at all it would have been because the claimant's baby was pale in the sense of being ill. We do not find that there was any link to the claimant's race or religion in relation to this allegation.

126. For clarity, therefore, our starting point is that we do not accept that the remark was made. If it was made, and we are wrong about our primary position, what we find is that it was not less favourable treatment due to race or religion. We

find that Miss Fitzjohn would have made a similar remark in relation to any poorly baby that she was discussing with a colleague.

Allegation 17 – On 3 February 2021 Dominic Hampson, during the claimant's sick leave, ask him to attend a face-to-face wellness meeting

127. The first point in relation to this is that an employer is perfectly entitled to contact an employee who is off work during sickness to seek to establish how long they are likely to be off work and what can be done to facilitate their return.

128. We bear in mind that by this point the claimant had been off sick since 28 November 2020 i.e. a period of some two months. The claimant's allegation is that he was pressurised to attend a face-to-face meeting by Mr Hampson. We do accept that Mr Hampson at the meeting referred to the possibility of formal long-term sickness absence process, however the transcript of the conversation between the claimant and Mr Hampson in the bundle does not support the claimant's version of events. It does not suggest Mr Hampson putting undue pressure on the claimant to attend a face-to-face meeting. We find instead that Mr Hampson was trying his best to facilitate the claimant's return and that he made various suggestions to seek to achieve that. That included referring the claimant to Occupational Health and giving him the details of the Employee Assistance Scheme. When it came to the face-to-face meeting itself, he made some more practical suggestions such as agreeing that the meeting took place at a time when fewer management and fewer colleagues would be about.

129. What we find is that Mr Hampson was doing his best to help and there was no evidence that he would have treated anyone else who he was seeking to encourage back to work more favourably than he treated the claimant.

130. We find that there was no less favourable treatment because of race or religion in relation to this allegation also fails.

Summary

131. In summary, what we have found is that the allegations brought by the claimant all fail and are dismissed. We do not therefore need to decide the time limit point in this case.

132. We do in conclusion, however, note that we were concerned about some evidence we heard about behaviours at the respondent. In particular we heard evidence about the use of an explicitly racist term in a text message from Mr Hodgson in 2014 and of racially discriminatory views in an (undated) social media post by a former manager not involved in the allegations. We accept that those did result in disciplinary action, although we note that in relation to Mr Hodgson that action was not dismissal and that he was subsequently promoted. We took into account the evidence about the text message and Facebook post into account in deciding whether the burden of proof passed in relation to any of the allegations. In deciding what weight to give them we took into account their remoteness in time (in the case of the text message) and those involved (in the case of the Facebook post) in deciding how much weight to give them.

133. Even though we have not found in favour of the claimant, we can see, based on incidents such as the text message, and also due to other evidence we heard such as the lack of management staff of an ethnic minority background at the relevant time, how the behaviour experienced by the claimant might have fostered a conviction on his part that actions were motivated by his race or religion. That may have been fostered to a certain extent by the decision that his dismissal should be overturned which he may have taken as a sign that he should not have been dismissed in the first place. We have explained above in our findings and conclusions on allegations 1-3 why we do not think that is the case.

134. We also have no doubt of the impact of what happened on the claimant. There was clear evidence of that in the bundle and in the evidence we heard. Miss Fitzjohn herself, in the transcript of the conversation with the claimant, reflected on the fact that there was clearly a change in the claimant when he returned to work after reinstatement. We found that that was to some extent, as we have mentioned already, due to the change in relationship between Miss Fitzjohn, the respondent and the claimant, with a breach of trust which needed to be repaired. However, we do also find that the claimant himself took matters very badly and that that may have subsequently influenced the way that he saw behaviours towards him.

135. From our point of view, however, what we have to decide based on the evidence and the relevant legal tests is whether there was any less favourable treatment of the claimant because of race or religion. As we have said, we have decided that there was not.

136. The judgment of the Tribunal, therefore, is that the claimant's claim of direct race discrimination fails and is dismissed in relation to all 17 identified allegations, and the claimant's claim of direct religion discrimination fails and is dismissed in relation to the 17 allegations.

Employment Judge McDonald
Date: 5 October 2023

REASONS SENT TO THE PARTIES ON
13 October 2023

FOR THE TRIBUNAL OFFICE

Annex A - List of Allegations

	Date	Alleged discriminator	Less favourable treatment
1.			Beginning the disciplinary investigation
2.			Requiring the claimant to attend a disciplinary meeting
3.	29/6/20		Dismissing the claimant
4.	September 2020	Emma	Asking the claimant to carry out a delivery when the claimant had only 20-25 minutes left to work.
5.	9/9/20	Laura	Not permitting the claimant to book holidays on the dates he was trying to book them, and accusing him of being awkward.
6.	18/9/20	Jackie Cook	Making insensitive remarks when the claimant tried to take the day off to pray and be with his cousin when she lost her baby. Requiring the claimant to take the day as holiday.
7.	October 2020	Laura	Not giving the claimant a login or password to his Tesco account despite being requested and reminded to do so.
8.	8/10/20	Denise	Shouting at the claimant after he and others refused to deliver shopping into a nursing home.
9.	9/10/20	Laura	Belittling the claimant in relation to the previous day's incident.
10.	10/10/20	Vikki	Making the claimant feel guilty for isolating when his daughter had symptoms of COVID-19.
11.	21/10/20	Laura	Causing friction between the claimant and a colleague (James) by suggesting to James that claimant was taking James' hours.
12.	October 2020	Unclear	Treating the claimant unfairly by requiring him to do extra deliveries then criticising him for not loading up the shopping for the next deliveries.

13.	25/10/20	Bev	Criticising the claimant for parking in the top car park.
14	One Friday	Laura	Wrongly accusing the claimant of arriving late to work.
15.	8/11/20		Requiring the claimant to load two vans before doing his delivery.
16.	25/11/20	Laura	During a "welcome back" meeting following the claimant's son's admission to hospital with breathing difficulties on 22 November 2020 (a) Not believing that the claimant's explanation for being off work; and (b) Commenting that the claimant's baby looked "very pale", whilst looking the claimant up and down, implying that the claimant was not the baby's father because of his darker skin.
17.	3/2/21	Dom	During the claimant's sick leave, asking the claimant to attend a face-to-face wellness meeting.

Annex B – Reasons for refusing the claimant's application to amend

1. The amendment is to bring a claim of victimisation under section 27 of the Equality Act 2010, in other words a claim that the claimant was treated unfavourably because of doing what is called a "protected act". The relevant protected act in this case is said to be making an allegation of discrimination in his appeal against dismissal in July 2020. The claimant says that the allegations at numbers 4 through to 17 in the List of Issues are acts of victimisation.

2. In deciding whether to grant an amendment the leading authority is **Selkent Bus Company Limited v Moore [1996] ICR 836** which tells the Tribunal that it must take into account all the circumstances and should balance that injustice and hardship of allowing an amendment against the injustice and hardship of refusing it.

3. The Employment Appeal Tribunal in **Selkent** set out a list of factors which are relevant, and which are usually referred to as the "**Selkent** factors". In brief they include:

- the nature of the amendment – in other words, whether it is a minor matter or a substantive and significant change to the case;
- the applicability of time limits – if a new complaint or cause of action is added which is out of time the Tribunal should consider whether the time limit should be extended; and
- the timing and manner of the application – an application should not be refused solely because there has been a delay as there are no time limits set down for making amendments but delay is certainly a discretionary factor.

4. In the more recent case of **Vaughan v Modality Partnership UKEAT 0147/20/BA** the Employment Appeal Tribunal reminded parties and Tribunals that the core test in considering applications to amend is the balance of injustice and hardship. The exercise starts with the parties making submissions on the specific practical consequences of allowing or refusing the amendment. The balancing exercise is fundamental.

5. We will not set out in full the oral submissions made by the parties but have taken them into account. We refer to specific points below where relevant.

6. When it comes to our conclusions in relation to the **Selkent** factors, starting with the nature of the amendment, this is a significant amendment. It is not simply changing a detail in the facts of the case – it is saying that allegations 4-17 amount to treatment for a wholly different reason than has been put forward in the case to date. To date what has been said is that those allegations are acts of less favourable treatment because of the claimant's race or religion. What is being said in the amendment is that those acts are acts of unfavourable treatment and that the reason (rather than being the race or religion of the claimant) is the fact that he made an allegation of discrimination in his appeal. That is the introduction of a new claim,

namely victimisation. The claim is significantly out of time. Without doing the detailed calculations it is clear the claim should have been brought around the end of June 2021 at the latest. That allows for the early conciliation "stopping the clock" provisions and takes into account that the last incident relied on is 3 February 2021. That means that the amendment is being made nearly two years out of time.

7. Bearing in mind what **Vaughan v Modality** says about the practicalities, we considered what granting the amendment would mean. It would mean the claimant reframing his claim and the respondent setting out its response to the claim. It would also mean the Tribunal having to hear fresh evidence. The reason for that is that to date the respondent's witnesses have prepared their witness statements and been cross examined on the basis that their acts were alleged to be acts of less favourable treatment due to race or religion. They were not asked whether what they did was because of the claimant raising discrimination in his appeal. It is not even clear (because this was not put in evidence) which of the managers accused of conducting the allegations at 4-17 were aware of the appeal containing an allegation of discrimination and so aware of the alleged protected act.

8. We accept Ms Niaz-Dickinson's submissions that if we allowed the amendment, we would need to hear further evidence. That would not necessarily be an additional 5 days (because allegations 1-3 are not alleged to be acts of victimisation we would not need to hear evidence about them) but it would certainly involve a further multiday hearing given that allegations 4-17 involve a number of different witnesses. There will inevitably be a delay before a further multiday hearing with the same panel can be listed. There is clearly a prejudice to the respondent in the delay in reaching a final decision were the amendment to be granted. There is also prejudice to the respondent in terms of the cost of engaging legal representation for any further hearing and the indirect cost of its managers who are witnesses taking further days from work in order to attend the further hearing.

9. From the claimant's point of view there is clearly a potential disadvantage if he is prevented from bringing a claim that he wants to make. We note the submissions made on his part that he is not legally qualified and has been unable to obtain legal representation. That is the position of the vast majority of claimants in the Tribunal. There is an onus on a claimant to seek to clarify their case and to make sure that the correct legal label is put on it. That does not necessarily require the claimant to identify the correct provisions in the Equality Act or even the correct type of cause of action. The claimant in this case, however, could have been expected to be clear that he was saying that he was treated badly because he had raised an allegation of discrimination rather than (or as well as) because of his race or religion. The claimant has in this case had three opportunities at least to do so – the first being at the hearing when Employment Judge Horne in 2021 clarified the claim. The List of Issues was sent to the claimant as part of Judge Horne's Case Management Order, and it was clear at that point that his claim was identified as a claim of direct race discrimination. There were subsequent preliminary hearings at which the claimant did not seek to alter his position or seek clarification that the claim was being put on the right basis.

10. We have taken into account the submissions that the claimant was not well in terms of his mental health and therefore struggled to put his claim together. When it comes to that, we accept that there is evidence of impact on the claimant's mental

health but also accept that there is something in Ms Niaz-Dickinson's submission that he was able to pursue his case. On his behalf it was said that that was with his wife's assistance, and clearly he would also have been able to rely on her assistance in seeking to clarify the legal basis of the claim and to make any application to amend that was required. COVID was cited as a reason why the claimant would not have access to his support network. Even if that were the case during COVID times, bearing in mind that access to friends and family by video was still possible, it seems to us clear that there has been an opportunity since COVID restrictions were lifted to go through matters with friends and family and to make an application to amend at that point.

11. Dealing with matters in the round then what we find is that the application was made at the very last minute. It was clearly significantly out of time. There would be significant prejudice to the respondent in terms of cost and delay if we were to allow the amendment. There is prejudice to the claimant, but that in this case is outweighed by the prejudice to the respondent. In those circumstances our decision is that the application to amend is refused. That means that we continue to deal with the case as one of direct race and religion discrimination and not as one of victimisation.